# IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 9523 of 2017
With
SPECIAL CIVIL APPLICATION NO. 9434 of 2017
With
SPECIAL CIVIL APPLICATION NO. 10033 of 2017
With
SPECIAL CIVIL APPLICATION NO. 10289 of 2017
With
SPECIAL CIVIL APPLICATION NO. 10147 of 2017
With
SPECIAL CIVIL APPLICATION NO. 10142 of 2017
With
SPECIAL CIVIL APPLICATION NO. 10146 of 2017
With
SPECIAL CIVIL APPLICATION NO. 10151 of 2017
With
SPECIAL CIVIL APPLICATION NO. 10197 of 2017
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SPECIAL CIVIL APPLICATION NO. 10114 of 2017
With
SPECIAL CIVIL APPLICATION NO. 10109 of 2017
With
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With
SPECIAL CIVIL APPLICATION NO. 10108 of 2017
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TO
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With
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With
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With
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TO
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With
SPECIAL CIVIL APPLICATION NO. 10043 of 2017
TO
SPECIAL CIVIL APPLICATION NO. 10044 of 2017
With

**SPECIAL CIVIL APPLICATION NO. 10048 of 2017**
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**SPECIAL CIVIL APPLICATION NO. 14312 of 2017**
**With**
**SPECIAL CIVIL APPLICATION NO. 14313 of 2017**
**TO**
**SPECIAL CIVIL APPLICATION NO. 14316 of 2017**
**With**
**SPECIAL CIVIL APPLICATION NO. 14318 of 2017**
**With**
**SPECIAL CIVIL APPLICATION NO. 14323 of 2017**
**With**
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**SPECIAL CIVIL APPLICATION NO. 14896 of 2017**
**With**

**SPECIAL CIVIL APPLICATION NO. 14900 of 2017**
**With**
**SPECIAL CIVIL APPLICATION NO. 14927 of 2017**
**With**
**SPECIAL CIVIL APPLICATION NO. 14929 of 2017**
**With**
**SPECIAL CIVIL APPLICATION NO. 14971 of 2017**
**With**
**SPECIAL CIVIL APPLICATION NO. 16106 of 2017**
**With**
WRIT PETITION (PIL) NO. 132 of 2017
**With**
**SPECIAL CIVIL APPLICATION NO. 16402 of 2017**
**With**
**WRIT PETITION (PIL) NO. 137 of 2017**
**With**
**CIVIL APPLICATION NO. 6823 of 2017**
**In**
**WRIT PETITION (PIL) NO. 95 of 2017**
**With**
**CIVIL APPLICATION NO. 6824 of 2017**
**In**
**WRIT PETITION (PIL) NO. 95 of 2017**
**With**
**WRIT PETITION (PIL) NO. 95 of 2017**
**With**
**CIVIL APPLICATION NO. 5989 of 2017**
**In**
**WRIT PETITION (PIL) NO. 95 of 2017**
**With**
**CIVIL APPLICATION NO. 7479 of 2017**
**In**
**SPECIAL CIVIL APPLICATION NO. 9523 of 2017**
**With**
**CIVIL APPLICATION NO. 7983 of 2017**
**In**
**SPECIAL CIVIL APPLICATION NO. 9523 of 2017**
**With**
**CIVIL APPLICATION NO. 8412 of 2017**
**In**
**SPECIAL CIVIL APPLICATION NO. 9996 of 2017**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE THE CHIEF JUSTICE MR. R.SUBHASH REDDY**

**and**

**HONOURABLE MR.JUSTICE VIPUL M. PANCHOLI**

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|---|---|---|
| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | Yes |
| 2 | To be referred to the Reporter or not ? | Yes |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | Yes |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? | Yes |

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ATULKUMAR NIRANJANBHAI DAVE....Applicant(s)

Versus

STATE OF GUJARAT....Opponent(s)

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Appearance in WP (PIL) No.132 of 2017

MR.VISHAL J DAVE, ADVOCATE for the Applicant(s) No. 1

Appearance in WP (PIL) No.137 of 2017

MR.VISHAL J DAVE, ADVOCATE WITH MR ROHIT PATEL, ADVOCATE for the Applicant(s) No. 1

Appearance in SCA NO. 9434 OF 2017

MR PC KAVINA, SR. ADVOCATE WITH MRS. KALPANA K RAVAL, ADVOCATE FOR THE PETITIONER (S)

Appearance in SCA NO. 9523 OF 2017

MR MIHIR THAKORE, SR. ADVOCATE WITH MR. DHAVAL DAVE, SR. ADVOCATE WITH MR BIJAL CHHATRAPATI, ADVOCATE WITH MR. SIDDHARTH SINHA, ADVOCATE for J Sagar Associates for the petitioner(s)

Appearance in SCA NO. 10033 OF 2017

MR.SP MAJMUDAR , ADVOCATE for the petitioner (s)

Appearance in SCA NO. 10289 OF 2017

MR SN SOPARKAR, SR. ADVOCATE WITH MS DISHA N NANAVATY, ADVOCATE for the petitioner(s)

Appearance in SCA NO. 10147 OF 2017

MS.DISHA N NANAVATY, ADVOCATE for the petitioner(s)

Appearance in SCA NO. 10142 OF 2017

MS.DISHA N NANAVATY, ADVOCATE for the petitioner(s)

Appearance in SCA NO. 10146 OF 2017

MR.VISHWAS K SHAH, ADVOCATE for the petitioner(s)

Appearance in SCA NO. 10151 OF 2017

MR.VISHWAS K SHAH, ADVOCATE for the petitioner(s)

Appearance in SCA NO. 10197 OF 2017

SHRI SN SHELAT, SR. ADVOCATE WITH MS.DISHA N NANAVATY, ADVOCATE

for the petitioner(s)
Appearance in SCA NO. 10114 OF 2017
MR.JJ YAJNIK, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 10109 OF 2017
MR.DHAVAL D VYAS, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 10099 OF 2017
M/S.VYAS ASSOCIATES AND MR DA SANKHESARA, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 10100 OF 2017
M/S.VYAS ASSOCIATES AND MR DA SANKHESARA, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 10180 OF 2017
MR SUNIT SHAH, ADVOCATE WITH MR.VASIM MANSURI, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 10090 OF 2017
MR.VISHWAS K SHAH, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 10083 OF 2017
MR.AB PATEL, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 10089 OF 2017
MR.JAIMIN R DAVE, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 10179 OF 2017
MR.VISHWAS K SHAH, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 10094 OF 2017
MS DISHA N NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 10613 OF 2017
MR.DINESH B PATEL, ADVOCATE AND MR HB CHAMPAVAT, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 10284 OF 2017
MR.AJ YAGNIK, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 10211 OF 2017
MR.AJ YAGNIK, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 10108 OF 2017
MR.JJ YAGNIK, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 10053 OF 2017
MR.AJ YAGNIK, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 9965 OF 2017
MR.AJ YAGNIK, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 10054 OF 2017
MR.AJ YAGNIK, ADVOCATE for the Applicant(s) No. 1
Appearance in SCA NO. 13532 OF 2017
MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 13535 OF 2017
MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 13412 OF 2017
MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 13497 TO 13502 OF 2017
MR MIHIR JOSHI, SR. ADVOCATE WITH MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)

Appearance in SCA NO. 13714 OF 2017
MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 13715 OF 2017
MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 13717 OF 2017
MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 14988 TO 14991 OF 2017
MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 15028 OF 2017
MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 14898 OF 2017
MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 9572 OF 2017
MR RS SANJANWALA, SR. ADVOCATE WITH MRS.KALPANA K RAVAL, ADVOCATE WITH MR KUNAL M SHAH, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 9996 OF 2017
MR.DHAVAL D VYAS, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 10035 OF 2017
MR.MITUL K SHELAT, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 10038 OF 2017
MR.DHAVAL D VYAS, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 10043 AND 10044 OF 2017
MR MIHIR THAKORE, SR. ADVOCATE WITH MR. DHAVAL DAVE, SR. ADVOCATE WITH MR BIJAL CHHATRAPATI, ADVOCATE WITH MR. SIDDHARTH SINHA, ADVOCATE for J Sagar Associates for the petitioner(s)
Appearance in SCA NO. 10048 OF 2017
MR.VISHWAS K SHAH, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 10050 OF 2017
MR.VISHWAS K SHAH, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 10051 OF 2017
MR VISHWAS K SHAH, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 11047 OF 2017
MR SHALIN MEHTA, SR. ADVOCATE WITH MR KS CHANDRANI, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 11458 OF 2017
MR.AJ YAGNIK, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 11459 OF 2017
MR.AJ YAGNIK, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 11503 OF 2017
MR SAURIN MEHTA, ADVOCATE WITH MS.ANUJA S NANAVATI, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 11796 OF 2017
MR AMOGH SINGH, ADVOCATE WITH MR.AS VAKIL, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 12897 OF 2017
MR.ANGESH A PANCHAL, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 13084 OF 2017

MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 13086 OF 2017
MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 14261 OF 2017
MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 14312 TO 14316 OF 2017
MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 14318 OF 2017
MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 14323 OF 2017
MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 14324 OF 2017
MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 14351 OF 2017
MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 14552, 14587, 14589, 14590 AND 14592 OF 2017
MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 14896 OF 2017
MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 14900 OF 2017
MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 14927 OF 2017
MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 14929 OF 2017
MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 14971 OF 2017
MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in CA NO. 6823 OF 2017, CA NO.6824 OF 2017, WP (PIL) NO.95 OF 2017 AND CA 5989 OF 2017
PARTY IN PERSON for the Applicant(s) No. 1
Appearance in CA NO. 7479 OF 2017
MR DIPEN DESAI, ADVOCATE for the Applicant(s) No. 1
Appearance in CA NO. 7983 OF 2017
MR DIPEN DESAI, ADVOCATE for the Applicant(s) No. 1
Appearance in CA NO. 8412 OF 2017
MR.DHAVAL D VYAS, ADVOCATE for the Applicant(s) No. 1
Appearance in SCA NO. 15227 OF 2017
MR.JAIMIN R DAVE, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 15536 OF 2017
MR.ADITYA PARIKH, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 15410 OF 2017
MS.DISHA NANAVATY, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 15158 OF 2017
MR NIRAV R MISHRA, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 16106 OF 2017
MR.AV PRAJAPATI, ADVOCATE for the petitioner(s)
Appearance in SCA NO. 16402 OF 2017
MR MAULIK VAGHELA, ADVOCATE for the petitioner(s)

APPEARANCE IN ALL MATTERS FOR RESPONDENT – STATE
MR KAMAL TRIVEDI, ADVOCATE GENERAL WITH MR PRAKASH JANI, ADDITIONAL ADVOCATE GENERAL WITH MS. SK VISHEN, AGP FOR THE RESPONDENT - STATE
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CORAM: **HONOURABLE THE CHIEF JUSTICE MR. R.SUBHASH REDDY**
and
**HONOURABLE MR.JUSTICE VIPUL M. PANCHOLI**

**Date : 27/12/2017**

**CAV JUDGMENT**
**(PER : HONOURABLE THE CHIEF JUSTICE MR. R.SUBHASH REDDY)**

[1] All these petitions are filed under Article 226 of the Constitution of India in which the petitioners have challenged the constitutional validity of the Gujarat Self Financed Schools (Regulation of Fees) Act, 2017 (hereinafter referred to as the '**Act of 2017**') and Gujarat Self Financed Schools (Regulation of Fees) Rules, 2017 (hereinafter referred to as the `**Rules of 2017**') on the ground that the provisions of the aforesaid Act and the Rules are *ultra vires* to Article 19(1)(g) of the Constitution of India and Article 14 and Article 30 of the Constitution of India. The petition being Special Civil Application No.12897 of 2017 has been filed by the parent for implementation of the Act of 2017 and the Rules of 2017. The issues involved in all these petitions are similar and therefore with the consent of the learned advocates appearing for the parties, all the petitions are heard together and are disposed off by this common judgment.

[2] All these petitions can be classified into different categories. (a) The petitions filed by CBSE, ICSE and IB board, (b) the petitions filed by schools affiliated to state board, (c) the petitions filed by minority CBSE schools, (d) Writ Petition (PIL) filed by the parent and (e) one petition being Special Civil Application No.12897 of 2017 filed by parent for implementation of the Act of 2017 and Rules of 2017. The facts stated in the lead matters in each of the aforesaid categories are referred in brief as under:

**SPECIAL CIVIL APPLICATION NO.9523 OF 2017:**

[3] This petition is filed under Article 226 of the Constitution of India by Schools Welfare Federation contending that the petitioner no.1 therein is not for profit company incorporated under Section 8 of the Companies Act, 2013 and having approximately 44 members. The members of the petitioner no.1-association run schools which are affiliated to the Central Board of Secondary Education, New Delhi (`CBSE' for short).

[3.1] It is stated that the State of Gujarat came up with a Bill on 30.3.2017 to regulate and determine the fees of self financed schools namely Gujarat Self Financed Schools (Regulation of Fees) Bill, 2017

(`**Bill of 2017**' for short). The object of the bill is "to make special provisions for fixation of fees for the self financed schools in the State and the matters connected therewith and incidental thereto."

[3.2] Thereafter, the State Government issued circular dated 7.4.2017 wherein the State Government prescribed the fees at Rs.15,000/- p.a. for primary education, Rs.25,000/- p.a. for secondary education and Rs.27,000/- p.a. for higher secondary education. It is provided that the schools should not charge more than the previous year's fees and if charged in excess, it needs to be adjusted.

[3.3] It is further stated that on 12.4.2017, the Hon'ble Governor gave assent to the aforesaid Bill and therefore the Act of 2017 came to be enacted.

[3.4] On 25.4.2017, the State Government framed the Rule namely Rules of 2017 wherein it has been notified that pre-primary and primary schools, secondary and higher secondary schools (general stream) and higher secondary schools (science stream) charging more than Rs.15,000/-, Rs.25,000/- and Rs.27,000/- respectively shall have to submit proposal for approval, fixation of fees in accordance with the provisions of the Act of 2017.

[3.5] It is stated by the petitioners that the academic year for CBSE affiliated schools is from April to March and therefore the fees for each academic year are fixed about six months in advance which is also communicated to the parents. The new admissions begin several months before April of each academic year. Thus, it is stated that as the fees for academic year 2017-18 is already fixed, announced, implemented and substantially collected, the Act of 2017 cannot apply to such members of the petitioner no.1-association for academic year 2017-18.

[3.6] It is further stated that self finance schools can be divided into three classes (i) basic schools, (ii) holistic schools and (3) international schools. The petitioners have stated in the petition about the nature of activities in such schools. It is further contended in the petition that the State has to recognize that sizeable investment is required not only to upgrade the existing schools but also to set up new schools. The petitioners have carried out a sample project for setting up a new school within a radius of about a distance of 10 kms., from the district municipality. Copy of the project estimate is also produced with the said petition. It is stated that the said estimate shows that the investment of minimum Rs.25 crores is required simply for land and building (without furniture) at the most conservative rates. The estimate produced with the petition shows an initial fee of Rs.1 lac with

consistent 10% increase per year and considering the students' strength of 3000 (which is on the higher side) and further considering such students strength of 3000 right from the first year, the school would not break even till 8th year. Thus, it is contended that the fees fixed by the Rules ranging from Rs.15,000/- to 27,000/- per year is unrealistic.

[3.7] It is further stated that in today's age, there is a constant need to meet with the changing trends and demands, it is necessary that the schools have complete autonomy in financial matters so as to be able to plan their affairs and appropriately respond to all financial requirements including yearly increase of staff and teachers' salaries, inflationary pressures, repair and upkeep, upgradation of facilities, pay commission burden, improve infrastructure and adopt to new technologies and upgrade facilities etc. It is stated that not only this, in order to ensure the schools deliver 21st century learning skills, schools have to continuously keep investing in new systems and resources. Such investment can only be done when the school generate surplus.

[3.8] The petitioners have referred to various provisions of the Act of 2017 and Rules of 2017 in the petition and pointed out how the provisions of the Act and Rules of 2017 are unconstitutional and prayed for the following reliefs:

*"(a) The Gujarat Self financed Schools (Regulation of fees) Act, 2017 and Gujarat Self financed Schools (Regulation of fees) Rules, 2017 be declared as unconstitutional, ultra vires Articles 19(1)(g) of the Constitution and violative of Article 14 of the Constitution;*

*(b) Sections 2(g), 2(r), 2(t), 2(u), 3,8,9,10,11 and 12 of The Gujarat Self financed Schools (Regulation of fees) Act, 2017 and Rules 6,7 and 8 and Form II and its annexures, of the Gujarat Self financed Schools (Regulation of fees) Rules, 2017 be declared as unconstitutional, ultra vires Article 19(1)(g) of the Constitution and violative of Article 14 of the Constitution;*

*(c) Declare that the Gujarat Self financed Schools (Regulation of fees) Act, 2017 to the extent that it purports to apply to private schools affiliated to the Central Board of Secondary Education (CBSE) is outside the legislative competence of the State;*

*(d) Rules 6,7 and 8 of the Gujarat Self financed Schools (Regulation of fees) Rules, 2017 be declared as ultra vires The Gujarat Self financed Schools (Regulation of fees) Act, 2017;*

*(e) Declare that the Gujarat Self financed Schools (Regulation of fees) Rules, 2017 be declared as ultra vires The Gujarat self financed Schools (Regulation of fees) Act, 2017 to the extent that they purport to apply to private schools affiliated to the Central Board of Secondary Education (CBSE) as being outside the legislative competence of the State;*

*(f) Declare that Gujarat Self financed Schools (Regulation of fees) Act,*

*2017 and Gujarat Self financed Schools (Regulation of fees) Rules, 2017 can have no application to private schools which are affiliated to the Central Board of Secondary Education (CBSE);*

*(g) Restrain the Respondent from requiring the members of the Petitioner No.1 Association to approach the Fee Regulatory committee for fixation of the fees in terms of Gujarat Self financed Schools (Regulation of fees) Act, 2017 and Gujarat Self financed Schools (Regulation of fees) Rules, 2017;*

*(h) Restrain the Respondent from stopping and/or interfering, in any manner, whatsoever, with the freedom and autonomy of the members of the Petitioner No.1 Association, to collect fees in compliance with the applicable provisions of CBSE;*

*(i) Stay the operation of Gujarat Self financed Schools (Regulation of fees) Act, 2017 and Gujarat Self financed Schools (Regulation of fees) Rules, 2017 in its application to the members of Petitioner No.1 Association;*

*(j) Stay the provision of Rule 8 of the Gujarat Self financed Schools (Regulation of fees) Rules, 2017 in its application to the members of Petitioner No.1 Association;*

*(k) Pending the hearing and final disposal of the Petition, stay the operation of Gujarat Self financed Schools (Regulation of fees) Act, 2017 and Gujarat Self financed Schools (Regulation of fees) Rules, 2017 in its application to the members of Petitioner No.1 Association;*

*(l) Pending the hearing and final disposal of the Petition, stay the operation of the provision of Rule 8 of the Gujarat Self financed Schools (Regulation of fees) rules, 2017 in its application to the members of Petitioner No.1 Association;*

*(m) Pending the hearing and final disposal of the Petition, restrain the Respondent from stopping the members of the Petitioner No.1 from continuing to charge the fees which they have already fixed and implemented, for the academic year 2017-18;*

*(n) Ad-interim ex-parte relief in terms of paragraphs (j) to (m) above;*

*(o) the Hon'ble Court may grant such other and further reliefs as the nature and circumstances of the case may require."*

**SPECIAL CIVIL APPLICATION NO.10197 OF 2017:**

[4] This petition is filed by Gujarat State School Management Association and Gujarat State School Management Federation Trust. It is stated that the members of the petitioners have established and are managing unaided schools. It is stated that the school education in the State of Gujarat is provided by schools which can be classified as government schools. This would include schools run and administered by the State Government and Local Authorities/Bodies, private schools. These are schools which are managed by non-government institutions like public charitable trust-societies etc. It is further stated that private

schools are either government aided schools-this would include schools run by non-government bodies but which are receiving aid from the State Government, self financed schools-this would include schools which are established and managed by non-government/private bodies/public charitable trust/societies/companies and which do not receive any grant or financial aid from the state Government.

[4.1] It is stated that the state of Gujarat has enacted different enactments for regulating the education within the state of Gujarat. For e.g. Bombay Primary Education Act, 1947 as adopted by the state of Gujarat and Gujarat Secondary and Higher Secondary Education Act, 1972. Both these Acts seek to regulate the conduct of primary, secondary and higher secondary schools affiliated to the Gujarat state Board.

[4.2] The Central Government enacted Right of Children to Free and Compulsory Education Act of 2009 which seeks to regulate the education and impose certain norms and prohibitions of all the schools. The state Government has also framed the Right of Children to Free and Compulsory Education Rules of 2012. It is stated that the provisions of the said Act and the Rules together are a complete and comprehensive mechanism insofar as preventing the exploitation by any school administration and management in addition to obligation of free and

primary education.

[4.3] It is contended in the petition that though the aforesaid enactments are in force, the State Government enacted the Act of 2017 and Rules of 2017 though there have not been any complaints from the parents in respect of the fees being charged by the schools. It is stated that the parents have expressed satisfaction regarding the fees being collected and the parents have voluntarily deposited the fees as determined by the school management. After the enactment of the aforesaid legislation, the members of the petitioners have been receiving calls from office of the DEO in addition to personal visits seeking information about their schools, their course content, their administration, fee structure etc. The petitioners have reproduced relevant provisions of the Act of 2017 and Rules of 2017 in the memo of the petition and challenged the provisions of the same on various grounds. In this petition also, the petitioners have challenged the constitutional validity of the Act of 2017 as well as Rules of 2017.

**SPECIAL CIVIL APPLICATION NO.9434 OF 2017:**

[5] This petition has been filed by Prakash Higher Secondary School, school managed by Prakash Trust. It is stated that the school was recognized as minority education institution by the District Education

Officer of the respondent-State in the academic year 1994-95. The said school is further recognized as minority institution functioning for the betterment of the Jain community in the state of Gujarat. The said school has been affiliated with CBSE from the year 1971 and its affiliation has been lastly renewed on 31.8.2015 for a period of five years. It is stated that the school is always attempting to maintain a very high level of quality of education and alround development of its students. It is further stated that being a minority institution, the respondent has so far recognized the right of the petitioner-school under Article 30 of the Constitution of India and exempted the petitioner from any nature of general operation of any Act.

[5.1] In this petition, the petitioners have challenged the constitutional validity of the Act of 2017 and the Rules framed thereunder on the ground that they are violative of Articles 14, 19 and 30 of the Constitution of India. The relevant provisions of the Act of 2017 and Rules framed thereunder are referred and the petitioners have prayed that the provisions of the Act of 2017 and Rules framed thereunder be struck down or alternatively it is prayed that this Court may hold that the Act of 2017 and Rules framed thereunder do not apply to the petitioners being a self finance minority CBSE affiliated institution.

**WRIT PETITION (PIL) NO.132 OF 2017:**

[6] This petition in the nature of public interest litigation has been filed by a social worker working for creating awareness amongst the public on various social issues. The petitioner is also a parent and it is stated that he has interest in protecting the rights of all the parents and future of the children of the State. After referring to the relevant provisions of the Act of 2017 and Rules framed thereunder, it is stated that there is no inclusion of parents/guardians of the students in the Fees Regulatory Committee as well as in Fees Revision Committee constituted under the Act of 2017. It is stated that the object of the impugned Act is to provide a legislation for the control of the fees of self financed schools and to provide a relief to the parents of the students against the exorbitant charging of fee by self financed schools. However, in the Committee constituted under the provisions of the Act of 2017, there is no representation of the parents/inclusion of any parents in such Committees. Thus, in absence of the representation of the parents, the concerned committee would not be in a position to consider grievances of the parents and thereby such Committees will not serve the object of the impugned Act and the Rules.

[6.1] It is further stated in the said petition that the provisions under the Act of 2017 and the Rules framed thereunder are discriminative in nature sofaras the parents are concerned because in both the aforesaid Committees, there is one representation of the self finance school. However, there is no representation of the parents in such Committees.

[6.2] The petitioner has referred to the provision of similar Acts prevailing in State of Maharashtra and State of Karnataka and compared the provisions of the Act of 2017. From the different Acts enacted by different states, it is contended that in similar Acts enacted by the different states, there is a provision for the parents association for the effective mechanism of the regulation of fees. Such provision is missing in the Act of 2017. The petitioner has, therefore, prayed that the Act of 2017 and Rules framed thereunder be declared as ultra vires, unconstitutional and violative of Articles 14, 19 and 21 of the Constitution of India.

**SPECIAL CIVIL APPLICATION NO.12897 OF 2017:**

[7] This petition is filed by the parent whose child is studying in private unaided self finance school in the city of Ahmedabad. It is stated that he has been paying a high amount of fees for his child studying in the primary section of a self finance school. Thus, he is aggrieved and

agitated by the standard of fee levied by the self finance schools which is exorbitant and seeks implementation of the Act of 2017 and Rules framed thereunder. In the said petition, the petitioner has referred to various decisions rendered by the Hon'ble Supreme Court on the subject as well as the relevant provisions of the Constitution of India. It is further stated that various states in the country such as Tamil Nadu, Punjab, Rajasthan, Uttar Pradesh and national capital territory of Delhi have already enacted such Acts for regulation of collection of fees of self finance educational institutions which are of similar nature. It is further stated that where the vires of the said Act framed by the concerned state Government have been challenged before the concerned High Courts, such petitions are dismissed by the concerned High Court. Even Special Leave Petitions filed before the Hon'ble Supreme Court challenging the said orders have also been dismissed. It is, therefore, prayed in this petition that direction be issued to the respondents, its officers, servants, agents etc. to forthwith implement the Act of 2017 and the Rules of 2017 without further delay.

[8] All the petitions have been opposed by the respondent-State except Special Civil Application No.12897 of 2017. The respondent-State has filed an affidavit-in-reply through Deputy Secretary, Education Department in Special Civil Application No.9434 of 2017 and the said

reply is also annexed as affidavit-in-reply in other matters.

[8.1] In the said affidavit-in-reply, the respondent-state has mainly raised the following contentions:

(a) that the state legislature is very much competent to enact the Act of 2017 under the provisions of Entry 25 of List III of Seventh schedule to the Constitution of India.

(b) The provisions of Gujarat Primary Education Act of 1947 and Rules of 1949 as well as Gujarat Higher and Secondary Education Act of 1972 are referred and it is stated that the primary schools of the state have accepted and agreed to abide by the rates of tuition fees, pay scale and allowances approved by the government from time to time.

(c) The policies framed by the respondent-state from time to time have also been referred. Thereafter, it is stated that apart from charging of exorbitant fees by self finance institutions, there are other incidents that self finance institutions are indulging in unfair practices of collecting donations, profiteering inasmuch as the self finance institutions are making it mandatory for the students to procure uniform, shoes, books etc. provided by the school management or from a particular firm or agency, directly or indirectly

connected with the school management. Thus, several representations were received by the state government from all the stake holders who were grossly affected by the approach and attitude of the self finance institutions. It is further stated that even in self finance schools affiliated with CBSE and other Boards, similar position of charging exorbitant fees etc. appears to be persisting. The circular dated 3.6.2016 and advisory dated 19.7.2017 issued by CBSE are referred and produced along with the affidavit.

[8.2] After giving the aforesaid background, it is stated in the affidavit that on 23.3.2017, the Education Department of the State Government submitted a proposal before the cabinet for enacting a suitable legislation for regulating the fee structure along with draft Bill for approval, the cabinet after due deliberation approved the Bill which was thereafter presented in the Legislative Assembly on 30.7.2017 and the Bill was unanimously endorsed and passed by majority.

[8.3] It is stated in the affidavit-in-reply that self finance schools are at liberty to fix the fees including the facilities provided by them subject to the compliance of the provisions of the Act of 2017 and Rules of 2017 which are regulatory in nature. It is stated that it is for the self finance schools to send proposal to the Fee Regulatory Committee with

justification by relying upon necessary documents, statement of accounts and other evidence. It is further stated that one of the objects of Act of 2017 is to see that no capitation fees is charged as also fee fixed and collected in the self finance schools is not exorbitant and is not amounting to profiteering. Thus, it is stated that the Act of 2017 and Rules of 2017 are only regulatory measure and do not take away the powers of the educational institutions to fix their own fees.

[8.4] In paragraphs 8.1 to 8.4 of the affidavit-in-reply, it is pointed out that how the concerned Committee has prescribed Rs.15,000/-, Rs.25,000/- and Rs.27,000/- fees for primary, secondary and higher secondary general stream and higher secondary science stream respectively. The respondent-state has also stated in the affidavit-in-reply why the provisions of the impugned Act and the Rules framed thereunder are not violative of Articles 14, 19 and 30 of the Constitution of India.

**Submission by Mr. Mihir Thakore, learned Senior Advocate in SCA No.9523 of 2017.**

[9] Mr. Mihir Thakore, learned Senior Advocate appearing for the petitioners has mainly challenged the impugned Act, 2017 and Rules

framed thereunder on the following grounds :-

(i) The law is settled so as to recognize (a) the right to establish and administer an educational institution under Article 19 (1) (g) being an occupation; (b) that legislations like the impugned one, being accepted as imposing restrictions on the aforesaid fundamental right, and (c) the position that any legislation which impinges upon the exercise of such a right, can only be protected if it falls within Article 19(6), qualifying as a reasonable restriction.

(ii) The consistent recognition by various judgments as to the starkly different factual situations in terms of merit based admissions being necessary for higher and particularly professional courses, coupled with the limited seat availability for such courses, resulting in compulsion for the students to seek admission to a particular institution, vis-a-vis the totally opposite scenario of prohibition (and impossibility) of merit based admissions at school level and the abundance of schools and seats, including free schools and aided schools, resulting in no compulsion (but play of choice) for admission at school level.

(iii) The inherent possibility of profiteering of (ii) above at the level of higher or professional education being non existent at the school level.

(iv) The consequent recognition by the judgment in the case of **T.M.A. Pai Foundation v/s. State of Karnataka (2002) 8 SCC 481** (and the other judgments that followed and reaffirmed this view) that the extent of autonomy, which flows from the recognition of education being an occupation, would depend upon the different levels of education, i.e. from primary to professional and the government regulations for all levels or types of educational institution cannot be identical, so also, the extent of control or regulation could be greater vis-a-vis aided institutions, and that unaided private schools enjoy maximum autonomy, going as far as to approve “fees commensurate with the fees affordable”.

(v) A corollary to the above that what may be considered as a reasonable restriction in the context of higher and professional education, cannot necessarily be held to be reasonable in the context of school education.

(vi) More importantly, the substantial restriction already

imposed upon private unaided schools, in the form of the RTE Act, which undeniably restricts in particular, the right of private unaided schools to charge their normal fees for 25% of their students, will have to factored in, when examining if the impugned Act can be saved by Article 19(6). The fact that there is no legislation in the higher education space, akin to the RTE Act, which may justify the restrictions under the various higher and professional education regulation laws, is a position incomparable to school level education, which therefore rules out saving the impugned Act merely because such restrictive legislations in the higher and professional education space, have been held to be within Article 19(6).

(vii) Considered in the context of the existing restrictions under the RTE Act and otherwise also, the Act cannot be said to conform to Article 19(6) and runs foul of the principle of proportionality, by which the question as to whether a restriction is reasonable or not, needs to be tested.

(viii) Full effect has to be given to the mandate of the Hon'ble Supreme Court (in the Pai Foundation case) as regards the requirement to provide maximum autonomy to schools, in the

back ground of recognition of the fact that restrictions imposed upon higher and professional education cannot be replicated for school education. Recognizing that in absence of compulsion, if parents are willing to pay the fees demanded by the schools, there is no justification to control fees and if they are not willing, they can opt for other schools at convenient fee points, there being no compulsion, unlike higher and professional education. The only two ways to effectuate the aforesaid mandate of the Pai Foundation case can be (a) to regulate school fees, not at the stage of initial admission, where parents and children have a choice to choose school at comfortable fee points, to suit individual needs, but focus the recognition on the year on year increase, when a student is promoted to a new class. It is only this area where there is a scope for regulation, which can be done by providing a rational and a permissive automatic limit for increase, year on year, based on the increase in various cost factors and expenses, with a liberty for schools to apply for higher increase, should circumstances justify. Alternately, (b) to evolve a grievance mechanism in case of individual complaints against schools.

(ix) The impugned Act and the Rules thereunder are ultra vires the Article 19(1)(g) and Article 14 and it is impossible to read

down or put a purposive interpretation on, multiple sections and Rules of the impugned Act and Rules, which would really amount to re-writing the Act. The provisions as to the constitution of the Fee Regulatory Committee, which is not contemplated to be headed by a judicial member, though it has been held to be a quasi judicial body, is unconstitutional.

(x) The impugned Act being beyond the ambit of the legislative powers of the State, being repugnant to the RTE Act, which occupies the field as regards fees of primary unaided schools.

(xi) The impugned Rules and the Forms contemplated thereunder, being ultra vires the Act as also being violative of Article 14 and even otherwise unworkable and contrary to established accounting principles.

(xii) The application of the Rules to the current academic year (2017-18) being retrospective and ultra vires the impugned Act.

[9.1] Mr. Mihir Thakore, learned Senior Advocate contends that the impugned Act is in essence, a fee fixation Act, not a fee regulatory Act and therefore, it violates fundamental rights of school owners and is

ultra vires to Article 19(1)(g) of the Constitution of India. The statements of objects and reasons clearly indicate intention of the legislation to fix fees. The preamble of the impugned Act reinforces the same. An overall analysis of the impugned Act and the Rules framed thereunder requires Self Finance Schools to submit proposals for fee fixation and not to charge such fees till they are determined by the Fee Regulatory Committee, which conclusively demonstrates the real intent of the impugned Act and the Rules thereunder. Thus, it is submitted that it consequently wrongly interfere with the fundamental right of the petitioners. The impugned Act is arbitrary and unreasonable. Various provisions and definitions are actually unworkable. It also provides for excessive delegation of powers, confers uncanalized and unguided powers to the Fee Regulatory Committee and also on the executive. No guidance, control or checks are contemplated under the impugned Act. Therefore, the impugned Act is arbitrary in nature and violative of Article 14 of the Constitution of India.

[9.2] It is further submitted by Mr. Thakore that various provisions of the impugned Act substantiate the assertion as regards being a Fee Fixation Act. Learned Senior Advocate has referred provisions contained in sections 2(g), 3(1), 8, 9, 10 and 11 of the impugned Act. After referring to said provisions, it is submitted that in

essence, the impugned Act is enacted for fixation of fees and not for regulation of fees as contended by the respondent – State.

[9.3] At this stage, Mr. Thakore, has placed reliance on the judgments relied by the respondent State in the case of **Tamil Nadu Nursery v/s. State of Madras reported in 2010 (4) CTC 353,** wherein, the Hon'ble Court has upheld the validity of the Tamil Nadu Schools (Regulation of Collection of Fees) Act, 2009 pertaining to fee fixation observing that *"the ultimate object of the T.N. Schools Fee Act, 2009 is to regulate the collection of fee by schools in the State of Tamily Nadu. Excluding the CBSE Schools and ICSE Schools from the ambit of the Act would defeat the object of the Act"*. It is submitted that said judgment does not take into account two very significant aspects which have been highlighted in the instant proceedings. First the categorical recognition of the various levels of education and the clear ratio as to the extent of permissible regulation being determined by the level of education, the school level being permitted maximum autonomy, as laid down in the Pai Foundation case and subsequently, reaffirmed in the other cases. Second, the existence of the RTE Act already prescribing material restrictions on private and unaided schools, as being a factor to consider reasonableness of restriction, in the context of Article 19(1)(g).

[9.4] Mr. Thakore further distinguished decision of the Hon'ble Madras High Court in the case of **Lakshmi School v/s. State of Tamil Nadu reported in 2012 (6) CTC 8** on the ground that in the said judgment, provisions of the Tamil Nadu Schools (Regulation of Collection of Fees) Act, 2009 do not apply to schools affiliated to CBSE.

[9.5] Mr. Thakore thereafter, submitted that decision rendered by the concerned High Court in the case of **Nalanda Educational Society v/s. Government of Andhra Pradesh** would not be applicable to the facts of the present case.

[9.6] Mr. Thakore thereafter, submitted that Section 3 of the impugned Act entitles the Government to constitute the Fee Regulatory Committee and same is contrary to the ratio laid down by the Hon'ble Supreme Court in the case of **T.M.A. Pai Foundation and Islamic Academy of Education v/s. State of Karnataka reported in (2003) 6 SCC 697**, wherein, the Hon'ble Supreme Court has directed the States to form a committee headed by a retired High Court Judge to be nominated by the Chief Justice of that State. In the case of P.A.Inamdar case, the Hon'ble Supreme Court has held that a committee like one constituted under the impugned Act would be a quasi judicial in nature. Consequently, it has to be chaired by a judicial member. Other

consequences is that such appointment should be done in consultation with the judiciary. At this stage, Mr. Thakore, learned Senior Advocate submitted that section 3(4) of the Fee Fixation Act provides for the Chairperson of the Fee Regulatory Committee to be either a retired District and Sessions Judge or a person who has been a member of All India Service or a person who has been a member of Indian Police Service. There is no equivalence in terms of either experience, expertize or otherwise whatsoever between these three categories of persons and therefore, this provision is unreasonable, arbitrary and unconstitutional. Further it is submitted that Fee Regulatory Committee has adjudicatory powers, including power to levy fine and order cancellation of affiliation as provided in Section 8(2) (e) and Section 14 of the Act. Further the fact that the jurisdiction of Civil Court is barred, necessitates that the committee be Chaired only by a judicial member, which is not so in the instant case. Learned Senior Advocate has placed reliance on the decisions of the Hon'ble Supreme Court in the case of **Tamil Nadu Generation and Distribution Corporation Limited v/s. PPN Power Generating Company Ltd. reported in (2014) 11 SCC 53, Union of India v/s. Madras Bar Association reported in (2010) 11 SCC 1 and** in the case of **State of Gujarat and Anr. v/s. Gujarat Revenue Tribunal Bar Association and Anr. reported in (2012) 10 SCC 353** in support of aforesaid contentions.

[9.7] At this stage, Mr. Thakore, learned Senior Advocate submitted that under the impugned Act, unbridled powers are delegated to Fee Regulatory Committee. Section 8(2) (c) refers to “exorbitant fee” and sub-section (e) refers to “excess fee”. However, none of these terms are defined in the impugned Act. Thus, same would lead to subjective and arbitrary interpretation by the different zonal Fee Regulatory Committees. Such lacuna effectively results in unbridled and unfettered discretion upon said Committee to read and interpret the provisions of the aforesaid sections in a manner it may choose. It is further submitted that the impugned Act does not stipulate for the decision of the said Committee to record reasons, will only compound the arbitrariness of the entire exercise and is one more reason to declare these provisions as ultra vires. Similarly, the provisions contained in Section 8(2)(e) of the impugned Act provides that Fee Regulatory Committee shall have the power to verify whether the fee collected by school is recognized by the competent authority and Section 8(2)(g) confers the powers to the committee to report to respective authorities. Said provisions are violative of Article 19 and arbitrary for several reasons. It is not possible for the Fee Regulatory Committee to verify whether fee collected by Self Finance Schools is recognized by a competent State Educational Authority or affiliated to the Gujarat Secondary and Higher Secondary

Education Board / Central Board of Secondary Education / Council for Indian School Certificate Examination / IB Board or any other Board as the case may be, since no authority or board fixes or determine fees of private unaided schools.

[9.8] Mr. Thakore, learned Senior Advocate in detail pointed out how other provisions of the impugned Act, such as section 9 and explanation of Rule 11 of the Rules, Section 10, Section 11, Rule 6 and Rule 8 are unreasonable, arbitrary and unconstitutional.

[9.9] Mr. Thakore, learned Senior Advocate thereafter submitted that section 12, fills up the Fee Revision Committee with the government appointees and is not independently constituted. Not only this, it is revisional jurisdiction, not appellate jurisdiction, which is inherently limited and cannot involve re-appreciation of evidence. In the case of State of **Kerala v/s. K.M.Charia Abdulla and Co. reported in AIR 1965 SC 1585**, the Hon'ble Supreme Court clearly recognize the limited scope of revisional jurisdiction, as compared to appellate jurisdiction. He has thereafter, referred to the case of **Hindustan Petroleum Corporation Limited v/s. Dilbahar Singh reported in (2014) 9 SCC 78** and submitted that revisional jurisdiction will not be permitted re-hearing on facts or re-appreciating of evidence or acceptance of new evidence. The

fact that remedy against the Fee Revision Committee's order can only be a writ, which itself is simply supervisory and limited in nature, renders the entire mechanism of this section and section 3 unconstitutional. He has referred judgment in the case of **G. Veera Pillai v/s. Raman and Raman Limited reported in AIR 1952 SC 192, Syed Yakoob v/s. K.S.Radhakrishnan and Ors. reported in AIR 1964 SC 477, of State of M.P. v/s. Johri Mal reported in (2004) 4 SCC 714** and in the case of **State of Maharashtra v/s. Raghunath Gajanan Waingankar reported in (2004) 6 SCC 584**. It is submitted that only errors of law can be corrected under writ jurisdiction, not a mere wrong decision. It is submitted that considering particularly the bar to the jurisdiction of civil court, the provisions of the impugned Act are bad.

[9.10] Mr. Thakore, learned Senior Advocate thereafter submitted that section 13 read with Rule 12 provides a whole new requirement for maintenance of accounts and records, which is unconstitutional and inconsistent with the fact that Trusts or Companies already comply with the relevant statutory provisions, in this regard and creating such a new set of regulations puts a needless and unnecessary burden on the schools. Section 13(4) which requires the accounts and records to be at the premises of the educational institution, without realizing that the school is not a legal entity and that the accounts and records would be

with the Trust or the Company, as the case may be, which Trust or Company may have more than one school or other venture, is also violative of other and more specific enactments like the Companies Act which require the accounts and records to be kept at and made available at the registered office of the company.

[9.11] Mr. Thakore, learned Senior Advocate further submitted that section 14 provides for contravention and penalties to be imposed upon the school management, but does not stipulate as to which authority, will impose such penalty. Assuming that such penalty shall be imposed by the Committee, then, apart from the fact that Fee Regulatory Committee would be exercising adjudicatory powers, a significant lacuna in the impugned Act is that any such order imposing penalty, which may supposedly be passed by the Committee, cannot be carried in revision to the Fee Revision Committee, since section 12(3) only applies to the order of the Fee Regulatory Committee made under section 10. Section 14(2) which provides for the amount of fine, prescribes exorbitant and highly excessive. It proceeds to contemplate that fine of one percent of the total payable amount shall be levied each day till the refund of the total amount and fine is paid, which effectively translate to compounding on each day and results in fine on fine, amounting to double penalty.

[9.12] Mr. Thakore, learned Senior Advocate further submitted that section 16 is unconstitutional as it grants unbridled and arbitrary power to the State Government to issue general or special directions and provides for the management of the self financed school to be bound by such direction. It is further submitted that section 20(3) expressly required that the rules to be placed before the State Legislature for not less than 30 days, which requirement has not been complied with. In fact, the impugned Act itself came into force on 12.04.2017 and the Rules came into force on 25.04.2017.

[9.13] Mr. Thakore, learned Senior Advocate further contended that the respondent State does not have legislative competence and the impugned Act of 2017 is repugnant to the Right of Children to Free and Compulsory Education Act, 2009. It is further submitted that RTE Act already occupies the field in so far as primary education is concerned. Thus, the impugned Act is per se void and inoperative as it is repugnant to the RTE Act. It is pointed out that RTE Act came into force on 01.04.2010 pursuant to the Entry 25 of List III of the 7$^{th}$ Schedule to the Constitution of India. One of the purpose of RTE Act, apart from providing for free and compulsory education to all children of the age of 6 to 14 years was, by enactment of section 3(2), is

to remove financial barrier which may prevent a child from accessing education. The other purpose of enacting section 3(2) was to prevent educational institution from charging capitation fees resulting in creation of financial barrier which prevents child from accessing or exercise its right to education. At this stage, it is pointed out that section 13 of the RTE Act provides that *"no school or person shall, while admitting a child, collect any capitation fee..."*. Section 2(b) defines capitation fee so as to mean *"any kind of donation or contribution, or payment other than the fee notified by the school."* It is therefore, submitted that RTE Act occupies the field as to regulating private educational institutions from charging any kind of fees or charges or expenditure which may prevent the child from pursuing and completing elementary education. Thus, in face of special provisions under RTE Act, which expressly regulate the right of schools in so far as fees, charges or expenses are concerned, and permit freedom to school to charge such fees that it may choose, so long as the fees are notified, the impugned Act should not have been enacted by the State Legislature. In support of such contention, reliance is placed on the decision rendered by the Hon'ble Supreme Court in the case of **M. Karunanidhi v/s. Union of India reported in (1979) 3 SCC 431** and **ITC Ltd. v/s. Agricultural Produce Market Committee and Ors. reported in (2002) 9 SCC 232**.

[9.14] Mr. Thakore, learned Senior Advocate thereafter submitted that education is in the Concurrent list in the 7th Schedule of the Constitution and school affiliated to CBSE controlled by the Ministry of Human Resources Development, Government of India is outside the purview of State regulation. The CBSE affiliation bye-laws are referable to the exercise of legislative power by the Union of India, in exercise of its legislative field under Entry 25 of List III of the 7th Schedule of the Constitution. The provisions of the Fee Fixation Act or the Rules made thereunder, are inoperative on account of being eclipsed by the dominant legislation by the Union of India in terms of the CBSE affiliation bye-laws, enacted in exercise of concurrent field of legislation. It is therefore, submitted that the impugned Act which purports to fix fees of CBSE affiliated schools is ultra vires the legislative powers of the State.

[9.15] Mr. Thakore, learned Senior Advocate would further submit that the Hon'ble Supreme Court in the case of **Unni Krishnan v/s. State of Andhra Pradesh reported in (1993) 1 SCC 645** held that private educational institutions are necessity in the present day context, particularly in the sector of medical and technical education. The Hon'ble Supreme Court, however, with a view to not allow private educational institutions to commercialize, framed a scheme for

professional colleges but not schools. Thereafter, in the case of T.M.A. Pai Foundation, the Hon'ble Supreme Court held that the conclusion of the Unni Krishnan case that establishment of educational institution is an occupation was not correct but the proviso to such observation to the effect that this is so, provided no recognition is sought from the State or affiliation from the University, was erroneous. The Hon'ble Supreme Court held that the scheme framed by the Court and thereafter, followed by the Government was one that cannot be called a reasonable restriction under Article 19(6) of the Constitution and proceeded to further observe that the restriction imposed by the scheme in Unni Krischnan's case made it difficult for the educational institutions to run effectively. It is further submitted that in the case of T.M.A. Pai Foundation, the Hon'ble Supreme Court held that the right to establish and administer educational institutions is guaranteed under the Constitution to all citizens under Article 19(1)(g) and 26 of the Constitution. It is further held that education falls within the meaning of the expression “occupation” and that 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. Mr. Thakore, learned Senior Advocate further submits that the Hon'ble Supreme Court in the said case proceeds to decide on the extent of regulation and after

recognizing the need to charge better fees, it is held that it is left to the institutions, it chooses not to seek any aid from the Government to determine the scale of fee that it can charge from the student.

[9.16] Mr. Thakore, learned Senior Advocate thereafter submitted that the concept of profiteering or capitation fees has no application to school education since admission is not dependent on merits and market forces determine the fees. Existence of various schools, subsidized, aided and free, ensures that there is no profiteering by schools. Furthermore, in absence of compulsion, if parents are willing to pay the fees demanded by the schools, there is no justification to control. If they are not willing, they can opt for other schools. To give effect to the ratio of the judgment in Pai Foundation case as regards private schools being granted maximum autonomy, any fee fixation at the time of admission or new admissions cannot be contemplated. The only possible manner of regulation would be either create a mechanism to regulate the year on year fee increase, when a student is promoted to new class, which can be done by providing a rational and permissive automatic limit of increase, year on year, based on the increase in various cost factors and expenses, with a liberty for schools to apply for higher increase, should circumstances justify, or to have a complaint based grievance mechanism. It is only this area where there is a scope for regulation.

[9.17] It is further submitted by Mr. Thakore that the judgment in the case of Islamic Academy seeks to clarify the judgment of TMA Pai Foundation in respect to unaided professional educational institutions, both minority and non minority and not for school education. The Hon'ble Supreme Court hold that even in respect of professional unaided educational institutions, there can be no fixing of right fee structure. Each institute must have the freedom to fix its own fee structure, taking into consideration the need to generate funds to run the institutions and to provide facilities. The Hon'ble Supreme Court observed that there can be no profiteering and capitation fee and that imparting education is essentially charitable in nature. The Hon'ble Supreme Court appointed a committee to be headed by a retired High Court Judge nominated by the Hon'ble Chief Justice of the State and the other members to be nominated by the said judge, to approve the fee structure which can be charged.

[9.18] Mr. Thakore would submit that the judgment while referring to private unaided professional colleges, recognizes the clear distinction between private unaided professional colleges and other educational institutions i.e. schools and under graduate colleges by observing that undoubtedly, the majority judgment makes a distinction

between private unaided professional colleges and other educational institutions i.e. schools and under graduate colleges and emphasizes that in professional institutions merit is to be determined as a criteria for admission, as it is in national interest to have good and efficient professionals. The Hon'ble Supreme Court, equating profiteering with capitation fees, observed that “it is impossible to control profiteering / charging of capitation fees unless it is ensured that admission is on the basis of merit”. The Supreme Court also appoints a permanent committee to ensure the test conducted by association of professional colleges is fair and transparent.

[9.19] Mr. Thakore, learned Senior Advocate would submit that in the case of P.A.Inamdar, the Hon'ble Supreme Court clarified that it was not intending to pronounce its own independent opinion on the several issues which arose for consideration in Pai Foundation and that the Court not expressed dissent or disagreement, Pai Foundation being eleven Judges bench judgment. In this case too, the Hon'ble Supreme Court was concerned with higher education and not school education. The Hon'ble Court clearly recognized the concept of levels of education. The Hon'ble Supreme Court expressly reaffirms the ratio of Pai Foundation as to unaided professional institutions being given greater autonomy in determination of admission procedure and fee structure.

The Hon'ble Court thereupon, after recognizing / reaffirming such distinction, proceeds to reaffirm, in so far as higher professional education is concerned, that State regulation should be minimized and only with a view to maintain fairness and transparency in admission procedure and to check exploitation of the student by charging exorbitant money or capitation fee. The Court proceeded to deal with capitation fee and effectively re-affirmed, considering that there is no merit based admission and consequently no requirement of transparency, which only applies to higher and particularly professional course and not to school education, that there cannot be fee fixation at school level.

[9.20] Mr. Thakore, learned Senior Advocate further submitted that in the case of **Modern Dental College and Research Centre and Ors. v/s. State of M.P. And Ors. reported in (2016) 7 SCC 353,** the Hon'ble Supreme Court was once again concerned with professional education and particularly medical and dental post graduate courses and not school education. Significantly, the Hon'ble Supreme Court noted the submission of the counsel appearing for the State of M.P. As regards the recognition of levels of education by Pai Foundation, the Hon'ble Court thereupon expressly, proceeded to hold and accept the submissions of the counsel appearing for the State of Madhya Pradesh as

regards the recognition of levels of education by Pai Foundation. This further explained in para 58 of the judgment.

[9.21] Mr. Thakore, learned Senior Advocate would further contend that limited number of seats in professional courses and requirement of merit based admissions will be completely frustrated if fees are not regulated. Requirement of admission on merit necessarily requires prohibition on charging capitation fee and profiteering otherwise if professional colleges are permitted to charge exorbitant fees, or capitation fee merit based admission will be sacrificed. Thus, merit based admission and restriction on fees are two sides of the same coin. One cannot be achieved without the other. As merit based admission is not required for schools, there is no need to impose any restriction on fees. It is in this background that in the case of P.A.Inamdar, the Hon'ble Supreme Court has negated the argument of post audit or checks after the institution have adopted their own admission in fee structure in case of professional colleges. The said principle will have no application to schools, where admission is not based on merit and unlike professional courses if there is any case of profiteering, remedial measures can be taken.

[9.22] Mr. Thakore, learned Senior Advocate further submitted that subsequent judgments do actually recognize and reaffirm the ratio

of Pai Foundation. Even, if they did not, it would still be fallacious to contend that the observations made in the Pai Foundation case as regards maximum autonomy for schools and as regards different regulations for schools and higher education, have not been followed in the subsequent judgments because (i) the subsequent judgments were not concerned with school education and therefore, had no reason to refer to or consider or recognize the ratio of Pai Foundation as regards school education and (ii) as the decision in the case of P.A.Inamdar itself brings out, the task before the Hon'ble Court was not to pronounce its own independent opinion on the issues which arose for consideration in Pai Foundation. The Hon'ble Court in the Inamdar case proceeded to state that being bound by the eleven judge bench, it could not express dissent or disagreement.

[9.23.] Mr. Thakore, learned Senior Advocate thereafter submitted that apart from decision of the Hon'ble Supreme Court in the case of Pai Foundation, the only other judgment of the Hon'ble Supreme Court which deal with school education are the judgments in the case of **Modern Schools v/s. Union of India & Ors. reported in (2004) 5 SCC 583** and **Action Committee, Unaided Private Schools and Ors. v/s. Director of Education, Delhi and Ors. reported in (2009) 10 SCC 1**. It is submitted that the respondent State is not correct in submitting to the

effect that the judgment in the Modern School's case clearly lays down that the authorities are entitled to fix the fees. Reliance placed by the State on the decisions rendered by the Hon'ble Delhi High Court in the case of **Delhi Abibhabak Mahasangh v/s. Union of India and Ors. reported in AIR 1999 Delhi 124** and in the case of **Delhi Abibhabak Mahasangh v/s. Union of India and Ors. Reported in 2011 SCC Online Delhi 3394** do not take the case of the State any further. Learned Senior Advocate has tried to distinguish the said decisions on the facts of the present case. Mr. Thakore, learned Senior Advocate has also pointed out the provisions of Delhi School Education Act, 1973 and particularly section 17 of the said Act is distinct from the provisions of the impugned Act. Thus, it is contended that under Article 19(1)(g) of the Constitution, the right to establishment of an educational institute is fundamental right and it is occupation. It is submitted that if restrictions imposed by the State by way of impugned legislation are not reasonable, then the said provisions can be declared as ultra vires and unconstitutional. It is submitted that State can impose reasonable restriction in the interest of general public and State has to follow the principles of proportionality.

[9.24] Mr. Thakore, learned Senior Advocate has referred following aspects in support of his contention that restriction imposed by

the respondent State under Article 19(6) of the Constitution are not reasonable.

(i) The categorical finding in the TMA Pai judgment as to maximum autonomy be required to be provided to private schools.

(ii) As has been brought on record, the number of schools in Gujarat are about 52424, the children studying in Gujarat are about 1.77 crores. The number of children studying in higher secondary are about 950803. As against this, available admissions to medical colleges are 3380 or to dental college are 1155. The resultant rush for admission creating the possibility of non merit based admissions by capitation or profiteering for higher professional courses, is the singular criteria for justifying the various legislations in respect to higher education which contemplate a competitive admission process, fee fixation and committees, for the purpose. While such legislations (for higher professional education) have been held to be a reasonable restriction in the interest of general public under Article 19(6), a similar legislation but for a different situation (school education) where there is no scope for merit based admissions, cannot be considered to be reasonable in the context Article 19(6). In so far as school education is concerned, where a child has multiple

options, there is no such risk of profiteering and consequently, there arises no necessity to determine or fix school fees at the school level. In fact, the availability of free schooling in Government schools or schooling at subsidized fees in Municipal or aided schools, obtaining of admissions at convenient free points is not at all a handicap. Not only this, unlike in case of higher / engineering or medical education, where the course curriculum is standardized at school level, there are huge variations in the standards, services and facilities as also the quality of education being provided by schools and particularly the self financed schools with the result that neither can there by a comparison between the fees of two schools nor can there be a straight jacket fee fixation, for self financed schools. Insofar as school education is concerned, there is no compulsion and the child can choose a school as may be suitable and at a fee point which may be convenient, which choice and option are invariably not available in case of higher professionally education college or university in view of limited availability of seats. The attendant possibility therefore, of an institute of higher professional educational institution exploiting such a situation to profiteer, is non existent in a school. There is no compulsion for students to attend private schools, the rush for admission being occasioned simply because

of the standards maintained by such private schools.

(iii) The acceptance by the Hon'ble Supreme Court in the case of Modern Dental of the principle of proportionality in the context of balancing the rights recognized under Article 19(1)(g) with reasonable restrictions and particularly upon consideration as to (a) the purpose of a purported reasonable restriction under Article 19(6)(b) whether the measures undertaken as purported reasonable restrictions to effectuate a limitation on the exercise of fundamental right have a rational connection to fulfillment of that purpose (c) whether the measures purported as reasonable restrictions are necessary or that there are alternative measures that may similarly achieve the same purpose with a lesser degree or limitation and (d) there being the need for a proper relation (proportionality strictosensu or balancing) between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.

[9.25] Mr. Thakore, learned Senior Advocate further submitted that burden is on the State to prove reasonableness, which in the present case, the State has failed to prove. It is submitted that when the enactment on the face of it is found to be violative of fundamental right

guaranteed under Article 19(1)(g) of the Constitution, then it must be held to be invalid, unless those who support such legislation are able to bring it within the purview of the exception as laid down under Article 19(6). The State Government in the present case has failed to justify the interest of general public sought to be achieved and how such fee fixation can be considered to be a reasonable restriction in the face of the already existing restriction under RTE Act and/or failing to show as to how the four tests held and approved in the Modern Dental College case are satisfied.

[9.26] Mr. Thakore, learned Senior Advocate lastly contended that an attempt has been made by the State to save the impugned Act of 2017 and the Rules framed thereunder by suggesting reading down of certain provisions or purposively interpreting certain provisions of the impugned Act. Such endavour is misconceived for several reasons *inter-alia,* considering the extensive extent of reading down sought and the nature thereof. Reading down can only be resorted to for ironing out the creases, not stitch a new garment. In fact, in the guise of reading down, the State is actually amending and altering the basic provisions and re-writing them.

[9.27] Mr. Thakore, learned Senior Advocate referred to compilation -IV submitted by learned Advocate General during the

course of hearing and after referring to the various suggestions with regard to purposive interpretation, it has been contended that attempt on the part of the respondent State by way of providing such compilation is directly contrary to the ratio of decisions rendered by the Hon'ble Supreme Court in the case of **Cellular Operators Association of India reported in (2006) 7 SCC 703** as well as in the case o **Union of India v/s. Indo Swift Laboratories Ltd. reported in (2011) 4 SCC 635.**

[9.28] Mr. Thakore, learned Senior advocate therefore, urged that provisions of the impugned Act and the Rules framed thereunder are unconstitutional and violative of Article 14, 19(1)(g) of the Constitution and therefore, the provisions of the same be struck down.

**SUBMISSIONS CANVASSED BY LEARNED SENIOR ADVOCATE MR.S.N. SHELAT IN SPECIAL CIVIL APPLICATIN NO.10197 OF 2017:**

[10] Learned Senior advocate Mr.Shelat appearing in Special Civil Application No.10197 of 2017 has assailed the provisions of the Act of 2017 and Rules of 2017 mainly on the ground that such provisions are violative of Article 19 of the Constitution of India. It is contended that the petitioner has fundamental right under Article 19(1)(g) of the Constitution of India to establish the educational institutions. Such fundamental right can be regulated by the state Government by framing

legislation. However, such legislation should not lay excessive and prohibitive burden upon exercise of right under Article 19(1)(g) of the Constitution. It is submitted that in absence of any monopoly vested in an enterprise by the government, it cannot exercise control on the fees to be charged. The legislative field is in essence to regulate the standards of education and not to fix the cost which can be incurred by a private enterprise and recovered by it for imparting education. Thus, the impugned Act is beyond the competence of the State Government and therefore the same be declared unconstitutional. It is further submitted that under Article 19(6) of the Constitution, the state can impose reasonable restriction. However, such restriction may be partial, complete or permanent must bear close nexus with the object for which they are imposed. Such restriction should not be of excessive nature beyond what is required in the interest of public.

[10.1] At this stage, it is submitted that the constitutional Bench judgment in the case of TMA Pai Foundation and others V/s State of Karnataka reported in (2002)8 SCC 481 has held that it is in the interest of general public that more good quality schools are established, autonomy and non-regulation of school administration in the right of appointment, admission of the students and the fees to be charged will ensure that more such institutions are established. It is, therefore,

submitted that the impugned legislation which seeks to take over effectively the control and administration of self finance schools violates the mandate of Article 19(1)(g) of the Constitution of India.

[10.2] Learned senior advocate Mr.Shelat thereafter submitted that the field of permissible legislation in respect of self finance schools is already occupied by central legislation namely through the Right of Children to Free and Compulsory Education Act, 2009. Thus, the field being occupied, the impugned legislation is impermissible in law.

[10.3] Learned senior advocate Mr.Shelat would thereafter contend that the fee regulatory mechanism contemplated under the impugned Act is neither fair nor reasonable nor just. It is submitted that independence is a basic and essential feature of any statutory scheme providing for an adjudicatory process. The entire constitution of Fee Regulatory Committee is solely on the basis of the nomination by the government which would clearly impinge upon the independence of the Committee. It is stated that the administration of the quasi-judicial authority like the Fee Regulatory Committee has to be manned by persons of legal acumen, expertise and experience. Thus, the provision insofar as it enables the government to appoint retired administrative officers and police officers to be the chairpersons of the Regulatory

Committee is illegal and unconstitutional. Similarly, the Review Committee is consisting predominantly of government officers defeating the very purpose of its constitution. It is further pointed out that the functions of the Committee travel beyond the scope of the Act by including the powers to verify the nature of course content being introduced in the schools.

[10.4] Learned senior advocate Mr.Shelat thereafter submits that by notification dated 25.4.2017, fee structure has been prescribed by the state Government in preprimary and primary and secondary and higher secondary self finance schools. The fee-cap fixed by the respondent-government is not as a result of any survey conducted by the government. Thus, the imposition of fee-cap would be treated as guidelines by the parents and would be so treated by the Regulatory Committee also as a result the Regulatory Committee cannot undertake objective assessment about fee structure. Learned advocate Mr.Shelat has further submitted that in Section 2(n)(iii) and in Section 10(ix), following part is required to be struck down:

"and shall also include trust or Company associated with the school in any manner whatsoever."

"expenditure incurred on the students against total income of the school which shall include profit earned from the school by the trust or

Company associated with such school."

[10.5] That the provision infringes the rights of the trustees, rights of the company and rights of the promoters of the company to the extent it regulates that the trust or the company which are associated with the school should also be restrained in the manner laid down. It is well recognized that the trust or the company cannot be barred from making the surplus which arises from the activity carried out by the educational institution. It is further submitted that the above mentioned extracted portion of Section 2(n) lays down an uncontrolled purview to extend. The clause indicated hereinabove is required to be struck down as it leads to vagueness leading to repugnance and unconstitutionality. It is submitted that "reading into" such vague provision is impermissible. Section 13 read with Rule 12 regulate accounts and maintenance of record by the school. Rule 13 mandates that the self-financed school shall open and operate only one bank account and all income as well as expenditure should be reflected in the said account. The school account is regulated by Section 13. The question of trust receiving any fund arising out of the school activity cannot arise because all incomes and expenditures are to be reflected in the bank account of the school.

[10.6] Learned senior advocate Mr.Shelat has further referred to

certain provisions which read as under:

> "Proviso (i) to Section 9 which reads as under:
>
> "Provided further that exclusive pre-primary classes/play groups/creches/not attached to any school shall be exempted from the application of the provisions of this Act."

Rule 11(3) reads as under:

> "Exclusive pre-primary classes/play groups/creches not attached to any school shall be exempted under Section 9 of the Act."
>
> "Explanation : For the purposes of second proviso to sub-section (1) of Section 9 and sub-rule(3), any tie up agreement collaboration of any such pre-primary classes/play groups/creches with any self financed school either directly or indirectly, or operating under functional/financial or administrative control of the same management or of the relatives or the pre-primary schools being run as franchise or agency by the primary school shall be considered to be an attachment with such school."

[10.7] It is submitted that the said Rule restricts exemption granted in favour of pre-primary school by legislative fiction. Relying upon a decision of the Hon'ble Supreme Court in the case of ***Agricultural Market Committee V/s Shalimar Chemical Works Ltd., reported in AIR 1997 SC 2502,*** it is submitted that the legislative

function cannot be delegated in favour of rule making authority by restricting exemption and legal fiction cannot be created by delegation. In support of the same contention, learned advocate Mr.Shelat also relied upon the decisions in the case of (1) **National Coal Development Corporation Ltd. V/s Manmohan Mathur reported in 1970 1 SCC 208 and (2) Bhuwalka Steel Industries Ltd. And others V/s Union of India and others, reported in (2017)5 SCC 598.**

[10.8] Learned senior advocate Mr.Shelat further submitted that the provisions of Section 9 read with Rule 11 have created two classes within the class of pre-primary schools; those which are exclusively pre-primary schools (standalone) and those which attached to any school. The classification is wholly arbitrary. It is submitted that the classification being (a) arbitrary and (b) otherwise also delegation of legislative function by creating deeming fiction in Rule 11(3)the said rule requires to be struck down.

[10.9] Learned senior advocate Mr.Shelat further submits on the rule of interpretation that it is competent for the court to read down the section and make purposive interpretation (i) for sustaining the constitutionality of an Act, a court may take into consideration matters of common knowledge, reports, preamble, history of the times, object of

the legislation and all other facts which are relevant (ii) the court can give a liberal interpretation in order to avoid constitutional invalidity (iii) when a statute is silent or inarticulate, the court would attempt to transmulate the inarticulate and adopt a construction which would lean towards constitutionality albeit without departing from the material of which the law is woven, (iv) the first principle a casus omissus cannot be supplied by the court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily interfered and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed together and reference to the context and other clauses thereof so that the construction to be put on a particular provision makes constituent enactment of the whole statute.

**SUBMISSIONS OF MR.SHALIN MEHTA, SENIOR COUNSEL IN SPECIAL CIVIL APPLICATION NO.11047 OF 2017**

[11] Learned senior advocate Mr.Mehta submitted that the impugned Act of 2017 is not an Act for regulation of fees to be charged by self financed schools but it is an Act for fixation of fees to be charged by such schools. There are as many as nine indications for the same in the impugned Act itself. Learned senior advocate referred to the

Preamble, Sections 3(1), 8(1), 9(2), 10(1), 10(2), 10(3), 10(4), 11(1) of the Act of 2017. After referring to the same, it is submitted that the averments made by the respondent-State in the affidavit-in-reply in paragraphs 7.5 and 7.6 are therefore incorrect. It is submitted that the impugned Act stipulates the maxima of fees to be charged by all self financed schools and those self financed schools who do not want to fall in line are under an obligation to submit their proposal before the Fee Regulatory Committee for approval. Learned senior advocate gave an example that the impugned Act stipulates that all primary and pre-primary schools cannot charge more than Rs.15,000/- p.a. as fees and if they want to charge more than the prescribed fees, they are under an obligation to submit a proposal for approval and fixation of fee to the Fee Regulatory Committee in accordance with the provisions of the Act. Thus, the initial fee for all self financed schools is rigidly fixed by the impugned Act and those self financed schools which cannot afford this rigidity have to get their fee structure fixed before the Fee Regulatory Committee. It is contended that this structure of the impugned Act violates two important doctrines propounded by the Hon'ble Supreme Court firstly that there cannot be any rigid fee structure and secondly that the fee to be charged has to be fixed initially by self financed schools as the Fee Regulatory Committee's role is limited to overseeing that there is no profiteering and capitation fee. At this stage, it is

submitted that there is a material difference between the initial fixation of fees and post hoc approval of fees. The respondent-State has not considered the difference between the two.

[11.1] Learned senior advocate Mr.Mehta thereafter contended that the impugned Act of 2017 is violative of equality doctrine enshrined in the Article 14 of the Constitution. It is submitted that Article 14 prescribes invidious discrimination but condones reasonable classification. The equality doctrine can be violated in two ways by treating equals unequally or by treating unequals equally. It is submitted that the impugned Act of 2017 treats the unequals equally. Every self financed school is unique. The different factors would determine the fee to be charged by way of self financed school. Some other factors are enumerated in Section 10 of the impugned Act. Therefore, when the various factors are required to be considered, how the state government can submit that all these factors for all self financed schools are equal. The impugned Act is whimsically ambitious by equating all self financed schools at all levels in the matter of initial determination of fees.

[11.2] At this stage, it is contended that the composition of the Fee Regulatory Committee smacks some bias and Section 3(4) of the Act of 2017 is violative of Article 14 of the Constitution of India. The

Committee is entirely of government nominees and their tenure is of three years and their emoluments depend entirely on the government of the day. Thus, how such committee can displease the state government? It is stated that not a single member of the committee is an outsider, the Chairperson also need not be a retired District and Sessions Judge. There are options in that also. Thus, when the quasi judicial function is required to be performed by the Fee Regulatory Committee, there should be retired District or Sessions Judge in such Committee.

[11.3] Learned senior advocate Mr.Mehta would further contend that the impugned Act is an arbitrary piece of legislation. It is submitted that it is the duty of the state under Article 21A of Constitution to provide free and compulsory education to the children between the age of 6 to 14. The self financed schools have no duty under the Constitution to provide free or subsidized or compulsory education to children between the age of 6 to 14. However, the state has miserably failed in this area and therefore the self financed schools have stepped in to cater the needs of the general public. It is submitted that there cannot be profiteering and charging of capitation fees by any self financed schools but barring these two exceptions, the state has no business to meddle with the fee structure of the self financed schools. Thus, the impugned Act directly interferes with the free market economics in the field of the

school education.

[11.4] Learned senior advocate Mr.Mehta further contends that the impugned Act is an unreasonable restriction not saved by Article 19(6) of the Constitution of India. It is the fundamental right of the petitioners to manage and administer the self financed schools. It is submitted that Article 19(6) of the Constitution of India permits reasonable restriction on the exercise of right under Article 19(1)(g) in the interest of the general public. The reasonableness of the restriction can be tested on the anvil of the Article 14 of the Constitution of India. It is submitted that right to manage and administer an educational institution which is fundamental right which includes right to fix fee structure initially by such self financed schools. Thus, no one can fix the fees for self financed schools initially and ask such schools to approach the Fee Regulatory committee to get a fee other than the one fixed by the Act determined and approved. Such right is taken away wholly from the self financed schools by telling them the initial fees to be charged by all is fixed for them and they can exercise their right by the backhand. Thus, the determination of the initial fee to be charged by all self financed schools in the impugned Act itself is unconstitutional and unreasonable restriction.

[11.5] Learned senior advocate Mr.Mehta has placed reliance on the following decisions:

1. T.M.A.Pai Foundation and others V/s State of Karnataka reported in (2002)8 SCC 481.
2. Islamic Academy of Education V/s State of Karnataka reported in (2003)6 SCC 697
3. P.A.Inamdar V/s State of Maharashtra reported in (2005)6 SCC 537.

**Submissions by Mr. S.N.Soparkar, Senior Advocate in Special Civil Application No.10289 of 2017.**

[12] It is submitted that the question is whether restriction in the matter of fees is violative of provisions of Constitution of India. State Government cannot charge fees according to fees fixed by it. Schools are charging fees as per their requirement. Schools run on the principle of charitable institution and they cannot be prevented from charging fees. Attempt to identify expenses and link fees with the expenses is bad. Mr. Soparkar referred to judgment reported in (2015) 8 SCC 47. It is submitted that so long as the schools are using money for educational purpose, then it is charitable institution. Thereafter, Mr. Soparkar referred to judgment reported in (2016) 12 SCC 258. Students have right to have education in good school charging high fees. If restriction

is put, then it is violative of Article 19 of the Constitution of India. Mr. Soparkar referred to judgment reported in (2016) 7 SCC 703 and submitted that reasonable restriction should be in the interest of general public. Thereafter, Mr. Soparkar referred to section 6,7 and 8 of the RTE Act. While referring to section 8 read with section 10 it is submitted that there is standard fees for urban and rural areas and fees are not determined on the basis of location. It is submitted the Committee deals with accounts, management which the Committee is not competent. State Government is not superior to schools. Thereafter, Mr. Soparkar referred to Rules and forms. State Government is expecting fees to be charged for three years or one year is not clear. State Government has not considered other expresses, cost of development, increments of staff etc. Determination of fees by the State Government is illegal and non application of mind. It is submitted schools run under the Companies Act or Trust Act. He referred to section 128 and 129 of the Companies Act and submitted that accounts are maintained as per Companies Act, if the school is registered under the Companies Act. When the issue is covered by the Companies Act, the State Government cannot regulate the schools to maintain accounts. It is violative of Article 19 of the Constitution of India. It is submitted that there is difference of education in professional colleges and schools.

**SPECIAL CIVIL APPLICATION NO.11458 OF 2017 WITH 11459 OF**

**2017:**

**SUBMISSION OF LEARNED ADVOCATE MR. A.J.YAJNIK FOR THE PETITIONERS:**

[13] Learned advocate Mr.Yajnik firstly contended that notification dated 25.4.2017 issued by the respondent-State, in exercise of the powers conferred under Section 9(1) of the Act of 2017 is arbitrary, irrational, discriminatory and is violative of Article 14 of the Constitution of India. The said notification resorts to classification by providing a financial limit and thereby divides all the self financed schools into two separate classes i.e. one being exempted from the fee structure and other which is subject to scrutiny/approval from Fee Regulatory Committee. It is submitted that as per the various decisions rendered by the Hon'ble Supreme Court, it is now well settled that Article 14 of the Constitution provides that the classification must be reasonable and such classification must satisfy twin tests i.e. (I) the classification must be based on intelligible differentia or rationale distinction and (ii) the intelligible differentia or the rationale distinction between the two classes must have a rational relationship with the object sought to be achieved. From the record, it is submitted that financial limit prescribed to divide about 15,927 self financed schools in the state of Gujarat into two classes is not based on the rationale distinction or intelligible differentia. For the said purpose, learned

advocate has referred to the affidavit filed on behalf of the respondent-State. With regard to the financial limits prescribed in the notification, it is submitted that the said limit is also not fixed on the actual basis but such figures are arrived at on the basis of the expenditure incurred by the government schools towards four heads stated in the affidavit. Such standards are not applicable to the self financed institutions. Thus, for a law to be applied to self financed institutions to curb profiteering and capitation fees, the financial limit is arrived at on the basis of the statistics applicable to the government schools that too under limited heads.

[13.1] Learned advocate Mr.Yajnik thereafter contended that the impugned notification has no rational connection with the object sought to be achieved and for the said purpose, learned advocate has referred to the objects and purpose of the impugned Act of 2017. It is further submitted that the object and purpose of the Act is to regulate the fee structure of the self financed schools so as to prohibit profiteering and collection of capitation fees. When the self financed schools which charge less than Rs.15,000/- as fees by virtue of notification dated 25.4.2017 are exempted from getting their fee structure approved before the Fee Regulatory Committee, such exemption is on an assumption that schools which charge upto Rs.15,000/- do not resort to profiteering and

that they do not collect capitation fees. Thus, this assumption and presumption has no foundation.

[13.2] Learned advocate Mr.Yajnik thereafter submitted that excessive as well as unchannelized, unguided and unrestricted powers are vested in the Executive under Section 9(1) of the Act of 2017. He referred to the relevant provisions of the Act and thereafter submitted that Section 9(1) of the Act vests in the Executive to prescribe by way of notification as to which schools are exempted from the determination of the fees by the Fee Regulatory Committee. Such unguided, unchannelized powers are arbitrary in nature and therefore violative of Article 14 of Constitution of India.

[13.3] With regard to the validity of the provisions of the Act of 2017 and Rules framed thereunder, learned advocate Mr.Yajnik submitted that object and the purpose of the Act is to make special provisions for fixation of fees for the self financed schools in the state and matters connected therewith and incidental thereto. It is submitted that pre-determination is not the function of the state and that too in the unaided schools or self financed schools where no assistance is extended in any manner for the setting up of the school and to administer and run the same by the state government. At this stage, learned advocate

submits that right to determine the fee structure and evolve a comprehensive fee structure is a fundamental right of every self financed institutions guaranteed under Article 19(1)(g) of the Constitution of India. Therefore, by legislation, the very right in the name of reasonable restriction cannot be taken away. Therefore, the legislation is brought about on a premise that itself violates the fundamental right of self financed schools already protected and reiterated by the Hon'ble Supreme Court in the case of T.M.Pai (supra), **Islamic Academy of Education V/s State of Karnataka reported in (2003)6 SCC 697, Modern Schools V/s Union of India reported in (2004)5 SCC 583 and P.A.Inamdar V/s State of Maharashtra reported in (2005)6 SCC 537**.

[13.4] At this stage, it is further contended that the fundamental right of evolution of fee structure vested with the self financed school cannot be entrusted to anyone including the state authorities by legislation by respondent-state. As the collection of capitation fees and generation of excessive profit is already prohibited by the Hon'ble Supreme Court in various decisions, there is no requirement of a comprehensive legislation for the same even to provide the regulatory regime. Whenever there are complaints, a competent authority can certainly verify whether the school is collecting capitation fees or resorting to profit making converting charitable profession of imparting education into a commercial business.

[13.5] At this stage, it is further pointed out that capitation fees is also defined in the Right of Children to Free and Compulsory Education Act of 2009 in Section 2(b) of the said Act. Learned advocate has referred to the said definition and thereafter submitted that education is a concurrent subject. When the Government of India has enacted the Act of 2009 and has already incorporated into its scheme the issue of capitation fees and prohibited the same, the issue of collection or non-collection of capitation fees becomes an occupied field and if it is an occupied field, the state government cannot come out with a legislation on the same issue and subject matter.

[13.6] Learned advocate Mr.Yajnik thereafter referred to the provisions contained in Section 3 of the Act of 2017 which provides for composition of Fee Regulatory Committee. It is submitted that composition of said Committee and the Chairman in particular is inconsistent with the object and purpose of the Act. It is stated that IPS officer and a person of the rank of Additional Director General of Police has nothing to do with education and particularly the accounts and fee structure. The respondent-State retains the power in the form of appointment of Committee indirectly to regulate the fee structure which is nothing but a subterfuge and such committees will not be independent

and that will work at the instance of the state as the dependent body. At this stage, learned advocate has also referred to the provisions contained in Section 8 of the Act of 2017 and submitted that the nature of powers conferred under the said provision are of quasi judicial body holding adjudicatory power. Such powers are beyond the object and the purpose of the Act. Such powers are not only disproportionate but inconsistent with nature and duty of the Fee Regulatory Committee and therefore directly or indirectly infringe upon the fundamental rights of the self financed institutions conferred upon them under Article 19(1)(g) of the Constitution of India. Such powers do not fall within the ambit and scope of reasonable restriction and hence far beyond the mandate of the Article 19(1)(g) of the Constitution of India. Therefore, the same be declared as illegal and unconstitutional. Learned advocate Mr.Yajnik thereafter submits that the impugned Act of 2017 does not provide that it will have retrospective effect meaning therefore that it will have an operation before it was enacted on 12.4.2017 and brought into operation. It is submitted that it is well established now that unless it is categorically provided in the Act as an intention of the legislature, the legislation has to have prospective implementation and cannot be applied in retrospective or retroactive manner. However, what is not provided in the Act is sought to be provided by way of Rules and the Rules deal with the academic year 2017-18. Learned advocate at this

stage referred to Rule 6, Rule 8 and other relevant provisions of the Rules and thereafter submitted that by framing Rule 8, the Executive cannot implement the law from the academic year 2017-18 for member schools of the petitioner imparting education for the academic year 2017-18 because for the schools with affiliation with CBSE, ICSE, IB etc., the academic year 2017-18 has started during the middle of March, 2017. The fee structure was already announced between December, 2016 to February, 2017. Admissions have already been given and finanlized between November, 2016 to February, 2017 subject to 25% admissions under the Act of 2009. The fees have been collected in part and majority of the students have paid the fees for the first quarter as directed in the Rules before the end of April, 2017. Thus, it is submitted that the impugned Act of 2017 cannot be implemented upon for the academic year 2017-18.

[13.7] Learned advocate Mr.Yajnik lastly contended that the Doctrine of Reading Down is a principle of interpretation used to bring legislation or delegated legislation within the conformity of accepted parameters without striking it down as being unconstitutional or illegal. It is also perceived as a principle to be used as a part of purposive interpretation. However, the Hon'ble Supreme Court has time and again stated that when the language of the law and the provision thereof under consideration and scrutiny is pure, simple and does not have two

meanings, then in that case, doctrine of reading down cannot be resorted to by way of purposive interpretation or otherwise so as to bring the same in conformity of Article of Constitution or the provision of law. In other words, it is submitted that when the language of the provision of a law declares legislative intent in pure, simple and unequivocal language, then if it violates the mandate of Article 14, it has to be struck down. After referring to the chart produced by the learned Advocate General appearing for the respondent-State, it is submitted that the purposive meaning/understanding of the respondent-state cannot be accepted. Legislative intent cannot be substituted by a particular understanding of law as against intention and reading as well as implanting the law in contra distinction to what the legislative by law has provided for. Purposive interpretation of the law as against the plain, simple and unambiguous meaning of the provision of law or delegated piece of legislation is impressible in the eye of law. Thus, it is stated that the purposive interpretation given by the respondent-state cannot be accepted. Learned advocate Mr.Yajnik therefore urged that the impugned Act and Rules framed thereunder be declared as unconstitutional.

**Special Civil Application No.9434 of 2017 and 9572 of 2017**

**Submission of Mr. P.C.Kavina, learned Senior Counsel**

[14] Mr.Kavina, learned Senior Counsel appearing in Special Civil Application No.9434 of 2017 and 9572 of 2017 mainly contended that the petitioner – Schools are minority institutions recognized by the State Government as well as National Commission for Minority Educational Institutions. It is submitted that the impugned Act and Rules are violative of Article 14, 19 and 30 of the Constitution of India as impugned Act seeks to regulate fee structure of the petitioner schools in violation of rights enshrined under Article 30 of the Constitution of India. It is stated that the petitioner schools are affiliated with CBSE and therefore, it is bound to follow the regulations framed by the CBSE. Relevant Bye-laws are referred by Mr. Kavina, learned Senior Counsel, more particularly, Bye-law No.11 of CBSE which provides for fees. It is contended that because of provisions of impugned Act, now the petitioner – schools would be required to satisfy two separate authorities i.e. CBSE by which the school is affiliated as also respondent State Government which now seeks to regulate extent of fees of petitioner schools. It is further contended that since the petitioner institutions is recognized as minority institutions, it is bound to follow provisions of National Minority Educational Institutions Act, 2004. The Commission itself grants the petitioner institutions as minority institutions on which rate to charge reasonable fees and reserve upon itself right to recognize / de-recognize minority institutions under the provisions of

the said Act.

[14.1] Mr. Kavina, learned Senior Counsel would contend that provisions of the impugned Act seeks to regulate fees payable by students to Self Finance Schools on the basis of certain criteria laid down under Section 8 of the Act of 2017. Section 2(u) of the Act, defines Self Finance Schools. Said definition is inclusive and covers under it minority institutions such as the petitioner – schools. Said definition and fee structure runs contrary to the judgment rendered by the Hon'ble Supreme Court in various cases. It is submitted that in the case of T.M.A. Pai Foundation v/s. State of Karnataka (2002) 8 SCC 481, the Hon'ble Supreme Court has categorically stated that no restriction as, is sought to be imposed by way of the Act could be placed on the minority institutions of the nature of the petitioner – schools. Learned Senior Advocate has also referred and relied on decision of the Hon'ble Supreme Court in the case of P.A.Inamdar v/s. State of Maharashtra (2005) 6 SCC 537 as well as in the case of Islamic Academy of Education and Another v/s. State of Karnataka and Ors. (2003) 6 SCC 697.

[14.2] Mr. Kavina, learned Senior Counsel thereafter referred to decision of the Hon'ble Supreme Court in the case of Pramati Educational and Cultural Trust and Ors. v/s. Union of India reported in

(2014) 8 SCC 1. Mr. Kavina has particularly relied on paragraph no.52 to 54 of the said judgment.

[14.3] Mr. Kavina, learned Senior Counsel further submits that the Hon'ble Supreme Court while examining the operation of Tamil Nadu Schools (Regulation of Collection of Fees) Act, 2009 has directed that pending final consideration of the issue involved in the said petition, State of Tamil Nadu shall only be permitted to operate provisions of Section 7(3) of the said Act qua ICSE and CBSE schools, meaning thereby the Government can examine fee structure, however, cannot regulate the same and can only draw attention of the Board concerned towards issue qua fee structure of the relevant schools. Mr. Kavina, therefore urged that impugned Act and the Rules be declared ultra vires to the Constitution of India.

**Submission by Mr. Vishal Dave, learned advocate in WP(PIL) No.132 of 2017**

[15] Mr.Dave, learned advocate appearing in Writ Petition (PIL) No.132 of 2017 and Writ Petition (PIL) No.137 of 2017 submitted that the petitioner has mainly challenged the provisions of the impugned Act and more particularly, constitution of Fee Regulatory Committee for

determination of fees in Self Finance Schools. Mr. Dave referred to said provisions and thereafter, referred to provisions contained in Section 12 which provides for constitution of Fee Revision Committee. It is submitted that object of the impugned Act is to provide a legislation for the control of the fees to the Self Finance Schools and to provide relief to the parents of students against the illegal collection of fees by the said schools. However, from the constitution of Committees as provided under the impugned Act, it is revealed that there is no representative of any parents in such committees. Therefore, when the impugned Act is enacted with the object to regulate fees charged by the Self Finance Schools, respondent State ought to have made provisions with regard to inclusion of representative of parents in the Fee Regulatory as well as Review Committee.

[15.1] It is submitted by Mr. Dave that representative of the management is one of the members in both the aforesaid Committees, whereas, there is no representation on behalf of the parents in such committees and therefore, such provision is discriminatory. Mr. Dave, learned advocate has referred to similar Acts enacted by different States, for example Maharashtra Educational Institution (Regulation of Fees) Act, 2014 as well as Karnataka Educational Institution (Classification, Regulation and Prescription of Curricula etc.) Rules, 1995. After

referring to provisions of the said Act and the Rules, it is contended that there are provisions of appointment of representative of parents in the committees which regulates fee structure of Self Finance Schools. Learned advocate Mr. Dave, therefore, submitted that the impugned Act and Rules framed thereunder be declared unconstitutional.

[16] Learned advocates appearing for the respective petitioners in respective petitions have adopted submission canvassed by learned Senior Advocate Mr. Mihir Thakore, learned Senior Advocate Mr. S.N.Shelat and learned Senior Advocate Mr.Shalin Mehta.

**Submission by Mr. Kamal Trivedi, learned Advocate General for the respondent State in all the matters.**

[17] At the outset, Mr. Trivedi, learned Advocate General submitted that the impugned Act of 2017 and Rules framed thereunder are intra-vires the Constitution, inasmuch as the State legislation is very much competent to enact the same and same are not violative of Article 14, 19(1)(g) and 30 of the Constitution as contended by the petitioners.

[17.1] Mr. Trivedi, learned Advocate General submits that the fundamental right to establish and administer a self financed school conferred under Article 19(1)(g) of the Constitution is sought to be regulated and not restricted by the Act and the Rules of 2017 and that,

therefore, there arises no question of the application of provision of Article 19(1)(g) of the Constitution, which refers to imposition of reasonable restriction in exercise of the fundamental rights conferred under Article 19(1)(g) of the Constitution. It is further submitted that whilst assuming without admitting that the regulatory mechanism created by the Act of 2017 and the Rules of 2017 seeks to impose restriction and is not merely regulatory in nature, then in that case, as per the requirement of constitutional provision, such a restriction is required to satisfy a dual test viz. (a) it should not be manifestly arbitrary or unreasonable in the sense of not capable of being complied with and (b) it should be in the interest of general public. Reasonableness of a restriction has to be determined in an objective manner and from the standpoint of the interest of general public and not from the point of view of the persons upon whom the restrictions are imposed. Further, a just balance has to be struck between the restrictions imposed and the social control i.e. in the interest of general public as envisaged by Article 19(6). Learned Advocate General has placed reliance on the decision of the Hon'ble Supreme Court in the case of **Modern Dental College and Research Centre and Ors. v/s. State of M.P. And Ors. reported in (2016) 7 SCC 353.**

[17.2] Learned Advocate General thereafter, submitted that it

needs to be appreciated that section 3(1), 8(1), 9(2) and sub-sections (1) to (4) of Section 10 of the Act of 2017 use the word “determine” with respect to fee, whereas section 8(2)(a) of the Act of 2017 and the Rules 6(1) and 7(1)(a) of the Rules of 2017 use the word “proposal” with respect to fee. In other words, the Fee Regulatory Committee while determining the fee only gives the final approval to the proposal of the fees initially fixed and to be charged, after being satisfied that it is based on the factors mentioned in section 10 of the Act of 2017 and there is no commercialization of education. Thus, the said provisions of the Act of 2017 clearly suggest that they contemplate a regulatory measure and do not take away the powers of the self financed schools to fix their own fee.

[17.3] It is further submitted by learned Advocate General that the petitioners have claimed that when the enactment on the face of it is found to violate a fundamental right guaranteed under Article 19(1)(g) of the Constitution, the onus would shift upon the State to produce relevant material for justifying the restriction and its reasonability to bring it within the purview of exception laid down in clause (6) of Article 19. In support of said contention, reliance is placed by the petitioner on (a) AIR 1951 SC 118 (b) AIR 1954 SC 728 and (c) AIR 1964 SC 925.

[17.4] Learned Advocate General would thereafter contend that as held by the Hon'ble Apex Court in the case of **Narendra Kumar & Ors. v/s. Union of India reported in AIR 1960 SC 430,** where the restriction reaches, stage of total restraint of rights, special care has to be taken to see that the test of reasonableness is satisfied by considering the question in the background of the facts and circumstances under which the Act was enacted, taking into account the nature of evil that is sought to be remedied thereby, the harm caused to individual citizens because of the enactment and the effect reasonably expected to result to the general public and whether the restraint caused by the law was more than what is necessary in the interest of the general public.

[17.5] It is thereafter submitted that thus it is only in the case of complete 'prohibition' or 'deprivation' sought to be imposed by any enactment alleging violation of fundamental right guaranteed under Article 19(1)(g) of the Constitution, that the onus would shift upon the State to produce relevant material, justifying the prohibition or restriction and reasonability thereof.

[17.6] Learned Advocate General thereafter submitted that it is one of the contentions of the petitioners that the Fee Regulatory

Committee and the Fee Revision Committee under the Act of 2017 and the Rules of 2017 decide the lis between the parties and hence, the same should be headed by a legal mind and appointed in consultation with the Hon'ble Chief Justice of the High Court of Gujarat. In support of this contention, reliance came to be placed on (a) (2010) 11 SCC 1 (b) (2012) 10 SCC 353 (c) (2014) 11 SCC 53 (d) AIR 2015 SC 1571 and (e) (2013) 1 SCC 745.

[17.7] Learned Advocate General submitted that in response to above, there is no question of lis between the contesting parties which can arise before the Fee Regulatory Committee or the Fee Revision Committee and that therefore, there is no question of the same to be headed by the Former Judge of this Hon'ble Court to be appointed in consultation with the Hon'ble Chief Justice of the High Court of Gujarat. As per compilation V submitted before this Hon'ble Court on behalf of the respondent State, details of the Chairperson of 4 Fee Regulatory Committees in the State have been given. Admittedly, Chairpersons of Fee Regulatory Committee for Surat Zone, Rajkot Zone and Vadodara Zone are the Former District Judges, whereas the Chairperson of the Fee Regulatory Committee for Ahmedabad Zone is a seasoned Former Bureaucrat who has vast experience in acting as Chairman, Gujarat State Environment Assessment Authority and thereafter as President of

Gujarat Civil Services Tribunal for the period from 2012 to 2017. As against this, the Fee Revision Committee is headed by Hon'ble Mr. Justice D.A. Mehta, Former Judge of this Hon'ble Court. Thus, the presence of legal mind and the experience of acting as quasi judicial authority, being very much available take care of the concept of the independence of the judiciary flowing from the Constitution.

[17.8] It is further submitted by learned Advocate General that the Fee Regulatory Committee under the Act of 2017 cannot by any stretch of imagination be compared with Revenue Tribunal constituted under the provisions of the Gujarat Revenue Tribunal Act, 1957 inasmuch as the complicated questions of law which arise before the Revenue Tribunal can never arise before the Fee Regulatory Committee and hence, the concept of inevitable presence of judicial mind in the Fee Regulatory Committee cannot be pressed in service in the present matter. It is further submitted that in Compilation VI, the respondent State has referred to various legislative provisions under different legislation to demonstrate the discharge of quasi judicial function by non judicial fora which do not have a person with judicial / legal background. In support of above contentions, learned Advocate General has placed reliance on following decisions :-

(a) Shivji Nathubhai v/s. Union of India (AIR 1960 SC 606)

(b) Harinagar Sugar Mills Ltd. v/s. Shyam Sunder Jhunjhunwala (AIR 1961 SC 1669)

(c) Utility Users' Welfare Association v/s. State of Gujarat (2015 SCC Online Guj. 1142)

(d) Union of India v/s. R. Gandhi, President Madras Bar Association (2010) 11 SCC 1

(e) Satya Pal Anand v/s. State of Madhya Pradesh (2014) 7 SCC 244.

(f) Just Society v/s. Union of India (AIR 2017 SC 2428).

[17.9] Learned Advocate General thereafter submitted that merely because no remedy is provided under section 12 by way of revision against the order of penal action passed by the Fee Regulatory Committee under Section 8 and 14 of the Act of 2017, the said sections do not *ipso-facto* became bad in law.

[17.10] Learned Advocate General would submit that without prejudice to what is argued hereinabove, the respondent State undertakes to see that sub-section (3) of Section 12 of the Act of 2017 is suitably amended so as to remove / delete the words “made under section 10” by undertaking the legislative process whereby all the orders passed by the Fee Regulatory Committee are available for challenge by

way of Revision Application. In other words, the orders that may be passed by the Fee Regulatory Committee under sections 8,10 or 14 or under any other provisions of the said Act and the Rules framed thereunder would be subject to the Revision before the Fee Revision Committee under section 12 of the said Act. For ready reference, existing sub-section (3) of section 12 being relevant for the present purpose is set out hereunder :-

*"12.....*

*(3) A person aggrieved by the order of Fee Regulatory Committee made under section 10 may file revision application before the Fee Revision Committee within a period of twenty one days from the date of receipt of such order."*

After the proposed deletion / removal of the words "made under section 10", the said sub-section (3) of section 12 would read as under :-

"12.....

(3) A person aggrieved by the order of Fee Regulatory Committee may file revision application before the Fee Revision Committee within a period of twenty one days from the date of receipt of such order."

Similarly, the respondent State also undertakes to see that Rules 5 and 15 of the Rules of 2017 are suitably amended to provide that the meetings or the adjourned meetings of the Fee Regulatory Committee

and Fee Revision Committee are invariably presided over by the Chairpersons thereof indicated under section 3 and 12 of the Act of 2017.

[17.11] Thereafter, learned Advocate General submitted that Rule 8 of the impugned Rules is not retrospective in nature as contended by the petitioners. In support of such contention, learned Advocate General has referred to chronology of list of events and submitted that merely because the petitioners have started collecting fees prior to commencement of the academic year, collection of fees in advance does not render the rule prescribing for fixation of fees for the academic year 2017-18 as having retrospective effect. It is submitted that collection of fees well in advance i.e. in the month of October in the previous academic year is not practicable inasmuch as, it is only after the result of the school is declared followed by the grant of admission of the students in the next standard that the school can charge fees from the students from the next academic year. Thus, it does not confer on the petitioners to contend that petitioner schools affiliated with various Boards other than Gujarat Board had declared their fees, begun their term.

[17.12] Learned Advocate General thereafter, submitted that in view of above, it is not understandable as to how Rule 8 which is meant

for the year commencing from 1.4.2017 to 30.3.2018 (i.e. 2017-18) will become retrospective in nature for the petitioner schools which claim to have declared their fee even prior to the commencement of the academic year. Even assuming without admitting that what they contend is factually correct, then in that case, determination of reasonability of the said fee by the Fee Regulatory Committee cannot be said to be retrospective in nature, more particularly when the said declared and collected fee for the current academic year of 2017-18 is subject to the determination of its reasonability as aforesaid as well as adjustment / refund thereof in case of excess collection as aforesaid.

[17.13] Learned Advocate General further submitted that it is the contention of the petitioners that the penal action by the Fee Regulatory Committee is quasi criminal in nature and that, no such power can be conferred on the Fee Regulatory Committee, more particularly when the same is not manned by judicial mind. The aforesaid contention of the petitioners is misconceived and devoid of any substance. As discussed in Compilation VII of the respondent State, there have been several instances where the legality and validity of the administrative / executive authorities imposing penalties have been held to be legal and valid by the Apex Court in many decided cases.

[17.14] Learned Advocate General thereafter submitted that it is the contention of the petitioners that RTE Act, a central law and the Act under challenge being the State law are both relatable to Entry 25 of the concurrent list and that there is repugnancy between the two on the ground that subject to the prohibition against charging capitation fee, RTE Act permits self financed school to notify any fee, whereas, the State Act under challenge seeks to put restriction on the self financed schools to charge any fee and hence, the Act under challenge is void in view of the said repugnancy as per Article 254(1) of the Constitution.

[17.15] It is further submitted that according to the petitioners, section 2(b) of the RTE Act defines the term 'capitation fee' and section 13 of the RTE Act prohibits the charging of capitation fee. It is further contended that by the very nature of definition of the term 'capitation fee' under the RTE Act, the schools are at liberty to notify any fee and only if the school is found to take any kind of donation or contribution or payment other than the notified fee, the same would amount to 'capitation fee' and that therefore, there is no restriction on the part of the self financed schools to notify any fee under the RTE Act.

[17.16] In response to the said contention, it is submitted that the Act and the Rules under challenge do not suggest that self financed

schools cannot notify any fee. Such a liberty is inbuilt in the Act of 2017 and the Rules of 2017 subject to the same passing through the test of being reasonable in nature. However, there is no provision under the RTE Act as regards the mechanism for the purpose of notification of the fee by self financed school nor is there any provision thereunder for examining the various aspects including the reasonability of fee. As against this, detail provisions in this behalf are laid down under the Act of 2017 and the Rules of 2017 under challenge and provisions of both the said legislation can very well be operated upon simultaneously without disobeying each other.

[17.17] It is further submitted that while applying doctrine of 'pith and substance' to both legislation, it becomes clear that both the legislations deal with separate and distinct matters. The main objective of the RTE Act is to provide free and compulsory education to the children from disadvantaged and weaker sections from 1st Class to 8th Class so as to achieve the goal set by Article 21A of the Constitution, whereas the main objective of the Act under challenge is to examine the proposal of self financed school in respect of fees fixed by it and to determine the reasonability thereof. In support of this contention, he has relied on following decisions of the Hon'ble Supreme Court :-

(i) Banatwala and Co. v/s. LIC of India (2011) 13 SCC 446.

(ii) State of Maharashtra v/s. Bharat Shanti Lal Shah and Ors. (2008) 13 SCC 5.

(iii) Security Association of India v/s. Union of India (2014) 12 SCC 65.

[17.18] Learned Advocate General thereafter submitted that main contention of the petitioners is that decision rendered by the Hon'ble Supreme Court in the case of **T.M.A. Pai Foundation v/s. State of Karnataka (2002) 8 SCC 481, Islamic Academy of Education v/s. State of Karnataka (2003) 6 SCC 697, P.A.Inamdar v/s. State of Maharashtra (2005) 6 SCC 537 and Modern Dental College and Research Centre v/s. State of M.P. (2016) 7 SCC 353** cannot be made applicable to the facts of the present case since said decisions meant for Self Financed Professional Colleges which form a different class independent of the class of Self Financed Schools from the point of view of autonomy.

[17.19] It is further submitted that the petitioners have placed reliance on the observations made by the Hon'ble Supreme Court on relevant paragraphs of the said judgments. After referring to relevant paragraphs of the said judgments, learned Advocate General contended that common thread is passing through all the aforesaid judgments is

commercialization in education should be stopped at all levels of education. Further, commercialization of education may be resorted to by charging unreasonable fee or charging capitation fee or by profiteering. Thus, in order to find out as to whether any of the self financed schools have adopted any of the above referred means, there is need for an appropriate regulation whereby the fee fixed and proposed by self financed school can always be given a green signal, if the same is reasonable. For the said purpose, legislation dealing with mere grievance / complaint mechanism would not be sufficient to find out as to whether the self financed schools are charging unreasonable fee or charging capitation fee or are profiteering. It is further submitted that nature of restriction being imposed to curb commercialization of education cannot be different in the above referred two classes of educational institutions i.e. self financed professional colleges and self financed schools. Thus, it is contended that under the shelter of maximum autonomy, self financed schools cannot be permitted to contend that they have absolute autonomy and therefore, any regulatory measure imposed upon them to see that they charge reasonable fees, would be branded as unreasonable restriction and would not be saved by Article 19(6).

[17.20] Learned Advocate General further submits that now in view

of decision rendered by the Hon'ble Supreme Court as well as various other High Courts, some of which are confirmed by the Hon'ble Supreme Court deal with validity of similar fee regulatory legislation, operating in the various States of the country are applicable to the facts of the present case and therefore, the question raised by the petitioners in the captioned proceeding are no longer res-integra. In support of the same, learned Advocate General has placed reliance on the decision rendered by the Hon'ble Supreme Court in the case of **Modern School v/s. Union of India reported in (2004) 5 SCC 583.** It is submitted that while dealing with provisions of Delhi Schools Education Act, Hon'ble Supreme Court held to the following effect :-

(a) Director of School Education is authorized to regulate the fees and other charges under section 17 of the Act to prevent commercialization of education in all the schools including the self financed schools.

(b) Under section 17(3) of the Act, schools have to furnish a full statement of fee in advance before commencement of the academic session.

(c) Delhi School Education Rules, 1973 provide for the manner in which the accounts are required to be maintained by the schools and that the accounting in schools operates

differently as compared to balance sheet prescribed for a company under the Companies Act, 1956 and that therefore, the accounts of non business organization like schools are to be considered in light of the provisions contained in the Delhi School Education Act, 1973.

(d) Right conferred on minorities, religious or linguistic to establish and administer the educational institutions of their own choice under Article 30(1) is subject to reasonable regulation, which inter alia may be framed having regard to the public interest and national interest.

(e) Though in the matter of determination of fee structure, unaided educational institutions i.e. self financed schools exercise a greater autonomy, one is to strike a balance between the said autonomy and measures to be taken to prevent commercialization of education.

[17.21] Learned Advocate General further submits that subsequently a review application was filed for reviewing the aforesaid judgment of the Apex Court mainly on the ground that in view of the judgment of the larger bench of the Apex Court in case of **P.A. Inamdar reported in (2005) 6 SCC 537**, self financed schools and in particular the minority schools have a greater autonomy in laying down their own

fee structure and that, therefore, the Director of School Education under the Delhi Schools Education Act, 1973 has no power to regulate the fee structure of such private self financed schools. However, the said review application came to be rejected by the Apex Court by a detailed judgment in case of **Action Committee, Unaided Private Schools v/s. Director of Education, Delhi reported in (2009) 10 SCC 1**, except to the limited extent of liberty to transfer the funds from the school to the society or trust under the same management.

[17.22] Learned Advocate General thereafter placed reliance on the decision rendered by the Hon'ble Madras High Court in the case of **Tamil Nadu Nursery Matriculation and Higher Secondary School Association v/s. State of Tamil Nadu reported in 2010 (4) CTC 353**. The Hon'ble Madras High Court while dealing with the challenge against the constitutional validity of Tamil Nadu Schools (Regulation of Collection of Fee) Act, 2009 and the Tamil Nadu Schools (Regulation of Collection of Fee) Rules, 2009 and while relying upon the judgment of the Apex Court in cases of (i) T.M.A. Pai Foundation reported in (2002) 8 SCC 481 (ii) Islamic Academy reported in (2003) 6 SCC 697 and (iii) P.A.Inamdar reported in (2005) 6 SCC 537 held to the following effect :-

(a) The Act does not fix the fee but calls upon the management

to forward their proposed fee structure for the purpose of approval, which is called determination which is constitutionality valid and not violating Article 19(1)(g).

(b) It is a valid law even with regard to minority institution and not violating Article 30.

(c) It is also valid law which can also exist and operate in the presence of RTE Act.

(d) The State can provide and prescribe the account to be maintained by the school.

(e) Regulation of fee should be at the initial stage and not like post – audit or complaint based mechanism.

(f) Location of school plays a prominent role in determining the fee structure.

The aforesaid judgment of Hon'ble Madras High Court came to be confirmed by the Apex Court vide order dated 11.05.2010 dismissing the Special Leave Petition filed against the same.

[17.23] Learned Advocate General thereafter submitted that in case of **Nalanda Education Society v/s. Government of Andhra Pradesh reported in MANU/AP/0597/2010**, the Hon'ble Andhra Pradesh High Court while dealing with the Andhra Pradesh Educational Institutions

(Regulation of Admission and Prohibition of Capitation Fee) Act, 1983 after considering all the above referred judgments of the Apex Court with reference to the Self Financed Professional Colleges, inter-alia held that the State is authorized to regulate the fee structure of a self financed school while maintaining delicate balance between the permissible regulation to verify and prevent, profiteering and collection of capitation fee by the management of all the private unaided educational institutions in whatsoever form, garb, guise or camouflage, on the one hand and avoidance of undue intrusion into the operational, managerial and academic autonomy of the institution on the other. The aforesaid judgment of the Hon'ble Andhra Pradesh came to be confirmed by the Apex Court vide its order dated 19.09.2016.

[17.24] Learned Advocate General further submitted that in case of **Delhi Abhibhayak Maha Sangh v/s. Government of NCT of Delhi, reported in 2011 SCC Online Del. 3394**, the Hon'ble Delhi High Court while dealing with the challenge against the constitutional validity of Delhi Schools Education Act, 1973 held that though autonomy of self financed school is required to be respected, the commercialization of education cannot be permitted under the garb of autonomy and that the provisions of the Act is in tune with the legal principles stated by the Hon'ble Supreme Court in various judgments with reference to the

autonomy to the schools to fix their fee on the one hand and conferring authority upon the DOE to regulate the quantum of fee with limited purpose to ensure that the schools are not indulging in profiteering and that section 17(3) of the Act does not suffer from any vires or arbitrariness and is not violative of Articles 14 and 19(1)(g) or 30 of the Constitution. The aforesaid judgment of the Hon'ble Delhi High Court was taken note by the Apex Court vide its order dated 12.9.2014 whereby the judgment of the Hon'ble Delhi High Court has reached the finality.

[17.25] Learned Advocate General thereafter submitted on the aspect of concept of reading down the legislative provisions. It is submitted that rule of harmonious construction or purposive interpretation of a statutory provision is nothing but the rule of reading down which is essentially adopted for saving a statue from being struck down as unconstitutional and for making the same workable by bringing it in harmony with the objective and other provisions of the statue. It is submitted that it has been consistent view of the Hon'ble Supreme Court that all efforts be made to see that constitutionality of a statue is saved and while doing so, it is always open to the Courts, instead of striking down the impugned provision in its entirety, to read down the same in such a manner so as to save the same from being declared

unconstitutional. It is only in the event that reading down of the provision is not possible in view of the above referred circumstances / reasons that as a last recourse, a question of striking down the provision as unconstitutional may be considered. In support this contention, learned Advocate General has placed reliance on observations made by the Hon'ble Supreme Court in following decisions :-

(i) R.L.Arora v/s. State of Uttar Pradesh reported in AIR 1964 SC 1230

(ii) Jagdish Pandey v/s. Chancellor, University of Bihar reported in AIR 1968 SC 353.

(iii) Ahmedabad Municipal Corporation v/s. Nilay R. Thakore reported in (1999) 8 SCC 139.

(iv) Modern Dental College and Research Centre and Ors. v/s. State of Madhya Pradesh reported in (2016) 7 SCC 353.

(v) Indra Das v/s. State of Assam reported in (2011) 3 SCC 380.

[17.26] Learned Advocate General would thereafter submit that fundamental right to establish and administer a minority institution under Article 30 of the Constitution of India is not absolute and can be made subject to reasonable restriction. It is submitted that objective and corresponding provisions for achieving the same are different in both the

legislations i.e. National Commission for Minority Educational Institutions Act of 2004 and the impugned Act of 2017. It is submitted that Act of 2004 has been enacted for creation of National Commission for Minority Educational Institutions whereby they can seek recognition for an affiliated college to scheduled University and for allowing a forum of dispute resolution regarding the matters of affiliation between an educational institution and a Scheduled University, whereas, the Act of 2017 is to operate altogether in different field with reference to regulation of fee structure in schools whether minority or non minority. It is submitted that the Act of 2004 does not deal with the aspect relating to regulation of fee structure in self financed minority school. Learned Advocate General has placed reliance on decision rendered by the Hon'ble Supreme Court in the case of Pramati Educational and Cultural Trust v/s. Union of India reported in (2014) 8 SCC 1, more particularly, para 33 and 50 of the said judgment. Learned Advocate General also placed reliance on observation made by the Hon'ble Supreme Court on para 143 in case of P.A.Inamdar (supra) and on para 15 in the case of Modern School (supra).

[17.27] Learned Advocate General therefore, urged that provisions of impugned Act of 2017 and Rules framed thereunder cannot be said to be arbitrary, unconstitutional and therefore, the petitions filed by different schools as well as Association of schools be dismissed.

[18] Mr. Amit Panchal, learned advocate appearing in Special Civil Application No.12897 of 2017 has supported submissions canvassed by learned Advocate General and urged that respondent State be directed to immediately implement the provisions of the Act of 2017 and Rules framed thereunder.

[19] Having heard learned advocates appearing for the parties and having gone through the material produced on record, as well as decisions upon which reliance is placed by the learned advocates, following points are required to be considered in the present batch of petitions :-

A) Whether the respondent State has legislative competence to enact the impugned Act of 2017 and the Rules framed there-under and whether the impugned Act is repugnant to Right of Children to free and Compulsory Education Act, 2009?

B) Whether various provisions of the impugned Act of 2017 and Rules of 2017 are violative of Article 14 and 19(1)(g) of the Constitution of India or whether restriction imposed by the respondent State by enacting the Act of 2017 and Rules of 2017 can be said to be “reasonable restriction” within the meaning of Article 19(6) of the Constitution of India?

C) Whether the provisions of the impugned Act and Rules

violate rights guaranteed under Article 30 of the Constitution of India with regard to minority institutions?

D) Whether the provisions of constituting Fee Regulatory Committee and Fee Revision Committee are unconstitutional and whether representatives of parents are to be included in such Committees?

E) Whether the provisions of the impugned Act of 2017 and Rules are retrospective in nature?

F) Whether Notification dated 25.04.2017 issued by the respondent State in exercise of powers under sub-section (1) of section (9) of Gujarat Self Financed Schools (Regulation of Fees) Act, 2017 is illegal, arbitrary and fit to be quashed?

[20] Before we deal with the aforesaid points which are posed for our consideration, relevant facts for enactment of impugned Act are required to be taken note of. The State authorities received various complaints in the matter of charging exorbitant fees by the Self Financed Schools in the State and therefore, on 01.07.2011, Government Resolution came to be issued prescribing model code of conduct. Thereafter, on 17.05.2015, newspaper report in the concerned Gujarati newspaper was published highlighting about fee increase in S.N.K.School at Rajkot. Immediately, complaint was given by the concerned parent association to the concerned Minister of Education, State Government. Similarly, complaints were received in April, 2016 from the parents of the students studying in Divan Ballubhai School,

Ahmedabad. Thereafter, various complaints were received by the State authority with regard to charging of exorbitant fees by the Self Financed Schools and therefore, on 16.06.2016, the State Government issued another Government Resolution declaring revised Model Code of Conduct for Self Financed Schools.

[20.1] Thereafter also various complaints were received by the State authorities about charging of exorbitant fees by the Self Financed Schools and therefore, respondent State Government thought it fit to enact legislation relating to determination of fees for Self Financed Schools. Hence, on 23.03.2017, Bill No.22 of 2017 came to be published in the official gazette for the information of the general public. Said bill came to be passed in the State Assembly on 30.03.2017. State authority thereafter, issued press note containing necessary information. On 07.04.2017, Circular came to be issued by the State authority by which information was given to all the schools by the State to collect fees at old rates for three months with condition that after determination of fees by the Fee Regulatory Committee, excess fees collected, shall be refunded or adjusted. Thereafter, on 13.04.2017, assent was given by the Hon'ble Governor to the impugned Act of 2017. On 25.04.2017, Rules of 2017 came to be published in the official gazette.

[21] At this stage, it is also required to be noted that State

Government is also having power to deal with the subject with regard to fees in respect of any matters under Entry 66 of List II – State List of Seventh Schedule of Constitution. Similarly, under Entry 25 of Concurrent list – List III of Seventh Schedule of Constitution, State Government can deal with the matter with regard to education. Thus, while exercising powers conferred under Constitution, respondent State has framed impugned Act of 2017. Statement of objects and reasons of the impugned Act provides as under :-

> *"At present, clause (19) of Section 17 of Gujarat Secondary and Higher Secondary Education Act, 1972 empowers the Government to prescribe condition for admission of students to the registered schools and for that purpose, directions can be given to the Gujarat Secondary and Higher Secondary Education Board. Moreover, the Gujarat Primary Education Rules, 1949 also require strict adherence of the said rules and provisions of the Right of Children to Free and Compulsory Education Act, 2009. There is however, no law prescribing fixation of fees by the schools and more particularly Self Financed Schools. It is noticed that in absence of any such law prescribing standards of fees leviable by the Self Financed Schools, such schools charge exorbitant fees. Therefore, in order to mitigate the plight of parents seeking admission of their wards in the Self Financed Schools, it is considered necessary to provide law special provisions for fixation of fees for the Self Financed Schools."*

[22] Before we discuss aforesaid questions / points which are posed for our consideration, we would like to reproduce relevant

provisions of the impugned Act, which are as under :-

***Section 2(g)*** *"Fee or Fee Structure" means any amount, by whatever name called, collected, directly or indirectly, by a school for admission of a student to any standard or course of study and includes :-*

*(i) Tuition fee;*
*(ii) Term fee, which shall not exceed one month tuition fee per term;*
*(iii) Library fee and deposit;*
*(iv) Laboratory fee and deposit;*
*(v) Gymkhana fee;*
*(vi) Caution money;*
*(vii) Examination fee;*
*(viii) Admission fee, which shall not exceed one month tuition fee;*
*(ix) Yoga and Physical Education fee;*
*(x) any other fee as determined by the Fee Regulatory Committee;*

***Section 2(n)*** *"Management" means :-*

*(i) in the case of a school managed by the Government, the Government.*
*(ii) in the case of school managed by any local authority, the respective local authority;*
*(iii) in any other case, managing committee or the governing body by whatever name called, of school to which the affairs of the school are entrusted and, a person, by whatever name or designation called, where such affairs are entrusted to such person and shall also include trust or company associated with the school in any manner whatsoever:*

***Section 2(o)*** *"minority educational institution" means the Government approved institution established and administered by minority having right*

*to do so under clause (1) of article 30 of the Constitution of India:*

***Section 2(r)****"profiteering" means any amount accepted in cash or kind, directly or indirectly which is in excess of the fee fixed or approved as per the provisions of this Act and shall include profit earned from school by trust or company associated with the school in any manner whatsoever;*

***Section 2(u)****"self financed school" means any pre-primary school, primary school, upper primary school, secondary school or higher secondary school, established and administered or maintained by any person or body of persons including trusts and companies and recognized or approved by the competent authority under any law for the time being in force holding affiliation of International or Central or State Boards operating in the State of Gujarat, which are not receiving any financial grants or assistance from the Central Government or the State Government or any local authority, but does not include a school giving, providing or imparting religious instruction alone;*

***Section 3*** *(1)The Government shall constitute a Fee Regulatory Committee for the purpose of determination of the fee for any standard or course of study in self financed schools;*

*(2)The age of the Chairperson and the members shall not be more than 65 years at the time of appointment. The term of the Chairperson and other nominated members shall be three years.*

*(3) The honorarium and allowances payable to and other terms and conditions of service of member shall be such as may be prescribed.*

*(4) The committee shall consist of the following members, namely :-*

*(a) retired District and Sessions Judge or a person who had been a member of All India Service having retired from a post not below the*

*rank of Principal Secretary to Government or a person who had been a member of Indian Police Service, having retired from a post not below the rank Additional Director General of Police, to be nominated by the Government, who shall be the Chairperson of the Committee.*

*(b) the Chartered Accountant, to be nominated by the Government.*

*(c) one Civil Engineer / Government approved valuer, to be nominated by the Government;*

*(d) one representative from the self financed school management of the respective zone, to be nominated by the Government;*

*(e) one Academician of repute, to be nominated by the Government.*

*(5) The District Education Officer or, as the case may be, the District Primary Education Officer shall act as a co-ordinator to the Committee to provide administrative support.*

***Section 8** (1) Subject to the provisions of section 9, the Fee Regulatory Committee shall determine the fee payable by students in the self financed schools.*

*(2) The Committee shall have power to :-*

*(a) require each self financed school to place before the Committee, the proposed fee structure of such school along with all relevant documents and books of accounts for scrutiny before such date as may be specified by the Committee;*

*(b) Verify whether the fee proposed by the self financed school is justified and whether it amounts to profiteering or charging of exorbitant fee;*

*(c) approve the existing fee structure to determine the fee which can be charged by the self financed school;*

*(d) verify whether the fee collected by the self financed school, operating within the territory of the State of Gujarat, is recognized by the competent State Educational Authority or affiliated to the Gujarat Secondary and Higher Secondary Education Board / Central Board of Secondary Education / Council for Indian School Certificate Examinations / IB board and any other board, as the case may be and the school imparts instruction prescribed by the Gujarat Secondary and Higher Secondary Education Board or any other Board, as referred to above;*

*(e) hear complaints or initiate suo motu hearing with regard to the collection of excess fee by a self financed school, as referred to above in Clause (d);*

*(f) regulate the fee charged by the school and penal action as per the provisions of this Act;*

*(g) report the matter to the respective competent Educational Authority that the school has collected excess fee and it has not complied with the provisions of the respective applicable Act and rules made thereunder of the concerned Board for appropriate action.*

*(3)(a) For the purpose of this Act, the Fee Regulatory Committee, while holding inquiry shall have the powers of a Civil Court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters namely:-*

*(i) summoning and enforcing the attendance of any witness and examining him on oath;*

*(ii) requiring the discovery and production of any document;*

*(iii) receiving evidence an affidavit; and*

*(iv) issuing commission for examination of witnesses for local inspection.*

*(b) All inquiries and revisions under this Act shall be deemed to be the judicial proceedings within the meaning of sections 193, 219 and 228 of the Indian Penal Code.*

***Section 9*** *(1) The Fee Regulatory Committee may exempt such self financed schools that charge amount of fee lower than the fee prescribed by the Government my notification in the Official Gazette, from the determination of fee. Such self financed school shall file an affidavit to that effect.*

*Provided that if any such school desires to revise the fee, it shall follow the procedure as laid down in section - 8.*

*Provided further that exclusive pre-primary classes / play groups / creches / not attached to any school shall be exempted from the application of the provisions of this Act.*

*(2) The Fee Regulatory Committee may determine fee for all self financed schools except the self financed school as referred to in sub-section (1) imparting pre-primary, primary, upper primary, secondary and higher secondary education.*

*(3) The exemption shall remain operative till the prescribed fee is revised by the Government.*

*(4) The Fee Regulatory Committee may withdraw the exemption, after providing reasonable opportunity of hearing to the erring school, if it has reason to believe that the school has charged fee in excess of the fee, prescribed under sub-section (1) or has furnished false or misleading or incomplete information to the committee.*

*(5) The information regarding erring schools, including details of their management shall be published through an advertisement in the leading daily newspapers, in the best interest of students, parents and society at large.*

***Section 10*** *(1) The Fee Regulatory Committee shall determine the fee leviable by a self financed school taking into account the following factors, namely:-*

*(i) location of the self financed school i.e village, town, or city in which the school is situated;*

*(ii) investment incurred to setup the school;*

*(iii) infrastructure made available to the students for the qualitative education facilities provided as mentioned in the prospectus or website of the school;*

*(iv) expenditure on administration, maintenance of services and utilities of the school;*

*(v) excess fund generated from Non-Resident Indians, as a part of charity by the management and contribution by the Government for providing free-ship in fee or for other items under various Government schemes given to the school for the students.*

*(vi) students strength in the self financed school;*

*(vii) classes of study and courses of study offered by the school;*

*(viii) qualification of teaching and non-teaching staff (as per the relevant norms) their salary components, and reasonable amount for yearly salary increments;*

*(ix) expenditure incurred on the students against total income of the school which shall include profit earned from school by the trust or company associated with such school;*

*(x) reasonable revenue surplus for the purpose of development, education and expansion of the school;*

*(xi) any other factors which may be prescribed by the Government from time to time.*

*(2) The Fee Regulatory Committee shall, after determining the fee leviable by a self financed school, communicate its decision to the*

*school concerned.*

*(3) The Fee Regulatory Committee shall determine the total fees which shall be levied by considering all different fees charged by the school.*

*(4) The fee structure so determined by the Fee Regulatory Committee shall be binding on the self financed schools for a period of three years.*

*(5) The Fee Revision Committee may recommend to the Government for the upper fee limit to be kept for the schools of the State. The Government may consider such recommendation appropriately.*

***Section 11*** *(1) No self financed school shall collect any fee in excess of the fee fixed by the Fee Regulatory Committee for admission of students to any standard or course of study in that school.*

*(2) No excess fee shall be collected by any person either for himself or on behalf of such self financed school or on behalf of the management of such self financed school.*

*(3) No school itself or its behalf shall collect any donation or capitation fee under nay name whatsoever, or receive any deposit under any head to the school management, school trust, company or any trustee or member of the school. If any parents or guardian of a student has paid voluntarily any above referred amount, he shall inform the concerned Fee Regulatory Committee, the details of such payment on affidavit, Such non- disclosure shall amount to abetment of the profiteering committed by the School management.*

*(4) The School shall open and operate separate and only one Bank Account for the individual registered school. The parents shall make payments of prescribed fees directly into the concerned school bank*

*account. The acknowledgment of receipt of the total collected fee from the parents shall be given in the form of counterfoil from bank and concerned school, as the case may be.*

***Section 12*** *(1) The Government shall constitute a committee for the purpose of revision against the order passed by the Fee Regulatory Committee. The headquarters of the Fee Revision Committee shall be at Gandhinagar or at such other place, as may be decided by the Chairperson of the Committee.*

*(2) The Committee shall consist of the following members, namely:-*

*(i) retired Judge of the High Court to be nominated by the Government shall be the Chairperson of the Committee.*

*(ii) the Secretary to the Government of Gujarat, Education Department (Primary and Secondary);*

*(iii) the Secretary to the Government of Gujarat, Finance Department, or his nominee not below the rank of the Deputy Secretary;*

*(iv) the Secretary, Gujarat Secondary and Higher Secondary Education Board or, as the case may be, the Director, Primary Education, ex-officio, who shall be the Member - Secretary;*

*(v) one representative from the self financed school management to be nominated by the Government.*

*(vi) the Chartered Accountant, to be nominated by the Government.*

*(3) A person aggrieved by the order of the Fee Regulatory Committee made under section 10 may file revision application before the Fee Revision Committee within a period of twenty-one days from the date of receipt of such order.*

*Provided that if the Fee Revision Committee is satisfied that such school was prevented for filing a revision application within prescribed*

*time-limit for sufficient cause, it may condone the delay and shall allow the revision application but not later than three months.*

*(4) The orders passed by the Fee Revision Committee shall be final and binding on the self financed school.*

***Section 13** (1) The Government shall regulate the maintenance of accounts by the self financed schools in such manner as may be prescribed.*

*(2) The self financed schools shall maintain such records in such manner as may be prescribed.*

*(3) Every self financed school shall maintain accounts for different kinds of transactions like the fees collected, the grants received, financial assistance received including funds from NRIs payments of salary of staff, purchase of machinery and equipments, furniture, laboratory articles, sports equipments, library books, stationary and other expenditure incurred towards payments to the agencies, companies hired or engaged by the school for different kind of services and these accounts shall be audited by the Chartered Accountant.*

*(4) Every self financed school shall keep the accounts and the records within the premises of the educational institution and shall make them available at all reasonable times for inspection by the Fee Regulatory Committee or its authorized officer;*

*(5) The accounts maintained by the self financed school together with all vouchers relating to various items of receipts and expenditures shall be preserved by the schools for a period of seven years.*

***Section 14** (1) For contravention of any of the provisions of this Act or the rules made thereunder, the school management shall, in addition to refund of twice the amount of fee to the parents or guardians or to the person who has made the payment, be liable:-*

*(a) to pay fine which shall be upto five lakh rupees to the Fee Regulatory Committee for the first contravention;*

*(b) to pay fine which shall not less than five lakh rupees but which may extend to ten lakh rupees to the Fee Regulatory Committee for the second contravention; and*

*(c) for cancellation or withdrawal of registration / affiliation / No objection Certificate of the school, on third and subsequent contravention by the concerned authority on the recommendation of the Fee Regulatory Committee.*

*(2) The amount of fine and the amount of refund shall be paid within fifteen days from the receipt of the order, failing which fine of one per cent of the total payable amount shall be levied each day till the refund of the total amount and fine is paid. However, if the school management fails to make the payment of fine and refund within three months, than the entire unpaid amount shall be recovered as an arrear of land revenue.*

[23] **Point No.(A)**

Whether the respondent State has legislative competence to enact the impugned Act of 2017 and the Rules framed there-under and whether the impugned Act is repugnant to Right of Children to free and Compulsory Education Act, 2009?

It is the case of the petitioner that the Right of Children to Free and Compulsory Education Act, 2009 ('**RTE Act**' for short) already occupies field insofar as primary education is concerned and therefore, impugned Act of 2017 is void and inoperative as it is repugnant to RTE

Act. It is stated that RTE Act came into force on 1.4.2010 pursuant to Entry 25 of List III of Seventh schedule to the Constitution of India. It is submitted by the petitioners that one of the purpose of RTE Act, apart from providing for free and compulsory education to all children of the age of 6 to 14 years was, by enactment of section 3(2), to remove financial barrier which may prevent a child from accessing education and another purpose of enacting section 3(2) was to prevent educational institution from charging capitation fees resulting in creation of financial barrier which prevents child from accessing or exercise its right to education.

[23.1] For considering aforesaid submission, we would like to refer to Statement of Objects and Reasons of RTE Act, which provides as under :-

**Statement of objects and Reasons**

> *"The crucial role of universal elementary education for strengthening the social fabric of democracy through provision of equal opportunities to all has been accepted since inception of our Republic. The Directive principles of State policy enumerated in our Constitution lays down that the State shall provide free and compulsory education to all children up to the age of fourteen years. Over the years there has been significant spatial and numerical expansion of elementary schools in the country, yet the goal of universal elementary education continues to elude us. The number of children, particularly children*

*from disadvantaged groups and weaker sections, who drop out of school before completing elementary education, remains very large. Moreover, the quality of learning achievement is not always entirely satisfactory even in the case of children who complete elementary education.*

*2. Article 21A, as inserted by the Constitution (Eighty Sixth Amendment) Act, 2002 provides for free and compulsory education of all children in the age group of six to fourteen years as a Fundamental Right in such manner as the State may, by law, determine.*

*3. Consequently, the Right of Children to Free and Compulsory Education Bill, 2008 is proposed to be enacted which seeks to provide -*

*(a) that every child has a right to be provided full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards.*
*(b) 'compulsory education' casts an obligation on the appropriate Government to provide and ensure admission, attendance and completion of elementary education.*
*(c) 'free education' means that no child, other than a child who has been admitted by his or her parents to a school which is not supported by the appropriate Government, shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education.*
*(d) the duties and responsibilities of the appropriate Government, local authorities, parents, schools and teachers in providing free and compulsory education and*

*(e) a system for protection of the right of children and a decentralized grievance redressal mechanism.*

*4. The proposed legislation is anchored in the belief that the values of equality, social justice and democracy and the creation of a just and humane society can be achieved only through provision of inclusive elementary education to all. Provision of free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections is, therefore, not merely the responsibility of schools run or supported by the appropriate Governments, but also of schools which are not dependent on Government funds.*

*5. It is therefore, expedient and necessary to enact a suitable legislation as envisaged in Article 21A of the Constitution.*

*6. The Bill seeks to achieve this objective."*

[23.2] If we compare the object of impugned Act of 2017 and object of RTE Act, it is clear that object of both the Acts are different and therefore, it cannot be said that for the same object, respondent State has enacted legislation. We have already discussed herein-above, about the source of powers of the respondent State for enacting legislation. It is now well settled that when the field is not occupied, the State can enact legislation for the subject of concurrent list. At this stage, we would like to refer to relevant decisions of the Hon'ble Supreme Court. In the case of **Security Association of India and Another v/s. Union of India and Ors. reported in (2014) 12 SCC 65**, the Hon'ble Supreme

Court has observed in para 50 and 51 as under :-

*"50. As per this Court's decision in In re Special Reference No. 1 of 2001 every attempt should be made to reconcile a conflict between two statutes by harmonious construction of the provisions contained in the conflicting statutes. However, in the present matter from a bare reading of the above extracts it is evident that the Central Act only regulates the business of private security agencies and connected and incidental matters thereto. Thus, Section 13(1)(j) of the Central Act which requires compliance with the Central Labour laws as a condition to ensure the validity of the licence obtained under the Act is a provision incidental to the purpose of the Act. The statement of object of the State Act clearly indicates that the State Act seeks to regulate the employment of Private Security Guards employed in factories and establishment in the State of Maharashtra and seeks to ensure better terms and conditions of employment of such guards through the establishment of a Board.*

*51. It is evident from the above that the subject matters of the two Acts are substantially different and the conflict in the operation of the two Acts is incidental. Furthermore, after comparing the provisions of both the Acts, that both the Acts operate in different fields and that there is only incidental connection between the two regarding the regulation of private security agencies, wherein Section 23 of the State Act exempts private security guards for the operation of business of private security agencies after ensuring that such exempted guards enjoy benefits, either equal or better than those provided by the State Act. Therefore, the High Court has correctly held that:*

*"25. It is clear that this group of petitions have been filed after the*

*enactment of the Central Act to claim that in view of the enactment of the Central Act, the State Act has lost its efficacy in relation to the security agencies. Perusal of the preamble of the State Act shows; that the purpose; for which that Act has been enacted is - regulating the employment of security guards employed in factory and establishment in the State of Maharashtra and for making better provisions for their terms and conditions of employment and welfare through the establishment of a board there for. It is thus clear that the State Act is a labour Legislation enacted by the State Legislature for making better provisions for the terms and conditions of employment of the private security guards and their welfare. The Legislation, therefore, is referable to Entry 24 in List III (Concurrent List) in the Seventh Schedule of the Constitution of India. The entry reads as under:*

> *"24. Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits."*

*We have, thus, no doubt, in our mind that the State Act is a Labour Legislation, which the State Government is competent to enact because of Entry 24 found in List III of Seventh Schedule of Constitution. So far as the Central Act is concerned, its preamble shows that the Act has been enacted by the Parliament - for the regulation of the Private Security Agencies and for matters connected therewith and incidental thereto. The subject matter of the State Act is private security guards who may be engaged by the principal employer either through the Board or through the security agencies. The subject matter of the Central Legislation is not the private security guards, but private security agencies. Thus, the subject of two Legislations is different. Perusal of the Central Act shows that it makes an endeavour to*

*regulate the establishment and working of private security agencies. Section 4 lays down that no person shall carry on and commence the business of security agency unless he holds a licence issued under this Act. Section 5 of the Central Act lays down as to who are eligible for licence. From the scheme of the Central Act, it is thus clear that it regulates the business of private security agencies by making it obligatory on them to secure licence under the Central Act before commencing their business. The provisions found in the Central Act dealing with the eligibility of the security guards are incidental to the subject of legislation namely business of private security agency. The condition of service and welfare of the security guards is not the subject matter of Legislation in the Central Act. In list I or List III of the Seventh Schedule there does not appear to be any entry in relation to the regulation of business of security agency. Therefore, the Central Legislation may be relatable to residuary Entry 97 In List I. Perusal of the provisions of the State Act shows that it does not make any attempt to regulate the business of private security agency."*

[23.3] In the case of **Banatwala and Company v/s. LIC of India and another reported in (2011) 13 SCC 446**, the Hon'ble Supreme Court while discussing about concept of repugancy with reference to Maharashtra Rent Control Act, 1999 and the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 held in para 53 to 59 that incidental and superficial encroachments are to be disregarded and if the subject matters covered by the legislations are different, merely because the two legislations refer to some allied or cognate subjects they do not cover the same field and that they would not be repugnant to each other.

[23.4] In the case of **State of Maharashtra v/s. Bharat Shantilal Shah and Ors. reported in (2008) 13 SCC 5**, the Hon'ble Supreme Court has observed in para 48 as under :-

> *"48. Article 254 of the Constitution succinctly deals with the law relating to inconsistency between the laws made by the Parliament and the State Legislature. The question of repugnancy under Article 254 will arise when a law made by Parliament and a law made by State Legislature occupies the same field with respect to one of the matters enumerated in Concurrent List and there is a direct conflict in two laws. In other words, the question of repugnancy arises only in connection with subjects enumerated in Concurrent List. In such situation the provisions enacted by Parliament and State Legislature cannot unitedly stand and the State law will have to make the way for the Union Law. Once it is proved and established that the State law is repugnant to the Union law, the State law would become void but only to the extent of repugnancy. At the same time it is to be noted that mere possibility of repugnancy will not make a State law invalid, for repugnancy has to exist in fact and it must be shown clearly and sufficiently that State law is repugnant to Union law."*

[23.5] In the case of **Tamil Nadu Nursery, Matriculation and Higher Secondary Schools Association v/s. State of Tamil Nadu and others reported in 2010 (4) CTC 353**, similar question was raised for consideration before the High Court of Madras. Validity of Tamil Nadu Schools (Regulation of Collection of Fee) Act, 2009 and the Rules

framed there-under were challenged before the High Court of Madras. The High Court of Madras after considering various decisions rendered by the Hon'ble Supreme Court and after considering object and provisions of RTE Act, observed and held in para 36 as under :-

> *"36. The Constitution (86th Amendment) Act, 2002 has made Elementary Education a fundamental right under Article 21-A of the Constitution of India. The right to Free and Compulsory Elementary Education was a long felt need, which has now been given the status of a fundamental right. The Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as, 'The RTE Act'), which came into force from 1st April 2010 was a consequential legislation to translate the constitutional intent into action. The RTE Act, 2009 provides for 25 percent seats in private schools for children from poor families and prohibits donation or capitation fee. Though the RTE Act is Central Legislation, its effective implementation lies in the hands of the State Governments. While implementing the RTE Act from 1 April 2010, the Government of India announced that 25 Per cent reservation for children from economically weaker sections of the society would be operational from Class 1 with effect from the academic year 2011. The present impugned legislation if examined in the context of Article 21-A of the Constitution of India and the RTE Act is also valid."*

[24] From the aforesaid decisions rendered by the Hon'ble Supreme Court, it can be said that incidental and superficial encroachments are to be disregarded and if the subject matters covered

by the legislations are different, merely because the two legislations refer to some allied or cognate subjects, they do not cover the same field and that they would not be repugnant to each other. Article 254 of the Constitution deals with the law relating to inconsistency between the laws made by the Parliament and the State Legislature. The question of repugnancy under Article 254 of the Constitution will arise when a law made by Parliament and a law made by State Legislature occupies the same field with respect to one of the matters enumerated in Concurrent List and there is a direct conflict in two laws. It is further made clear that mere possibility of repugnancy will not make a State law invalid, for repugnancy has to exist in fact and it must be shown clearly and sufficiently that State law is repugnant to Union law. Every attempt should be made to reconcile a conflict between two statutes by harmonious construction of the provisions contained in the conflicting statutes.

[24.1] Keeping in view aforesaid decisions rendered by the Hon'ble Supreme Court and High Court of Madras, if provisions of RTE Act and the impugned Act are considered, we are of the view that there is no provision under the RTE Act as regards mechanism for the purpose of notification of fees by Self Financed Schools nor there is any provision there-under for examining various aspects including reasonability of

fees. Thus provisions of RTE Act and the impugned Act can very well be operated upon simultaneously without disobeying each other. While applying doctrine of 'pith and substance' to both legislation, it becomes clear that both the legislations deal with separate and distinct matters. Once again it is to be remembered that main object of the RTE Act is to provide free and compulsory education to the children from disadvantaged and weaker sections from 1st Class to 8th Class so as to achieve the goal set by Article 21A of the Constitution, whereas the main objective of the impugned Act is to examine the proposal of self financed school in respect of fees fixed by it and to determine the reasonability thereof.

[25] In view of above, we are of the view that respondent State is having legislative competence to enact impugned Act of 2017 and Rules framed there-under and provisions of the impugned Act are not repugnant to provisions of RTE Act.

[26] Another contention of learned advocates appearing for the petitioners is that CBSE is already having bye-laws and CBSE schools are bound to follow such bye-laws. There are restrictions imposed under such bye-laws with regard to charging of capitation fees and profiteering and therefore, respondent State is not competent to legislate the impugned Act. At this stage, it is required to be noted that similar issue

was raised before the High Court of Madras in the case of **Lakshmi School v/s. State of Tamil Nadu and others reported in 2012 (6) CTC 8.** High Court of Madras has observed in para 69, 71 and 82 as under :-

> *"69. The schools owe a duty and social responsibility to the public so that the fee charged is reasonable and commensurate with the facilities provided. As rightly submitted by the learned Advocate General, when the State Government is reimbursing the educational expenditure of the children of weaker sections and disadvantaged group, the CBSE schools cannot levy exorbitant fee and burden the State exchequer. Therefore, the CBSE schools cannot contend that they are out of the purview of T.N.Schools Fee Act and that the State Government cannot regulate the fee.*
>
> *71. There is no Central Act or other statutory body to regulate CBSE schools. Even though the Bye-laws provide for disaffiliation in case of charge of excess fee, in CBSE Bye-laws, there is no effective mechanism provided for regulation of collection of fee. As pointed out earlier, since the States have concurrent power to legislate regarding matter of education, CBSE insists for 'no objection certificate' from the State Government, so that there may not be any conflict between rules and regulations framed by the State Government regarding school education and the rules and regulations of CBSE. It is the bounden duty of the State to ensure that the private schools in the State do not indulge in profiteering in the name of imparting education. There has to be a mechanism to check the private schools from charging exorbitant fees. In so far as CBSE schools, State Government has the bounden duty to see that the fee collected by CBSE schools are commensurate with the facilities provided and see that CBSE schools*

*do not indulge in profiteering or charging capitation fees, when there is no Central Act or statutory body to regulate the fee. On a combined reading of Bye-law Nos.11, 13.1 and 13.3, it is evident that State Government has the power to regulate the collection of fees in CBSE schools.*

*82. Conclusions - CBSE schools:- we summarise our conclusions as under:-*

*(i) CBSE schools are "private schools" within the meaning of Section 2(j) of Tamilnadu Schools (Regulation of Collection of Fee) Act, 2009 and the provisions of Tamilnadu Schools (Regulation of Collection of Fee) Act, 2009 are applicable to CBSE schools.*

*(ii) Under Section 7 of Tamilnadu Schools (Regulation of Collection of Fee) Act, 2009, the Committee has the power to determine the fee and verify whether the fee collected by the CBSE schools is commensurate with the facilities provided and while so determining the fee, the Committee shall keep in view the parameters in Section 3(3) and 7(3) of the Act apart from the factors provided in Section 6 of the T.N.Schools Fee Act, 2009."*

[26.1] At this stage, it is required to be noted that aforesaid judgment of the High Court of Madras was carried in appeal before the Hon'ble Supreme Court wherein the Hon'ble Supreme Court has passed orders on 15.11.2015 and 28.01.2016. Hon'ble Supreme Court sought to consider issue relating to coverage of CBSE and ICSE schools under definition of term 'private schools' as defined under section 2(j) of the said Act while directing that regulatory mechanism of fee committee

shall be applicable to such schools as contemplated under section 7(3) of the said Act.

[27] It transpires that there is no Central Act or other statutory body to regulate CBSE schools. Even though the Bye-laws provide for disaffiliation in case of charge of excess fee, in CBSE Bye-laws, there is no effective mechanism provided for regulation of collection of fee. We have already discussed herein-above that States have concurrent power to legislate regarding matter of education, CBSE insists for 'no objection certificate' from the State Government, so that there may not be any conflict between rules and regulations framed by the State Government regarding school education and the rules and regulations of CBSE. It is further required to be noted that it is the bounden duty of the State to ensure that the private schools in the State do not indulge in profiteering in the name of imparting education. There has to be a mechanism to check the private schools from charging exorbitant fees. On a combined reading of Bye-law Nos.11, 13.1 and 13.3, it is evident that State Government has the power to regulate the collection of fees in CBSE schools. Thus, we are of the view that State Government is competent to legislate with regard to subject of determination of fees charged by CBSE, ICSE and IB Schools.

[28] **Point No.B.**

Whether various provisions of the impugned Act of 2017 and Rules of 2017 are violative of Article 14 and 19(1)(g) of the Constitution of India or whether restriction imposed by the respondent State by enacting the Act of 2017 and Rules of 2017 can be said to be "reasonable restriction" within the meaning of Article 19(6) of the Constitution of India?

The principal submission of the learned advocates for the petitioners is that the regulation of collection of fee by the unaided and minority schools is impermissible. It infringes the fundamental right of the unaided educational institutions whether belonging to minorities or otherwise to practice any profession or to carry on any occupation, trade or business, which is available under Article 19(1)(g) of the Constitution of India. This law imposing the restrictions thereunder cannot be said to be in the interest of general public and the restrictions cannot be considered to be reasonable. Similar issue came up for consideration before the High Court of Madras in the case of *Tamil Nadu Nursery, Matriculation and Higher Secondary Schools Association (supra)*. Division Bench of High Court of Madras considered various decisions rendered by the Hon'ble Supreme Court and thereafter, observed and held in para 10 to 19 as under :-

> *"10. The question of regulation of fees and admissions to the professional engineering and medical colleges came up before the Apex*

*Court in TMA Pai Foundation case (supra). In that matter the Apex Court had framed five issues for its consideration. In the present matter, the observations of the Apex Court on the third issue before it were pressed into service. The issue was whether in case of private institutions (unaided and aided), can there be a Government Regulation and if so, to what extent?*

*In paragraph 50 of the said judgment, the Apex Court laid down that 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 employee.*

*11. Paragraph 54 of the judgment was specifically pressed into service. For the sake of convenience, we can place it in two clauses, since it contains two statements, which read as follows:-*

> *"54. (i) The right to establish an educational institution can be regulated; but such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of maladministration by those in charge of management. (ii) The fixing of a rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions".*

*Based on those statements in paragraph 54, it was submitted that there can be a regulation of the right to establish an educational institution but it will have to be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of maladministration. Fixing of a rigid fee structure would be an unacceptable restriction. The statements in paragraph 56 were pressed into service to the effect that one cannot lose sight of the fact that providing good amenities to the students in the form of competent teaching faculty and other infrastructure costs money. It has, therefore, to be left to the institution, if it chooses not to seek any aid from the Government to determine the scale of fee that it can charge from the students. It was considered as stated in paragraph 57 of the judgment that profiteering is not permitted, though there can be a reasonable revenue surplus, which is permissible to an educational institution.*

*12. Paragraph 61 of the judgment was very much pressed into service, which states that 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 power, admission of students and the fee to be charged. At the school level, the admissions are not on the basis of merit. The Court has observed that the State run schools do not provide the same standard of education as the private schools. The State should use its resources for the state educational institutions and subsidize the fees payable by the students there. It is, however, in the interest of the general public that more good quality schools are established. The Court observed at the end of the paragraph as follows:-*

> *"61.....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. The fear that if a private school is allowed to charge fees commensurate with the fees affordable, the degrees would be "purchasable" is an unfounded one since the standards of education can be and are controllable through the regulations relating to recognition, affiliation and common final examinations."*

*13. Mr.Wilson, learned Additional Advocate General, on the other hand, pointed out that the judgment in Islamic Academy case (supra) brought in a Committee to regulate the fee structure. In paragraph 6 of that judgment, the Court framed the very first question, which was whether the educational institutions are entitled to fix their own fee structure. In paragraph 7, the Court referred to paragraph 56 of the judgment in TMA Pai#s case (supra) and then laid down that the respective Governments and the authorities will set up, in each State, a Committee headed by a retired High Court Judge to be nominated by the Chief Justice, which will oversee the fee structure available or to propose some other fees, which can be charged by the institute concerned. The fee fixed by the Committee shall be binding for a period of three years at the end of which period, the institute would be at liberty to apply for review. As far as the fixing of fees is concerned, the Court laid down as follows:-*

> *"7..... Each educational institute must place before this Committee, well in advance of the academic year, its proposed fee structure. Along with the proposed fee structure all relevant*

*documents and books of accounts must also be produced before the Committee for their scrutiny. The Committee shall then decide whether the fees proposed by that institute are justified and are not profiteering or charging capitation fee. The Committee will be at liberty to approve the fee structure or to propose some other fee which can be charged by the institute. The fee fixed by the Committee shall be binding for a period of three years, at the end of which period the institute would be at liberty to apply for revision. Once the fees are fixed by the Committee, the institute cannot charge either directly or indirectly any other amount over and above the amount fixed as fees. If any other amount is charged, under any other head or guise, e.g. donations, the same would amount to charging of capitation fee. The Governments/appropriate authorities should consider framing appropriate regulations, if not already framed, whereunder if it is found that an institution is charging capitation fees or profiteering that institution can be appropriately penalized and also face the prospect of losing its recognition/affiliation."*

*14. Mr.Wilson, learned Additional Advocate General, submitted that far more students attended the schools as against the professional courses about which the above mentioned three judgments were rendered. Regulation of fees of the schools was the felt necessity of the society. In the State of Tamil Nadu, there were about 5500 Nursery/Primary Schools, 4100 Matriculation Schools, 38 Anglo Indian Schools and 500 State Board Schools of Tamil Medium totalling to 10,138 schools which were unaided. There was no uniformity in their fee structure and on the face of it large numbers of*

*them were charging very high fees, which could not be justified. It was, therefore, felt necessary to regulate their fees. He placed before us documents and charts to show how excessive fees were charged. He submitted that the State Government was already regulating (1) starting of the schools (2) staffing pattern, strength of teachers (3) facilities/infrastructure and (4) examination. Mr.Wilson, therefore, contended that if that was not objected, why should regulation of fees be objected if that was sought to be done by objective standards as laid down in Section 6(1) of the Act. The State was not against reasonable revenue surplus, but against profiteering.*

*15. Having noted the submissions advanced by the learned counsel appearing for the respective petitioners, and of the learned Additional Advocate General, we must note that the Apex Court was concerned with the fees in the Medical and Engineering colleges in the above referred to three matters, and the fees collected by the private schools were not the subject matter of those proceedings. Yet, the counsel for both the parties accept that the principles laid down in the above referred to three judgments will be useful for deciding the question of validity of the legislation in this matter.*

*Guidelines for examining the validity of the legislation*

*Now, as can be seen in T.M.A.Pai#s case itself, the Apex Court has observed that the Government can provide regulations to control the charging of capitation fee and profiteering. Question No.3 before the Court was as to whether there can be Government regulations, and if so, to what extent in case of private institutions? What the Apex Court has observed in paragraph-57 of the judgment is instructive for our purpose.*

*"57. We, however, wish to emphasize one point, and that is*

*that inasmuch as the occupation of education is, in a sense, regarded as charitable, the Government can provide regulations that will ensure excellence in education, while forbidding the charging of capitation fee and profiteering by the institution. Since the object of setting up an educational institution is by definition "charitable", it is clear that an educational institution cannot charge such a fee as is not required for the purpose of fulfilling that object. To put it differently, in the establishment of an educational institution, the object should not be to make a profit, inasmuch as education is essentially charitable in nature. There can, however, be a reasonable revenue surplus, which may be generated by the educational institution for the purpose of development of education and expansion of the institution."*

*16. Again in paragraph-69 of the judgment, while dealing with this issue, the Apex Court observed that an appropriate machinery can be devised by the State or University to ensure that no capitation fee is charged and that there is no profiteering, though a reasonable surplus for the furtherance of education is permissible. Although the Apex Court overruled the earlier judgment in Unnikrishnan vs. State of Andhra Pradesh reported in 1993 (1) SCC 645, which was to the extent of the scheme framed therein and the directions to impose the same, part of the judgment holding that primary education is a fundamental right was held to be valid. Similarly, the principle that there should not be capitation fee or profiteering was also held to be correct.*

*17. Thereafter, when we come to the judgment in Islamic Academy case, the first question framed by the Apex Court was whether the*

*educational institutions are entitled to fix their own fee structure? It is pertinent to note that this judgment very much brought in a committee to regulate the fees structure, which was to operate until the Government/Appropriate Authorities consider framing of appropriate regulations. It is also material to note that in paragraph-20, the Apex Court has held that the direction to set up Committee in the States was passed under Article 142 of the Constitution and was to remain in force till appropriate legislation was enacted by Parliament.*

*18. The judgment in P.A.Inamdar's case, though sought to review the one in Islamic Academy case, it left the mechanism of having the committees undisturbed. In paragraph-129 of the judgment, the Apex Court observed that the State regulation, though minimal, should be to maintain fairness in admission procedure and to check exploitation by charging exorbitant money or capitation fees. In paragraph-140 of the judgment, the Apex Court has held that the charge of capitation fee by unaided minority and non-minority institutions for professional courses is just not permissible. Similarly, profiteering is also not permissible. The Apex Court observed that it cannot shut its eyes to the hard realities of commercialization of education and evil practices being adopted by many institutions to earn large amounts for their private or selfish ends. On question no.3, which was with respect to Government regulation in the case of private institutions, the Apex Court clearly answered in paragraph-141 that every institution is free to devise its own fee structure, but the same can be regulated in the interest of preventing profiteering. No capitation fee can be charged. In paragraph-145 of the judgment, the Apex Court rejected the suggestion for post-audit or checks if the institutions adopt their own*

*admission procedure and fee structure, since the Apex Court was of the view that admission procedure and fixation of fees should be regulated and controlled at the initial stage itself.*

*19. Thus, in P.A.Inamdar's case (supra), the Apex Court left the mechanism laid down in Islamic Academy's case (supra) undisturbed with respect to the fees. On question No.3, viz., as to whether in the private institutions there can be a Government Regulation, the Court held that every institution was free to devise its own fee structure but the same can be regulated in the interest of preventing profiteering. What the Court held in paragraphs 144 and 147 is relevant for our purpose and, therefore, we quote those two paragraphs hereunder:-*

> *"144. The two Committees for monitoring admission procedure and determining fee structure in the judgment of Islamic Academy are in our view, permissible as regulatory measures aimed at protecting the interest of the student community as a whole as also the minorities themselves, in maintaining required standards of professional education on non-exploitative terms in their institutions. Legal provisions made by the State Legislatures or the scheme evolved by the Court for monitoring admission procedure and fee fixation do not violate the right of minorities under Article 30(1) or the right of minorities and non-minorities under Article 19(1)(g). They are reasonable restrictions in the interest of minority institutions permissible under Article 30(1) and in the interest of general public under Article 19(6) of the Constitution.*
>
> *147. In our considered view, on the basis of the judgment in Pai Foundation and various previous judgments of this Court which have been taken into consideration in that case, the scheme*

*evolved out of setting up the two Committees for regulating admissions and determining fee structure by the judgment in Islamic Academy cannot be faulted either on the ground of alleged infringement of Article 19(1)(g) in case of unaided professional educational institutions of both categories and Article 19(1)(g) read with Article 30 in case of unaided professional institutions of minorities.*"

*Again in paragraph-146, the Apex Court observed that even non-minority institutions can be subjected to similar restrictions which are found reasonable and in the interest of the student community. The same view is again reiterated in Paragraphs 148 & 155 of the judgment."*

[28.1] Tamil Nadu Schools (Regulation of Collection of Fee) Act, 2009, provision of which was challenged before the High Court of Madras was enacted by the concerned State Government to regulate collection of fees in the schools of Tamil Nadu. Section 5(1) of the said Act provides that the Government shall constitute a committee for the purpose of determination of the fee for admission to any standard or course of study in private schools. Similar provision is made by the respondent State in impugned Act of 2017 in section 3(1). High Court of Madras in the aforesaid case ultimately held in para 28 as under :-

*"28. In view of what is stated above, it can be said that the scheme of the present Act is in consonance with the law laid down by the Apex Court, and it by and large strikes a balance between the autonomy of*

*the institutions and measures to be taken to prevent commercialization of education. There are sufficient guidelines in the statute for either approving or fixing the fees. The procedure prescribed provides for appropriate opportunity to the managements. The Committee is headed by a retired High Court Judge. The minority educational institutions have also to maintain non-exploitative terms as held in P.A.Inamdar#s case. The impugned Act, therefore, cannot be said to be in any way in violation of Articles 19(1)(g) and 26 or 30 of the Constitution of India. However, having said this, when it comes to Section 11 of the Act, we have to examine the procedure little more carefully."*

[29] In the case of **Modern School v/s. Union of India reported in (2004) 5 SCC 583,** the Hon'ble Supreme Court, while dealing with provisions of Delhi Schools Education Act held to the following effect :-

(a) Director of School Education is authorized to regulate the fees and other charges under section 17 of the Act to prevent commercialization of education in all the schools including the self financed schools.

(b) Under section 17(3) of the Act, schools have to furnish a full statement of fee in advance before commencement of the academic session.

(c) Delhi School Education Rules, 1973 provide for the manner in which the accounts are required to be maintained by the schools and that the accounting in schools operates

differently as compared to balance sheet prescribed for a company under the Companies Act, 1956 and that therefore, the accounts of non business organization like schools are to be considered in light of the provisions contained in the Delhi School Education Act, 1973.

(d) Right conferred on minorities, religious or linguistic to establish and administer the educational institutions of their own choice under Article 30(1) is subject to reasonable regulation, which inter alia may be framed having regard to the public interest and national interest.

(e) Though in the matter of determination of fee structure, unaided educational institutions i.e. self financed schools exercise a greater autonomy, one is to strike a balance between the said autonomy and measures to be taken to prevent commercialization of education.

Thereafter, Review application was filed for reviewing the aforesaid judgment of the Hon'ble Supreme Court mainly on the ground that in view of the judgment of the larger bench of the Apex Court in case of **P.A. Inamdar reported in (2005) 6 SCC 537**, self financed schools and in particular the minority schools have a greater autonomy in laying down their own fee structure and that, therefore, the Director

of School Education under the Delhi Schools Education Act, 1973 has no power to regulate the fee structure of such private self financed schools. However, the said review application came to be rejected by the Hon'ble Supreme Court by a detailed judgment in case of **Action Committee, Unaided Private Schools v/s. Director of Education, Delhi reported in (2009) 10 SCC 1**, except to the limited extent of liberty to transfer the funds from the school to the society or trust under the same management.

[29.1] In the decision rendered by the High Court of Madras in the case of **Tamil Nadu Nursery, Matriculation and Higher Secondary Schools Association v/s. State of Tamil Nadu and others (supra),** the Division Bench of High Court of Madras has considered decisions rendered by the Hon'ble Supreme Court in the case of **TMA Pai Foundation (supra), P.A.Inamdar (supra) and Islamic Academy (supra).** A common thread is passing through all the aforesaid decisions of the Hon'ble Supreme Court that commercialization in education should be stopped at all levels of education. Further, commercialization of education may be resorted to by charging unreasonable fee or charging capitation fee or by profiteering in order to find out as to whether any of the self financed schools have adopted any of the above referred means, there is need for an appropriate regulation whereby the

fee fixed and proposed by self financed school can be accepted, if the same is reasonable. For the said purpose, legislation dealing with mere grievance / complaint mechanism would not be sufficient to find out as to whether the self financed schools are charging unreasonable fee or charging capitation fee or are profiteering. It is also required to be noted that nature of restriction being imposed to curb commercialization of education cannot be different in the above referred two classes of educational institutions viz. self financed professional colleges and self financed schools. Thus, under the shelter of 'maximum autonomy', self financed schools cannot be permitted to contend that they have 'absolute autonomy'. Thus, regulatory measure imposed by the impugned Act cannot be said to be unreasonable restriction.

[29.2] We are also in agreement with the view taken by the High Court of Madras in the case of Tamil Nadu Nursery, Matriculation and Higher Secondary Schools Association (supra). At this stage, it is also required to be noted that Special Leave Petition filed against the decision rendered by the High Court of Madras before the Hon'ble Supreme Court has been dismissed.

[29.3] At this stage, we would like to refer to other decisions rendered by Hon'ble Supreme Court and other High Courts on the point of Article 19(6) of the Constitution. In the case of **Narendra Kumar v/s.**

**The Union of India and Ors. reported in AIR 1960 SC 430**, the Hon'ble Supreme Court has observed in para 17 and 18 as under :-

> *"17. After Art. 19(1) has conferred on the citizen the several rights set out in its seven sub-clauses, action is at once taken by the Constitution in cls. 2 to 6 to keep the way of social control free from unreasonable impediment. The raison detre of a State being the welfare of the members of the State by suitable legislation and appropriate administration, the whole purpose of the creation of the State would be frustrated if the conferment of these seven rights would result in cessation of legislation in the extensive fields where these seven rights operate. But without the saving provisions that would be the exact result of Art. 13 of the Constitution. It was to guard against this position that the Constitution provided in its cls. 2 to 6 that even in the fields of these rights new laws might be made and old laws would operate where this was necessary for general welfare. Laws imposing reasonable restriction on the exercise of the rights are saved by cl. 2 in respect of rights under sub-cl. (a) where the restrictions are " in the interests of the security of the State; " and of other matters mentioned therein; by cl. 3 in respect of the rights conferred by sub-cl. (b) where the restrictions are " in the interests of the public order; by cls. 4, 5 and 6 in respect of the rights conferred by sub-cls. (c), (d), (e), (f) & (g) the restrictions are " in the interest of the general public "-in cl. 5 which is in respect of rights conferred by sub cls.(d),(e) & (f) also where the restrictions are ',for the protection of the interests of any scheduled tribe ". But for these saving provisions such laws would have been void because of Art. 13, which is in these words.*
>
> *"All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent, of such*

*inconsistency be void; (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void . . . "*

*18. As it was to remedy the harm that would otherwise be caused by the provisions of Art. 13, that these saving provisions were made, it is proper to remember the words of Art. 13 in interpreting the words " reasonable restrictions " on the exercise of the right as used in cl. (2). It is reasonable to think that the makers of the Constitution considered the word restriction " to be sufficiently wide to save laws inconsistent " with Art. 19(1), or " taking away the rights " conferred by the Article, provided this inconsistency or taking away was reasonable in the interests of the different matters mentioned in the clause. There can be no doubt therefore that they intended the word " restriction "to include cases of "prohibition" also. The contention that a law prohibiting the exercise of a fundamental right is in no case saved, cannot therefore be accepted. It is doubtedly correct, however, that when, as in the present case, the restriction reaches the stage of prohibition special care has to be taken by the Court to see that the test of reasonableness is satisfied. The greater the restriction, the more the need for strict scrutiny by the Court."*

[29.4] In the case of **Lokanath Misra v/s. State of Orissa and Another reported in AIR 1952 Orissa 42**, the High Court observed in para 12 as under :-

*"12. In considering the reasonableness of the impugned Act one must not over-look the gradual change in the conception of the functions of a Govt. In the nineteenth century when the principle of 'laissez-faire*

*held the field the State contented itself with mere maintenance of law and order and became, as it were, a 'police state' and all other activities were left to free competition. But this idea has now been given up even in the non-Communist States of the world and a State has changed from a 'police State' to a 'welfare State' and directly participates in several activities for the welfare of the public. The framers of the Constitution did not contemplate a purely police State and in Part IV dealing with the directive principles of State policy they have given directions which show unmistakably that they were contemplating a welfare State. In particular I refer to Art. 38 and Cls. (b) and (c) of Art. 39 which run thus :*
*"Art. 38 : The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."*
*"Art. 39 (b), that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;*
*(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;" For such a welfare State the enacting of the subsidiary Act cannot be said to cause unreasonable restriction on the fundamental rights guaranteed to the citizens".*

[29.5] In the case of **Modern Dental College and Research Centre and Ors. v/s. State of Madhya Pradesh reported in (2016) 7 SCC 353,** the Hon'ble Supreme Court has observed in para 65 and 81 as under :-

*"65. We may unhesitatingly remark that this Doctrine of Proportionality, explained hereinabove in brief, is enshrined in Article 19 itself when we read clause (1) along with clause (6) thereof. While defining as to what constitutes a reasonable restriction, this Court in plethora of judgments has held that the expression 'reasonable restriction' seeks to strike a balance between the freedom guaranteed by any of the sub-clauses of clause (1) of Article 19 and the social control permitted by any of the clauses (2) to (6). It is held that the expression 'reasonable' connotes that the limitation imposed on a*

*person in the enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interests of public. Further, in order to be reasonable, the restriction must have a reasonable relation to the object which the legislation seeks to achieve, and must not go in excess of that object {See P.P. Enterprises & Ors. v. Union of India & Ors.}. At the same time, reasonableness of a restriction has to be determined in an objective manner and from the standpoint of the interests of the general public and not from the point of view of the persons upon whom the restrictions are imposed or upon abstract considerations {See Hanif Quareshi Mohd. v. State of Bihar18). In M.R.F. Ltd. v. Inspector Kerala Govt.19, this Court held that in examining the reasonableness of a statutory provision one has to keep in mind the following factors:*

*(1) The Directive Principles of State Policy.*
*(2) Restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public.*
*(3) In order to judge the reasonableness of the restrictions, no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.*
*(4) A just balance has to be struck between the restrictions imposed and the social control envisaged by Article 19(6).*
*(5) Prevailing social values as also social needs which are intended to be satisfied by the restrictions.*
*(6) There must be a direct and proximate nexus or reasonable connection between the restrictions imposed and the object sought to be achieved. If there is a direct nexus between the restrictions, and the object of the Act, then a strong presumption in favour the constitutionality of the Act will naturally arise.*
*81. It is in the aforesaid context that we have to determine the question as to whether the provisions relating to fixation of fee are violative of Article 19(1)(g) of the Constitution or they are regulatory in nature, which is permissible in view of clause (6) of Article 19 of*

*the Constitution, keeping in mind that the Government has the power to regulate the fixation of fee in the interest of preventing profiteering and further that fixation of fee has to be regulated and controlled at the initial stage itself. When we scan through Section 9 of the Act, 2007 from the aforesaid angle, we find that the parameters which are laid down therein that has to be kept in mind while fixing the fee are in fact the one which have been enunciated in the judgments of this Court referred to above. It is also significant to note that the Committee which is set up for this purpose, namely, Admission and Fee Regulatory Committee, is discharging only regulatory function. The fee which a particular educational institution seeks to charge from its students has to be suggested by the said educational institution itself. The Committee is empowered with a purpose to satisfy itself that the fee proposed by the educational institution did not amount to profiteering or commercialisation of education and was based on intelligible factors mentioned in Section 9(1) of the Act, 2007. In our view, therefore, it is only a regulatory measure and does not take away the powers of the educational institution to fix their own fee. We, thus, find that the analysis of these provisions by the High Court in the impugned judgment, contained in paragraph 42, is perfectly in order, wherein it is observed as under:*

*"42. We are of the view that Sections 4 (1) and 4 (8) of the Act, 2007 have to be read with Section 9 (1) of the Act, 2007, which deals with factors which have to be taken into consideration by the Committee while determining the fee to be charged by a private unaided professional educational institution. A reading of Sub-section (1) of Section 9 of the Act, 2007 would show that the location of private unaided professional educational institution, the nature of the professional course, the cost of land and building, the available infrastructure, teaching, non-teaching staff and equipment, the expenditure on administration and maintenance, a reasonable surplus required for growth and development of the professional institution and any other relevant factor, have to be taken into consideration by*

*the Committee while determining the fees to be charged by a private unaided professional educational institution. Thus, all the cost components of the particular private unaided professional educational institution as well as the reasonable surplus required for growth and development of the institution and all other factors relevant for imparting professional education have to be considered by the Committee while determining the fee. Section 4 (8) of the Act, 2007 further provides that the Committee may require a private aided or unaided professional educational institution to furnish information that may be necessary for enabling the Committee to determine the fees that may be charged by the institution in respect of each professional course. Each professional educational institution, therefore, can furnish information with regard to the fees that it proposes to charge from the candidates seeking admission taking into account all the cost components, the reasonable surplus required for growth and development and other factors relevant to impart professional education as mentioned in Section 9 (1) of the Act, 2007 and the function of the Committee is only to find out, after giving due opportunity of being heard to the institution as provided in Section 9 (2) of the Act, 2007 whether the fees proposed by the institution to be charged to the student are based on the factors mentioned in Section 9 (1) of the Act, 2007 and did not amount to profiteering and commercialisation of the education. The word "determination" has been defined in Black's Law Dictionary, Eighth Edition, to mean a final decision by the Court or an administrative agency. The Committee, therefore, while determining the fee only gives the final approval to the proposed fee to be charged after being satisfied that it was based on the factors mentioned in Section 9 (1) of the Act, 2007 and there was no profiteering or commercialisation of education. The expression 'fixation of fees' in Section 4 (1) of the Act, 2007 means that the fee to be charged from candidates seeking admission in the private professional educational institution did not vary from student to student and also remained fixed for a certain period as mentioned in Section 4(8) of the Act, 2007. As has been held by the Supreme Court in Peerless General Finance v. Reserve Bank of India (supra), the Court has to examine the substance of the provisions of the law to find out whether provisions of the law impose reasonable restrictions in the interest of the general public. The provisions in Sections 4 (1), 4 (8) and 9 of the Act, 2007 in substance empower the Committee to be only satisfied that the fee proposed by a private professional educational institution did not amount to profiteering or commercialisation of education and was based on the factors mentioned in Section 9 (1) of the Act, 2007. The provisions of the Act, 2007 do not therefore, violate the right of private professional*

*educational institution to charge its own fee."*

[29.6] In the case of **Nalanda Educational society v/s. Government of Andhra Pradesh reported in 2011(2) ALD 163**, the High Court of Andhra Pradesh while dealing with Andhra Pradesh Educational Institution (Regulation of admission and prohibition of capitation fee) Act, 1983, after considering various judgments rendered by the Hon'ble Supreme Court with reference to Self Financed Professional Colleges held that the State is authorized to regulate the fee structure of a self financed school while maintaining delicate balance between the permissible regulation to verify and prevent profiteering and collection of capitation fee by the management of all the private unaided educational institutions in whatsoever form, garb, guise or camouflage, on the one hand and avoidance of undue intrusion into the operational, managerial and academic autonomy of the institution on the other.

[29.7] Similarly, in the case of **Delhi Abhibhavak Mahasangh and Ors. v/s. Govt. of NCT of Delhi and Ors. Reported in 2011 SCC Online Del 3394**, Delhi High Court while dealing with the challenge against constitutional validity of Delhi School Education Act, 1973 held that though autonomy of self financed school is required to be respected, the commercialization of education cannot be permitted under the garb of

autonomy and that the provisions of the Act is in tune with the legal principles stated by the Hon'ble Supreme Court in various decisions with reference to the autonomy to the schools to fix their fee on the one hand and conferring authority upon the Director of Education to regulate the quantum of fee with limited purpose to ensure that the schools are not indulging in profiteering and on the other hand. Section 17(3) of the Act does not suffer from any vires or arbitrariness and is not violative of Articles 14 and 19(1)(g) or 30 of the Constitution of India. Said decision was taken note by the Hon'ble Supreme Court in its order dated 12.04.2014 whereby decision of Delhi High Court has attained finality.

[29.8] Similarly, in the case of **Anti Corruption and Crime Investigation Cell v/s. State of Punjab reported in 2013 SCC Oline P & H 7412**, the Punjab and Harayana High Court directed setting up of committee with the task to look into the accounts of schools and find out the reasonableness of increase in fees by the schools with recommendation to come out with suitable legislation relating to fee regulation. Special Leave Petition filed against the said decision was dismissed by the Hon’ble Supreme Court.

[30] From the aforesaid decisions rendered by the Hon'ble Supreme Court and various High Courts, it can be said that the State is authorized to regulate the fee structure of a self financed school while

maintaining delicate balance between the permissible regulation to verify and prevent profiteering and collection of capitation fee by the management of all the private unaided educational institutions in whatsoever form, garb, guise or camouflage, on one hand and avoidance of undue intrusion into the operational, managerial and academic autonomy of the institution on the other. It is further clear that though autonomy of self financed school is required to be respected, commercialization of education cannot be permitted under the garb of autonomy. We are of the view that the provisions of the Act is in tune with the legal principles laid down by the Hon'ble Supreme Court in various decisions with reference to the autonomy to the schools to fix their fee on the one hand and conferring power to regulate the quantum of fee with limited purpose to ensure that the schools are not indulging in profiteering on the other hand. As pointed out herein-above, in the present batch of petition, we have to determine the question as to whether the provisions relating to fixation of fee are violative of Article 19(1)(g) of the Constitution or they are regulatory in nature, which is permissible in view of Article 19(6) of the Constitution, keeping in mind that the Government has the power to regulate the fixation of fee in the interest of preventing profiteering and further that fixation of fee has to be regulated and controlled at the initial stage itself. If the provisions of the impugned Act are carefully examined in light of observations made

by the Hon'ble Supreme Court as well as different High Courts referred herein-above, we are of the view that while enacting the impugned Act and the Rules made thereunder, fundamental right of the petitioners guaranteed under Article 19(1)(g) of the Constitution has not been violated and the restrictions imposed by the respondent State can be said to be reasonable restriction within the meaning of Article 19(6) of the Constitution.

[30.1] Apart from questioning the constitutionality and competency of State legislature to enact the impugned Act, certain provisions of the Gujarat Self Financed Schools (Regulation of Fees) Act, 2017 and Rules made thereunder are also questioned on the ground that said Rules are invalid, arbitrary and ultra-vires to Article 14 and 19(1)(g) of the Constitution of India. Specific reference is made to provisions of Sections 2(g), 2(r), 2(t), 2(u), 3, 8, 9, 10, 11, 12 of the impugned Act and Rule 6,7,8 and Form -II and its annexures of the Gujarat Self Financed Schools (Regulation of Fees) Rules, 2017.

[30.2] Section 2(g) of the Act defines “Fee or Fee Structure” which means any amount, by whatever name called, collected, directly or indirectly, by a school for admission of a student to any standard or course of study and includes :-

"(i) Tuition fee;
(ii) Term fee, which shall not exceed one month tuition fee per term;
(iii) Library fee and deposit;
(iv) Laboratory fee and deposit;
(v) Gymkhana fee;
(vi) Caution money;
(vii) Examination fee;
(viii) Admission fee, which shall not exceed one month tuition fee;
(ix) Yoga and Physical Education fee;
(x) any other fee as determined by the Fee Regulatory Committee"

With reference to above said provision, it is argued by learned Counsel appearing for the petitioners that fee and fee structure as defined includes only one with reference to fees under different head notified in the definition and it precludes to charge any other fees, which can be possibly justified, by charging such fees to improve quality education. Thus, it is pleaded that such restriction is not reasonable restriction and it violates Article 14 and 19(1)(g) of the Constitution.

[30.3] With regard to above provision, it is pleaded by learned Advocate General appearing for the respondent State that fee and fee structure as defined under section 2(g) of the Act include nine different heads of fees and any other fees, as may be determined by the Fee Regulatory Committee. It is submitted that such definition is to be read along with other provisions of the Act in entirety and Rules made

thereunder. It is submitted this will not restrict Self Financed Schools to propose any other fees to be charged. It is submitted that different heads notified in the definition are only illustrative but not exhaustive. It is submitted that said definition is with reference to prescribed Annexure-II Part (IV) of the Rules relating to financial information. In column no.2, type of income is not only restricted to fee collected under different heads as notified under section 2(g), it includes any other fees to be charged by the school management with regard to transportation fees, break fast or lunch fees, books selling, computer fees etc.

[30.4] From the above said provision of Section 2(g) read with Rules and required information to be furnished in Part IV relating to financial information of Annexure-II to the Rules, we are of the opinion that if school management is charging any other fees apart from the fees charged under different heads as notified under section 2(g) of the Act, it is always open for the school management to show such fees in the proposal in Part-IV of Annexure-II to the Rules. Thus, we hold that different heads of fees notified under section 2(g) are only illustrative but not exhaustive. As such, this will not preclude the Self Financed Schools to charge any other fees viz. transportation fees, computer fees, book selling etc. and such fees collected can be included in the proposal which is to be submitted to the Fee Regulatory Committee for approval of fees to be charged.

[31] Section 2(r) of the Act defines “profiteering”. As defined, profiteering means any amount accepted in cash or kind, directly or indirectly which is in excess of the fee fixed or approved as per the provisions of this Act and shall include profit earned from school by trust or company associated with the school in any manner whatsoever.

[31.1] Above said provision defining profiteering is challenged mainly on the ground that the school is invariably never an independent legal entity, is not expected to maintain profit or loss account or balance sheet. As such, definition 'profiteering' runs contrary to the legal and accounting principles, as school is not an independent entity and if such position is accepted, definition 'profiteering' becomes completely unworkable, arbitrary and violative of Article 19(1) of the Constitution of India. It is true that school has no independent legal entity and is required to be established either by the Trust or Company. But at the same time, from the very definition of profiteering, it becomes clear that acceptance of amount in cash or kind directly or indirectly in excess of fees fixed or approved as per the provisions of the Act, includes profit earned by the Trust or company. The term profiteering as defined under Section 2(r) does not prohibit the Trust or Company running Self Financed Schools from making profit. What is prohibited is making profit by collecting fees, in excess of fees, prescribed and approved by

the competent authority and in the event of such acceptance of cash or kind in excess of fees, prescribed under the provision of the Act, will amount to profiteering and same will include profit earned from school run by the Trust or the Company.

[31.2.] If the definition is considered with reference to provision under Section 10(1)(x) of the Act, it is clear that this will not preclude the Management or Trust of the School to collect any fees, which includes reasonable revenue surplus for the purpose of development, education and expansion of school. Profit attracts to the Trust or the Company, only in the event of collecting excess fees more than reasonable revenue surplus which is required for the purpose of development, education and expansion of the school. This definition is required to be considered with reference to object of the Act, which is designed to prevent profiteering in running the schools. Merely because there is no independent legal entity to the school, and only such schools are to be run by the Trust or Company does not make definition of profiteering as illegal or arbitrary so as to accept the case of the petitioners.

[32] Section 2(t) merely defines “recognized schools” which means a school recognized by the competent educational authority of the State or Central Government.

[33] Section 2(v) defines “school”, which includes a pre-primary, upper primary, secondary and higher secondary school and also includes any other institution which imparts education or training below the degree level, but does not include an institution which exclusively imparts technical education.

[34] Section 3(1) empowers the Government to constitute Fee Regulatory Committee for the purpose of determination of the fee for any standard or course of study in self financed schools. Composition of the Committee as per section 3(4) of the Act is as under :-

> *(a) retired District and Sessions Judge or a person who had been a member of All India Service having retired from a post not below the rank of Principal Secretary to Government or a person who had been a member of Indian Police Service, having retired from a post not below the rank Additional Director General of Police, to be nominated by the Government, who shall be the Chairperson of the Committee.*
>
> *(b) the Chartered Accountant, to be nominated by the Government.*
>
> *(c) one Civil Engineer / Government approved valuer, to be nominated by the Government;*
>
> *(d) one representative from the self financed school management of the respective zone, to be nominated by the Government;*
>
> *(e) one Academician of repute, to be nominated by the Government.*

[35] Section 8 of the Act confers power to the Fee Regulatory

Committee to determine fees payable by the students in the self financed schools.

[35.1] Section 8(2)(a) of the Act provides that the self financed school is required to place before the Committee, the proposed fee structure of such school along with all relevant documents and books of accounts for scrutiny before such date as may be specified by the Committee.

[35.2.] Section 8(2)(c) of the Act, the Committee is empowered to approve the existing fee structure or determine the fees which can be charged by the self financed school.

[36] As per section 9 of the Act, Fee Regulatory Committee is empowered to exempt such self financed schools that charge amount of fee lower than the fee prescribed by the Government by notification in official gazette from the determination of fee. Such self financed school is required to file an affidavit to that effect.

[37] Section 10 of the Act deals with the provisions relating to factors for determining fees to be taken by the Fee Regulatory Committee. Factors includes location of the self financed schools, investment incurred to setup the school, salary component of the

teachers, reasonable amount for yearly salary increments in paying salaries and expenditure incurred on the students against total income of the school, reasonable revenue surplus for the purpose of development, education and expansion of the school etc.

[38] Section 11 of the Act prohibits the Self Financed Schools to collect fees in excess fees fixed by the Fee Regulatory Committee for admission of students to any standard or course of study.

[39] Section 12 of the Act empowers the Government to constitute Fee Revision Committee. Composition of Committee is provided in section 12(2) of the Act which is as under :-

> *(i) retired Judge of the High Court to be nominated by the Government shall be the Chairperson of the Committee.*
>
> *(ii) the Secretary to the Government of Gujarat, Education Department (Primary and Secondary);*
>
> *(iii) the Secretary to the Government of Gujarat, Finance Department, or his nominee not below the rank of the Deputy Secretary;*
>
> *(iv) the Secretary, Gujarat Secondary and Higher Secondary Education Board or, as the case may be, the Director, Primary Education, ex-officio, who shall be the Member - Secretary;*
>
> *(v) one representative from the self financed school management to be nominated by the Government.*
>
> *(vi) the Chartered Accountant, to be nominated by the Government.*

[39.1] Section 12(3) of the Act gives power of revision to such Fee Revision Committee against the order passed by the Fee Regulatory Committee under section 10 of the Act within a period of twenty one days from the date of receipt of such order passed by the Fee Regulatory Committee.

[39.2] With reference to aforesaid provisions, it is mainly argued by learned Counsel for the petitioners that Fee Regulatory Committee is empowered to fix and determine fees as referred under various provisions of the Act and as such fixation and determination power conferred on the Fee Regulatory Committee is not reasonable restriction more so, when more autonomy at school level to the management is approved by the Hon'ble Supreme Court in various judgments.

[39.3] To counter such submission, it is submitted by learned Advocate General appearing for the respondent State that it is always open for the management of the school to propose fees. It is submitted that in absence of any restriction on the proposal, it cannot be said that Fee Regulatory Committee is either fixing or determining the fee as sought to be projected by the petitioners. It is submitted that words 'fixation and determination' are used with reference to power of approval conferred on the Committee approving fees or proposal sent by

the management. It is submitted that while considering the proposal for determining fees, there is nothing wrong on the part of the Fee Regulatory committee to verify whether fee proposed by the self financed schools are justified or whether it amounts to profiteering or charging exorbitant fees as referred in section 8(2)(b) of the Act. It is submitted that any fee, in order to be reasonable, has to be commensurate with the facilities being provided by the Self Financed Schools. Whatever, fees which are collected by petitioners under various heads can be shown as reasonable surplus for the purpose of approval of such fee by the Fee Regulatory Committee. It is submitted that if the proposals are reasonable and does not amount to profiteering or charing exorbitant fees, such proposal will be approved. Only in cases, where the Committee finds that the proposal for fee fixation amounts to profiteering or charging exorbitant fees, only such proposal will not be approved by the Fee Regulatory Committee. It is submitted that statute as a whole is looked into with reference to objects and reasons of the Act, power conferred on the Committee is only regulatory mechanism and it cannot be said the Committee is fixing the fees on its own.

[39.4] Thus, it is clear from the various provisions of the Act that initially proposals are to be submitted by the School / management of the schools and in absence of any ceiling limit fixed on the proposal, it

cannot be said that Fee Regulatory Committee is empowered to fix and determine fees leviable by the schools. It is submitted that under the scheme of the Act, penal provisions are also attracted under Chapter IV of the Act when the school management contravenes the provisions of the Act and the Rules made thereunder. With reference to composition of Fee Regulatory Committee, it is submitted that said Committee is not discharging any adjudicatory function, as such does not necessarily include Retired High Court Judge or District Judge. It is submitted that Fee Revision Committee constituted under Section 12 of the Act is headed by Retired Judge of the High Court to be nominated by the Government, who shall be Chairman of the Committee. It is submitted by learned Advocate General appearing for the State that so far as provisions of Revision under Section 12(3) of the Act, the Government will take necessary steps to amend the above said provision suitably so as to approach Revisional Authority by any person aggrieved by any order of the Fee Regulatory Committee, not merely confining to orders passed under section 10 as exists now. It is submitted that by following necessary procedure, steps will be taken to amend the provision suitably.

[39.5] From the title of the Act “The Gujarat Self Financed Schools (Regulation of Fees) Act, 2017, it is clear that Self Financed Schools which are covered by the Act are required to submit proposal for fee or fee structure along with documents and books of accounts for scrutiny

before such date as may be specified by the Fee Regulatory Committee. If the various provisions of the Act and Rules made thereunder are considered, it is clear that regulatory mechanism is provided under the scheme of the Act to check profiteering as defined under Section 2(r) of the Act. It is also clear that this will not preclude the school / school management to propose any kind of fees to seek justification for approval of such proposal by the Committee and the Committee is empowered only to see that there is no profiteering as defined under the Act based on the relevant documents to be produced before the Committee along with the proposals.

[39.6] Fee Regulatory Committee cannot fix the fees on its own. The words 'fixation and determination' used in various provisions of the Act are with reference to proposal of fee or fee structure to be submitted by the school management. In such event, the Fee Regulatory Committee is empowered to scrutinize such proposals so as to check that such proposals do not amount to profiteering within the meaning of section 2(r) of the Act. In that view of the matter, we are of the view that merely because words 'fixation and determination' are used under certain provisions of the Act, by itself is no ground to invalidate the said provisions, as submitted by learned Counsel for the petitioners, as the object of the Regulation is to provide regulatory mechanism to prevent profiteering in running the school. The words 'fixation and

determination' mentioned in the provisions referred above, by itself is no ground to declare such provisions as ultra vires or violative of Article 19(1)(g) of the Constitution of India.

[39.7] It is further submitted by learned Advocate General that the words determination and fixation used in various sections are to be read holistically and keeping in mind all the provisions of the Act and also with reference to objects and reasons for enactment. It is further submitted that merely because words 'fixation and determination' are used in some sections as projected by the petitioners, same is no ground to declare such provisions as illegal or unconstitutional. It is further submitted that such words used in some sections have to be read down only to show that such power is only to scrutinize the proposals and check whether such charging of fees amounts to profiteering or not. It is further submitted that rule of harmonious construction or purposive interpretation of a statutory provision is nothing but the rule of reading down which is essentially adopted for saving a statue from being struck down as unconstitutional and for making the same workable by bringing it in harmony with the objective and other provisions of the statue.

[39.8] Learned Counsel for the petitioners submitted that attempt on the part of the State suggesting reading down of certain provisions of the Act may not be accepted. It is submitted that reading down can only

be resorted to for ironing out the creases and not to stitch a new garment. It is submitted that under the guise of reading down, the State is actually amending provisions, which is not permissible. It is therefore, submitted by learned counsel for the petitioners that such attempt on the part of the State is impermissible and in support of their case, they have relied on following decisions of the Hon'ble Supreme Court :-

*(1) In the case of Delhi Transport Corporation v. D.T.C. Mazdoor Congress and others, reported in 1991 (Suppl.) (1) SCC 600;*

*(2) In the case of State of Jharkhand and another v/s. Govind Singh, reported in AIR 2005 SC 294;*

*(3) In the case of Arun Kumar and others v. Union of India and others, reported in (2007) 1 SCC 732;*

*(4) In the case of Union of India and others v. Ind-Swift Labouratories Ltd., reported in (2011) 4 SCC 635; and*

*(5) In the case of Cellular Operators Association of India & Others v. Telecom Regulatory Authority of India and others, reported in (2016) 7 SCC 703.*

[39.9] In the aforesaid decisions upon which reliance is placed by the learned advocates for the petitioners, the Hon'ble Supreme Court declined to read down the particular legislative provisions because of the following circumstances:

1. When the reading down the particular provision is to result into perversion of the purposes of the statute.
2. When the reading down is to result into destruction of the

rationale of the provisions under challenge.

3. When the language of the provision under challenge is clear, definite, unambiguous and explicit and not capable of being construed in different ways.

[39.10] On the other hand, the respondent State has placed reliance upon the decision rendered by the Hon'ble Supreme Court in the case of ***R. L. Arora v. State of U.P and others*, reported in AIR 1964 SC 1230.** The relevant observations made by the Hon'ble Supreme Court in para 9 read as under:

> *"9. .....Therefore, a literal and mechanical interpretation is not the only interpretation which courts are bound to give to the words of a statute; and it may be possible to control the wide language in which a provision is made by taking into account what is implicit in it in view of the setting in which the provision appears and the circumstances in which it might have been enacted.....Parliament must also be well aware of the provision of Art. 31(2) which lays down that compulsory acquisition of property can only be made for a public purpose. Clause (aa) was inserted between cl. (a) and cl. (b) of S. 40(1). Section 40(1) as it stood before the amendment prohibited consent being given to acquisition of land by a company unless the acquisition was for one of the two reasons mentioned in cls. (a) and (b). Those two clauses clearly showed that acquisition for a company was for a public purpose and such acquisition could not be made for any purpose other than public purpose. Between the existing cl. (a) and cl. (b) of S. 40 (1), we find cl. (aa) being inserted. We also find that cl. (aa) specifically uses the words "public purpose" and indicates that the company for which land is required should be engaged or about to be engaged in some industry or work of a public purpose. It*

*was only for such a company that land was to be acquired compulsorily and the acquisition was for the construction of some building or work for such a company, i.e., a company engaged or about to be engaged in some industry or work which is for a public purpose. In this setting it seems to us reasonable to hold that the intention of Parliament could only have been that land should be acquired for such building or work for a company as would subserve the public purpose of the company; it could not have been intended, considering the setting in which. Cl. (aa) was introduced, that land could be acquired for a building or work which would not subserve the public purpose of the company.....We are therefore of opinion that in the setting in which cl. (aa) appears and in the circumstances in which it came to be enacted, a literal and mechanical construction for which the petitioner contends is not the only construction of this clause and that there is another construction which in our opinion is a better construction, and which is that the public purpose of the company is also implicit in the purpose of the building or work which is to be constructed for the company and it is only for such work or building which subserves, the public purpose of the company that acquisition under cl. (aa) can be made..... We are therefore clearly of opinion that two constructions are possible of this clause of which the second construction which is other than literal is the better one. It is well settled that if certain provisions of law construed in one way will be consistent with the Constitution, and if another interpretation would render them unconstitutional, the Court would lean in favour of the former construction:"*

[39.11] In the case of **Jagdish Pandey v. The Chancellor, University of Bihar, reported in AIR 1968 SC 353,** the Hon'ble Supreme Court has observed in para 8 as under:

*"8. The next attack on the validity of S. 4 is that it confers uncanalised powers on the Chancellor without indicating any criterion on the basis of which the power under S. 4 can be*

*exercised. There is no doubt that if one reads S. 4 literally it does appear to give uncanalised powers to the Chancellor to do what he likes on the recommendation of the Commission with respect to teachers covered by it. We do not however think that the legislature intended to give such an arbitrary power to the Chancellor. We are of opinion that S. 4 must be read down and if we read it down there is no reason to hold that the legislature was conferring a naked arbitrary power on the Chancellor. It seems to us that the intention of the legislature was that all appointments, dismissals, etc. made between the two dates should be scrutinised and the scrutiny must be for the purpose of seeing that the appointments, dismissals etc. were in accordance with the University Act and the Statutes. Ordinances, Regulations and Rules framed thereunder, both in the matter of qualifications, and in the matter of procedure prescribed for these purposes. We do not think that the legislature intended more than that when it gave power to the Chancellor to scrutinise the appointments, dismissals, etc., made between these two dates. We have therefore no hesitation in reading down the Section and hold that it only authorises the Chancellor to scrutinise appointments, dismissals etc. made between these two dates for the purpose of satisfying himself that these appointments, dismissals etc., were in accordance with the University Act and the Statutes, Ordinances, Regulations or Rules made thereunder, both as to the substantive and procedural aspect thereof. If the appointments etc. were in accordance with the University Act etc., the Chancellor would uphold them, and if the were not, the Chancellor would pass such orders as he deemed fit. Read down this way, S. 4 does not confer uncanalised power on the Chancellor, as such it is not liable to be struck down as discriminatory under Art. 14."*

[39.12] In the case of **Ahmedabad Municipal Corporation and another v. Nilaybhai R. Thakore and another, reported in (1999) 8 SCC 139,** the Hob'ble Supreme Court has observed in para 13 and 14 as under:

*"13. Though the High Court was right in coming to the*

*conclusion that the rule in question does suffer from an element of arbitrariness, we are of the opinion that the remedy does not lie in striking down the impugned rules the existence of which is necessary in the larger interest of the institution as well as the populace of the Ahmedabad Municipal Corporation. The striking down of the rule wold mean opening the doors of the institution for admission to all the eligible candidates in the country which would definitely be opposed to the very object of the establishment of the institution by a local body. It is very rarely that a local body considers it as its duty to provide higher and professional education. In this case, the Municipality of Ahmedabad should be complimented for providing medical education to its resident students for the last 30 years or more. It has complied with its constitutional obligation by providing 15% of the seats available to all- India merit students. Its desire to provide as many seats as possible to its students is a natural and genuine desire emanating from its municipal obligations which deserves to be upheld to the extent possible. Therefore, with a view to protect the laudable object of the Municipality, we deem it necessary to give the impugned rule a reasonable and practical interpretation and uphold its validity.*

*14. Before proceeding to interpret Rule 7 in the manner which we think is the correct interpretation, we have to bear in mind that it is not the jurisdiction of the Court to enter into the arena of the legislative prerogative of enacting laws. However, keeping in mind the fact that the rule in question is only a subordinate legislation and by declaring the rule ultra vires, as has been done by the High Court, we would be only causing considerable damage to the cause for which the Municipality had enacted this rule. We, therefore, think it appropriate to rely upon the famous and oft-quoted principle relied on by Lord Denning in the case of Seaford Court Estates Ltd. v. Asher wherein he held:*

> *"When a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament,..... and then he must supplement the written word so as to give 'force and life' to the intention of the legislature.... A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases."*

*This statement of law made by Lord Denning has been consistently followed by this Court starting in the case of M. Pentiah v. Muddala Veeramallappa and followed as recently in the case of S. Gopal Reddy v. State of A.P. (SCC at 608 : AIR at p. 2188). Thus, following the above rule of interpretation and with a view to iron out the creases in the impugned rule which offends Article 14, we interpret Rule 7 as follows:*

> *"Local student means a student who has passed HSC (sic SSC)/New SSC Examination and the qualifying examination from any of the high schools or colleges situated within the Ahmedabad Municipal Corporation limits and includes a permanent resident students of the Ahmedabad Municipality who acquires the above qualifications from any of the high schools or colleges situated within the Ahmedabad Urban Development Area."*

[39.13] In the case of **Modern Dental College and Research Centre and others v. State of Madhya Pradesh and others, reported in (2009) 7 SCC 751,** the Hon'ble Supreme Court has observed in para 13 as under:

*"13. In our view, it cannot be left to the unilateral decision of the State Government to say that the private institutions have failed to meet with the triple tests mentioned in Inamdar's case (supra), because that will be giving unbridled, absolute and unchecked power to the State Government. In our prima facie opinion, the M.P. Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, 2007 (for short 'the Act of 2007'), appears to handover the entire selection process to the State Government or the agencies appointed by the State Government for under-graduate, graduate and post-graduate medical/dental colleges and fee fixation. This, in our prima facie opinion, is contrary to, and inconsistent with the observations (quoted above) made by the 11 Judge Bench decision of this Court in T.M.A. Pai's case (supra), and hence the 2007 Act would become unconstitutional if it is read literally. We have therefore to read down the 2007 Act and Rules to make them constitutional. Such reading down of a statute is permissible, since it is well*

*settled that the Court should make all efforts to sustain the validity of a statute, even if that involves reading its language down vide G. P Singh's 'Principles of Statutory Interpretation' Ninth Edition, 2004 pp. 496-503. Thus, while considering the validity of the Hindu Women's Right to Property Act, 1937, the Federal Court construed the word 'property' as meaning 'property, other than agricultural land', vide In re Hindu Women's Right to Property Act AIR 1941 F.C. 72 (75), otherwise the Act would have become unconstitutional."*

[39.14] In the case of **Indra Das v. State of Assam, reported in (2011) 3 SCC 380,** the Hon'ble Supreme Court observed in para 27 as under:

*"27. Similarly, we are of the opinion that the provisions in various statutes i.e. 3 (5) of TADA or Section 10 of the Unlawful Activities (Prevention) which on their plain language make mere membership of a banned organization criminal have to be read down and we have to depart from the literal rule of interpretation in such cases, otherwise these provisions will become unconstitutional as violative of Articles 19 and 21 of the Constitution. It is true that ordinarily we should follow the literal rule of interpretation while construing a statutory provision, but if the literal interpretation makes the provision unconstitutional we can depart from it so that the provision becomes constitutional."*

[40] Keeping in view the aforesaid decisions rendered by the Hon'ble Supreme Court, it can be said that all efforts should be made to see that constitutionality of a statute is saved and while doing so it is always open to the Courts instead of striking down the impugned provision in its entirety, to read down the same in such a manner so as to save the same from being declared unconstitutional. It is only in the event that reading down of the provisions is not possible in view of the

circumstances discussed hereinabove, as a last recourse a question of striking down the provisions as unconstitutional may be considered.

[41] Now, keeping in view aforesaid decisions rendered by the Hon'ble Supreme Court, we are of the considered view that the words 'determination and fixation' used in some of the provisions of statute have to be read down as power of approval of the proposed fees by the Fee Regulatory Committee. It is clear from the objects and title of the Act itself that such Act is enacted to regulate fees in Self Financed Schools, as it is noticed that in absence of any such law prescribing standards of fees leviable by the Self Financed Schools, such schools charge exorbitant fees. It is further stated in the object of the Act, 2017 that in order to mitigate the plight of parents seeking admission of their wards in the Self Financed Schools, it is considered necessary to provide special provisions for fixation of fees for the Self Financed Schools. If the object of Act, 2017 is considered with reference to all the provisions of the Act, it is clear that words 'determination and fixation' used in certain provisions are only considered as approval of fees by the Fee Regulatory Committee on proposal sent by the management of school. It is to be noticed that under the scheme of the Act, there is no maximum ceiling limit fixed while sending such proposal. Only aspect is when such proposals are sent, relevant data and requirements as contemplated

under the provisions of the Act and Rules have to be submitted by the management for scrutiny of such proposal by the Fee Regulatory Committee. On such proposal, the Fee Regulatory Committee has to find whether fees proposed are justified including reasonable surplus which can be used by the management of the school for development and expansion of school etc. Ultimately, if the Fee Regulatory Committee finds that fees which are sought to be charged as proposed are exorbitant and amounts to profiteering, then the Committee may not approve. In which event, there is remedy provided in the Act itself to approach Fee Revisions Committee which is headed by Retd. Judge of High Court, where order of Fee Regulatory Committee is subject matter of approval by the Revisional Authority.

[42] For the aforesaid reasons, we are of the view that case law referred above and relied by learned Advocate General supports that constructive or purposive interpretation of provisions of the Act is nothing but the rule of reading down which is essentially adopted for saving a statue from being struck down as unconstitutional and for making the same workable by bringing it in harmony with the objective and other provisions of the statue.

[43] Accordingly, we hold that provisions of Section 2(g), 2(r),

2(t), 2(u), 3, 8, 10, 11 of the Gujarat Self Financed Schools (Regulation of Fees) Act, 2017 and Rule 6, 7,8,10,11 and Form II of the Gujarat Self Financed Schools (Regulation of Fees) Rules, 2017 cannot be declared as unconstitutional or arbitrary on the grounds pleaded by the petitioners.

[44] So far as section 12 of the Act, 2017 is concerned, the Government is empowered to constitute a Committee for the purpose of Revision against the order passed by the Fee Regulatory Committee. Such Committee is headed by the Retd. Judge of the High Court, who will be the Chairman of the Committee. Under section 12(3) of the Act, 2017, a person aggrieved by the order of the Fee Regulatory Committee made under section 10 may file revision application before the Fee Revision Committee within a period of 21 days from the date of receipt of such order. As per provisio, if the Fee Revision Committee is satisfied that such school was prevented for filing a revision application within prescribed time limit for sufficient cause, it may condone delay and allow the revision application but not later than three months.

[45] Chapter IV of the Act, 2017 deals with contraventions and penalties. In the event of contravention of provisions of the Act, there is power to impose fine upto Rs.5 lakhs for the first contravention, which

may extend to Rs.10 lakhs for the second contravention. Further the Fee Regulatory Committee is empowered to recommend cancellation or withdrawal of registration of school. With reference to above said provisions, it is pleaded that under section 12(3) of the Act, power of revision is confined to order passed by the Fee Regulatory Committee under section 10 of the Act, but at the same time, there is no remedy at all against the order passed under section 14 of the Act. In response to such argument, learned Advocate General appearing for the respondent State submitted that the State undertakes to take steps for amending section 12(3) of the Act so as to allow persons to file Revision before the Fee Regulatory Committee aggrieved by any order, not confined only to order passed under section 10 of the Act. In view of such statement, we place on record submission made by learned Advocate General.

[46] **Point No.C**

Whether the provisions of the impugned Act and Rules violate rights guaranteed under Article 30 of the Constitution of India with regard to minority institutions?

In some of the petitions, learned advocates appearing for concerned petitioners raised contention that provisions of the impugned Act and the Rules are violative of Article 30 of the Constitution and also violative of provision of National Commission for Minority Educational Institutions Act of 2004. In support of said contention, learned

advocates have placed reliance on the decisions of the Hon'ble Supreme Court in the case of **TMA Pai Foundation (supra), P.A.Inamdar (supra) and Islamic Academy (supra)**. At this stage, it is required to be noted that fundamental right to establish and administer minority institution under Article 30 is not absolute and same can be made subject to reasonable restriction. In the case of P.A.Inamdar (supra), the Hon'ble Supreme Court has held in para 143 as under :-

> *"143. The learned senior counsel appearing for different private professional institutions, who have questioned the scheme of permanent Committees set up in the judgment of Islamic Academy, very fairly do not dispute that even unaided minority institutions can be subjected to regulatory measures with a view to curb commercialization of education, profiteering in it and exploitation of students. Policing is permissible but not nationalization or total take over, submitted Shri Harish Salve, the learned senior counsel. Regulatory measures to ensure fairness and transparency in admission procedures to be based on merit have not been opposed as objectionable though a mechanism other than formation of Committees in terms of Islamic Academy was insisted on and pressed for. Similarly, it was urged that regulatory measures, to the extent permissible, may form part of conditions of recognition and affiliation by the university concerned and/or MCI and AICTE for maintaining standards of excellence in professional education. Such measures have also not been questioned as violative of the educational rights of either minorities or non- minorities."*

[46.1] In the case of **Modern School and Ors. v/s. Govt. of NCT of Delhi reported in (2004) 5 SCC 583**, the Hon'ble Supreme Court has observed in para 15 as under :-

> *"15. As far back as 1957, it has been held by this Court in the case of State of Bombay v. R.M.D. Chamarbaugwala reported in [AIR 1957 SC 699] that education is per se an activity that is charitable in nature. Imparting of education is a State function. The State, however, having regard to its financial constraints is not always in a position to perform its duties. The function of imparting education has been to a large extent taken over by the citizens themselves. In the case of Unni Krishnan, J.P. v. State of A.P. (supra), looking to the above ground realities, this Court formulated a self-financing mechanism/scheme under which institutions were entitled to admit 50% students of their choice as they were self-financed institutions, whereas rest of the seats were to be filled in by the State. For admission of students, a common entrance test was to be held. Provisions for free seats and payment seats were made therein. The State and various statutory authorities including Medical Council of India, University Grants Commission etc. were directed to make end or amend regulations so as to bring them on par with the said Scheme. In the case of TMA Pai Foundation v. State of Karnataka reported in [(2002) 8 SCC 481], the said scheme formulated by this Court in the case of Unni Krishnan (supra) was held to be an unreasonable restriction within the meaning of Article 19(6) of the Constitution as it resulted in revenue short-falls making it difficult for the educational institutions. Consequently, all orders and directions issued by the State in furtherance of the directions in Unni Krishnan's*

*case (supra) were held to be unconstitutional. This Court observed in the said judgment that the right to establish and administer an institution included the right to admit students; right to set up a reasonable fee structure; right to constitute a governing body, right to appoint staff and right to take disciplinary action. TMA Pai Foundation's case for the first time brought into existence the concept of education as an "occupation", a term used in Article 19(1)(g) of the Constitution. It was held by majority that Articles 19(1)(g) and 26 confer rights on all citizens and religious denominations respectively to establish and maintain educational institutions. In addition, Article 30(1) gives the right to religious and linguistic minorities to establish and administer educational institution of their choice. However, right to establish an institution under Article 19(1)(g) is subject to reasonable restriction in terms of clause (6) thereof. Similarly, the right conferred on minorities, religious or linguistic, to establish and administer educational institution of their own choice under Article 30(1) is held to be subject to reasonable regulations which inter alia may be framed having regard to public interest and national interest. In the said judgment, it was observed vide para 56 that economic forces have a role to play in the matter of fee fixation. The institutions should be permitted to make reasonable profits after providing for investment and expenditure. However, capitation fee and profiteering was held to be forbidden. Subject to the above two prohibitory parameters, this Court in TMA Pai Foundation's case held that fees to be charged by the unaided educational institutions cannot be regulated. Therefore, the issue before us is as to what constitutes reasonable surplus in the context of the provisions of the 1973 Act. This issue was not there before this Court in the TMA Pai Foundation's case."*

[46.2] Delhi High Court has also taken similar view in the case of Delhi Abhibhavak Mahasangh and Ors. (supra).

[47] If the objects and provisions of the National Commission for Minority Educational Institutions Act, 2004 and the object and provisions of the impugned Act are considered, it is revealed that Act of 2004 has been enacted for creation of National Commission for Minority Educational Institutions whereby they can seek recognition for an affiliated college to scheduled University and for allowing a forum of dispute resolution regarding the matters of affiliation between educational institution and Scheduled University, whereas, the impugned Act is to operate altogether in different field with reference to regulation of fee structure in schools in respect of Self Financed Schools whether minority or non minority. It is clear that the Act of 2004 does not deal with the aspect relating to regulation of fee structure in self financed minority school. At this stage, we would like to refer to observations made by the Hon'ble Supreme Court in the case of **Pramati Educational and Cultural Trust and Ors. v/s. Union of India and Ors. reported in 2014 (8) SCC 1** wherein the Hon'ble Supreme Court has held in para 33 as under :-

*"33.....Thus, the law as laid down by this Court is that the minority*

*character of an aided or unaided minority institution cannot be annihilated by admission of students from communities other than the minority community which has established the institution, and whether such admission to any particular percentage of seats will destroy the minority character of the institution or not will depend on a large number of factors including the type of institution."*

[47.1] From the aforesaid decisions rendered by the Hon'ble Supreme Court, it is clear that Article 30(1) gives the right to religious and linguistic minorities to establish and administer educational institutions of their choice. Similarly, Articles 19(1)(g) and 26 confer rights on all citizens and religious denominations respectively to establish and maintain educational institutions. However, right to establish an institution under Article 19(1)(g) is subject to reasonable restriction in terms Article 19 thereof. The right conferred on minorities, religious or linguistic, to establish and administer educational institution of their own choice under Article 30(1) is held to be subject to reasonable regulations which inter alia may be framed having regard to public interest and national interest. It is further clear that the institutions should be permitted to make reasonable profits after providing for investment and expenditure. However, capitation fee and profiteering were held to be forbidden. Thus, we are of the view that fundamental right to establish and administer minority institutions under Article 30 of the Constitution is not absolute and same can be

subject to reasonable restriction.

[48] Thus keeping in view aforesaid object and provisions of both the Acts as well as decisions rendered by the Hon'ble Supreme Court, if the facts of the present case are examined, we are of the view that impugned Act and the Rules under challenge are not violative of Article 30 of the Constitution nor repugnant to National Commission for Minority Education Institution Act, 2004 as contended by the petitioners.

[49] **Point No.(D)**

Whether the provisions of constitution of Fee Regulatory Committee and Fee Revision Committee are unconstitutional and whether representative of parents shall be included in such Committees?

Section 3 of the impugned Act empowers the Government to constitute Fee Regulatory Committee and Fee Revision Committee for the purpose of determination of the fee for any standard or course of study in self-financed schools. Section 3(4) of the impugned Act provides for appointment of Chairperson of the Committee and other members of such committee. The main contention of the petitioners is that the Fee Regulatory Committee and Fee Revision Committee decide the lis between the parties and therefore the same should be headed by a legal mind and appointment be made in consultation with the Chief Justice of the High Court. It is further contended by the petitioners that Fee

Regulatory Committee has adjudicatory powers including power to levy fine and order cancellation of affiliation *inter-alia* under Section 8(2)(e) and Section 14 of the impugned Act. The same is coupled with the fact that bar of jurisdiction of the Civil Court necessitates that the fee regulatory committee be chaired only by judicial member, which is not so in the instant case. It is submitted that the same is contrary to various decisions rendered by the Hon'ble Supreme Court. In the case of *Union of India vs. Madras Bar Association,* reported in *2010 11 SCC 1*, the Hon'ble Supreme Court has held in para 101 as under:

> *"101.Independent judicial tribunals for determination of the rights of citizens, and for adjudication of the disputes and complaints of the citizens, is a necessary concomitant of the rule of law. The rule of law has several facets, one of which is that disputes of citizens will be decided by Judges who are independent and impartial; and that disputes as to legality of acts of the Government will be decided by Judges who are independent of the executive. Another facet of the rule of law is equality before law. The essence of the equality is that it must be capable of being enforced and adjudicated by an independent judicial forum. Judicial independence and separation of judicial power from the executive are part of the common law traditions implicit in a Constitution like ours which is based on the Westminster model."*

[49.1] In the case of **State of Gujarat and another v. Gujarat Revenue Tribunal Bar Association and another, reported in (2012) 10 SCC 353**, the Hon'ble Supreme Court has observed in para 18 as under:

> *"18. Tribunals have primarily been constituted to deal with cases under special laws and to hence provide for specialised adjudication alongside the courts. Therefore, a particular*

*Act/set of Rules will determine whether the functions of a particular Tribunal are akin to those of the courts, which provide for the basic administration of justice. Where there is a lis between two contesting parties and a statutory authority is required to decide such dispute between them, such an authority may be called as a quasi-judicial authority, i.e., a situation where, (a) a statutory authority is empowered under a statute to do any act;(b) the order of such authority would adversely affect the subject; and (c) although there is no lis or two contending parties, and the contest is between the authority and the subject; and (d) the statutory authority is required to act judicially under the statute, the decision of the said authority is a quasi judicial decision. An authority may be described as a quasi-judicial authority when it possesses certain attributes or trappings of a 'court', but not all. In case certain powers under C.P.C. or Cr.P.C. have been conferred upon an authority, but it has not been entrusted with the judicial powers of the State, it cannot be held to be a court. (See Bharat Bank Ltd. v. Employees, Virindar Kumar Satyawadi v. The State of Punjab, Engineering Mazdoor Sabha v. Hind Cycles Ltd., Associated Cement Companies Ltd. v. P.N. Sharma, Ram Rao v. Narayan, State of H.P. v. Mahendra Pal, Keshab Narayan Banerjee v. State of Bihar, Indian National Congress (I) v. Institute of Social Welfare, K. Shamrao v. Assistant Charity Commissioner, Trans Mediterranean Airways v. Universal Exports, SCC 316 p. 338, para 53 and Namit Sharma v. Union of India).”*

[49.2] In the case of **Namit Sharma v. Union of India, reported in (2013) 1 SCC 745,** the Hon’ble Supreme Court has observed in para 85, 86 and 91 as under:

*“85.Section 20 is the penal provision. It empowers the Central or the State Information Commission to impose penalty as well as to recommend disciplinary action against such Public Information Officers who, in its opinion, have committed any acts or omissions specified in this section, without any reasonable cause. The above provisions demonstrate that the functioning of the Commission is not administrative simpliciter but is quasi-judicial in nature. It exercises powers and functions which are adjudicatory in character and legal in nature. Thus,*

*the requirement of law, legal procedures, and the protections would apparently be essential. The finest exercise of quasi-judicial discretion by the Commission is to ensure and effectuate the right of information recoginsed under Article 19 of the Constitution vis-a-vis the protections enshrined under Article 21 of the Constitution.*

*86. The Information Commission has the power to deal with the appeals from the first appellate authority and, thus, it has to examine whether the order of the appellate authority and even the Public Information Officer is in consonance with the provisions of the Act of 2005 and limitations imposed by the Constitution. In this background, no court can have any hesitation in holding that the Information Commission is akin to a tribunal having the trappings of a civil court and is performing quasi-judicial functions.*

*xxx xxx xxx*

*91. The requirement of legal person in a quasi-judicial body has been internationally recognised. We have already referred amongst others, to the relevant provisions of the respective Information Acts of USA, UK and Canada. Even in the Canadian Human Rights Tribunal, under the Canadian Human Rights Act, the Vice-Chairman and Members of the Tribunal are required to have a degree in law from a recognised university and be the member of the Bar of a province or a Chamber des notaires du Quebec for at least 10 years. Along with this qualification, such person needs to have general knowledge of human rights law as well as public law including Administrative and Constitutional Laws. The Information Commissioner under the Canadian law has to be appointed by the Governor-in-Council after consultation with the leader of every recognised party in the Senate and the House of Commons. Approval of such appointment is done by resolution of the Senate and the House of Commons. It is noted that the Vice-Chairperson plays a pre-eminent role within this Administrative Tribunal by ensuring a fair, timely and impartial adjudication process for human rights complaints, for the benefit of all concerned."*

[49.3] In the case of **Tamil Nadu Generation and Distribution Corporation Ltd. V. PPN Power Generating Company Pvt. Ltd.,**

**reported in (2014) 11 SCC 53**, the Hon'ble Supreme Court has observed and held in para 60 and 61 as under:

> *"60. As noticed earlier, Section 84(2) enables the State Government to appoint any person as the Chairperson from amongst persons who is, or has been, a Judge of a High Court. Such appointment shall be made after consultation with the Chief Justice of the High Court. The provision contained in Section 84(2) is notwithstanding the provision contained in Section 84(1). In our opinion, the State Government ought to have exercised its power under sub-section (2) to appoint one or more Judicial Members on the State Commission especially when complicated issues are raised involving essentially civil and contractual matters. A Constitution Bench of this Court in Madras Bar Assn. recognised that: (SCC pp. 50 & 51, paras 87 & 90)*
>
> > *"87. ……..that the legislature has the power to create tribunals with reference to specific enactments and confer jurisdiction on them to decide disputes in regard to matters arising from such special enactments. Therefore it cannot be said that legislature has no power to transfer judicial functions traditionally performed by courts to tribunals."*
> >
> > *xxx xxx xxx*
> >
> > *90. But when we say that the legislature has the competence to make laws, providing which disputes will be decided by courts, and which disputes will be decided by tribunals, it is subject to constitutional limitations, without encroaching upon the independence of the judiciary and keeping in view the principles of the rule of law and separation of powers. If tribunals are to be vested with judicial power hitherto vested in or exercised by courts, such tribunals should possess the independence, security and capacity associated with courts. If the tribunals are intended to serve an area which requires*

> *specialised knowledge or expertise, no doubt there can be technical members in addition to judicial members……."*
>
> *61. Keeping in view the aforesaid observations of this Court, in our opinion, the State of Tamil Nadu ought to make necessary appointments in terms of Section 84(2) of the Act. We have been informed that till date no judicial Member has been appointed in the Tamil Nadu State Commission. We are of the opinion that the matter needs to be considered, with some urgency, by the appropriate State authorities about the desirability and feasibility for making appointments, of any person, as the Chairperson from amongst persons who is, or has been, a Judge of a High Court."*

[50] Relying upon the aforesaid decisions, the petitioners contended that where there is a lis between two parties and statutory authority is required to decide such dispute between them, such an authority may be called as quasi judicial authority where, (a) a statutory authority is empowered under the Act to do any act; (b) the order of such authority would adversely affect the subject; (c) although there is no lis between the parties but between the authority and the subject and (d) the statutory authority is required to act judicially under the statute, the decision of the said authority is a quasi judicial decision. Moreover, for quasi judicial body, the members should be persons possessing requisite qualification and experience in the field of law and also that when the judicial Tribunal having essential trappings of a Court, it must as an irresistible corollary, follow that the appointments are made in consultation with the judiciary. We cannot dispute the aforesaid proposition of law laid down by the Hon'ble Supreme Court. However,

the aforesaid decisions would not render any assistance to the petitioners in the facts and circumstances of the present case.

[51] At this stage, we would like to refer to the other set of decisions rendered by the Hon'ble Supreme Court as well as this Court on the subject. In the case of **Shivji Nathubhai v. Union of India, reported in AIR 1960 SC 606**, the Hon'ble Supreme Court has observed and held in para 9 as under:

> *"9. The next question is whether there is anything in the Rules which negatives the duty to act judicially by the reviewing authority. Mr. Pathak urges that R.54 gives full power to the Central Government to act as it may deem 'just and proper' and that it is not bound even to call for the relevant records and other information from the State Government before deciding an application for review. That is undoubtedly so. But that in our opinion does not show that the statutory Rules negative the duty to act judicially. What the Rules require is that the Central Government should act justly and properly; and that is what an authority which is required to act judicially must do. The fact that the Central Government is not bound even to call for records again does not negative the duty case upon it to act judicially, for even courts have the power to dismiss appeals without calling for records. Thus, R.54 lays down nothing to the contrary. We are therefore of opinion that there is prima facie a lis in this case as between the person to whom the lease has been granted and the person who is aggrieved by the refusal and therefore prima facie it in the duty of the authority which has to review the matter to act judicially and there is nothing in R. 54 to the contrary. It must therefore be held that on the Rules and the Act, as they stood at the relevant time, the Central government was acting in a quasi-judicial capacity while deciding an application under R. 54. As such it was incumbent upon it before coming to a decision to give a reasonable opportunity to the appellant, who was the other party in the review application whose rights were being affected, to represent his case. Inasmuch as this was not*

*done, the appellant is entitled to ask us to issue a writ in the nature of certiorari quashing the order of 28.01.1954, passed by the Central Government."*

[51.1] In the case of **Harinagar Sugar Mills Ltd. v. Shyam Sundar Jhunnjhunwala, reported in AIR 1961 SC 1669**, the Hon'ble Supreme Court has observed and held in para 13, 14 and 16 as under:

*"13. In The Bharat Bank Ltd., Delhi v. Employees of the Bharat Bank Ltd., Delhi, 1950 SCR 459 : (AIR 1950 SC 188) the question whether an adjudication by an industrial tribunal functioning under the Industrial Tribunals Act was subject to the jurisdiction of this Court under Art. 136 of the Constitution fell to be determined: Mahajan, J. in that case observed:*

> *"There can be no doubt that varieties of administrative tribunals and domestic tribunals are known to exist in this country as well as in other countries of the world but the real question to decide in each case is as to the extent of judicial power to the State exercised by them. Tribunals which do not derive authority from the sovereign power cannot fall within the ambit of Art. 136. The condition precedent for bringing a tribunal within the ambit of Art. 136, is that it should be constituted by the State. Again a tribunal would be outside the ambit of Art. 136 if it is not invested with any part of the judicial functions of the State but discharges purely administrative or executive duties. Tribunals however which are found invested with certain functions of a Court of Justice and have some of its trappings also would fall within the ambit of Art. 136 and would be subject to the appellate control of this Court whenever it is found and necessary to exercise that control in the interests of justice."*

*14. It was also observed by Fazl Ali, J at p. 463 (of SCR): (at p. 190 of AIR) that a body which is required to act judicially and which exercises judicial power of the State does not cease to be one exercising judicial or quasi-judicial functions merely because it is not expressly required to be guided by any recognised substantive law in deciding the disputes which come*

*before it.*

*16. The Attorney-General contended that even if the Central Government was required by the provisions of the Act and the rules to act judicially, the Central Government still not being a tribunal, this Court has no power to entertain an appeal against its order or decision. But the proceedings before the Central Government have all the trappings of a judicial tribunal. Pleadings have to be filed, evidence in support of the case of each party has to be furnished and the disputes have to be decided according to law after considering the representations made by the parties. If it be granted that the Central Government exercises judicial power of the State to adjudicate upon rights of the parties in civil matters when there is a lis between the contesting parties, the conclusion is inevitable that it acts as a tribunal and not as an executive body. We therefore overrule the preliminary objection raised on behalf of the Union of India and by the respondents as to the maintainability of the appeals.*

[51.2] In the case of ***Kihoto Hollohan v. Zachillhu*, reported in *1992 Suppl. (2) SCC 651***, the Hon'ble Supreme Court has observed and held in para 24(G) and 115 as under:

*"24. On the contentions raised and urged at the hearing the questions that fall for consideration are the following:*

*xxx xxx xxx*

*(G) The concept of free and fair elections as a necessary concomitant and attribute of democracy which is a basic feature includes an independent impartial machinery for the adjudication of the electoral disputes. The Speaker and the Chairman do not satisfy these incidents of an independent adjudicatory machinery.*

*The investiture of the determinative and adjudicative jurisdiction in the Speaker or the Chairman, as the case may be, would, by itself, vitiate the provision on the ground of reasonable likelihood of bias and lack of impartiality and therefore denies the imperative of an independent adjudicatory machinery. The Speaker and Chairman are elected and hold office on the support of the majority party and are not required to resign their Membership of the political party after their*

*election to the office of the Speaker or Chairman.*

*xxx xxx xxx*

*115.The question is, whether the investiture of the determinative jurisdiction in the Speaker would by itself stand vitiated as denying the idea of an independent adjudicatory authority. We are afraid the criticism that the provision incurs the vice of unconstitutionality ignores the high status and importance of the office of the Speaker in a Parliamentary democracy. The office of the speaker is held in the highest respect and esteem in Parliamentary traditions. The evolution of the institution of Parliamentary democracy has as its pivot the institution of the Speaker. 'The Speaker holds a high, important and ceremonial office. All questions of the well being of the House are matters of Speaker's concern'. The Speaker is said to be the very embodiment of propriety and impartiality. He performs wide ranging functions including the performance of important functions of a judicial character."*

[51.3] In the case of **Utility Users Welfare Association v. State of Gujarat, reported in (2015) SCC online Gujarat 1142**, this Court read down the provisions of Section 84(2) of the Electricity Act of 2003 with a view to facilitate the appointment of the former judge of the High Court as the Chairperson of the Gujarat State Electricity Regulatory Commission on the ground that it performed judicial functions. However, the said judgment came to be stayed by the Hon'ble Supreme Court vide order dated 16.12.2015, as pointed out by the learned Advocate General. Thus, merely because a quasi judicial authority is to decide important aspects after having heard the parties concerned, it does not mean that it has to be headed by judicial mind and that too, to be appointed in consultation with the Chief Justice of the High Court as

a matter of rule.

[51.4] At this stage, it is also required to be noted that the Division Bench of this Court in the judgment and order dated 19.08.2014 passed in Special Civil Application No.18688 of 2013 rendered in the case of Patel Haribhai Premjibhai v. Arvindbhai Chotabhai Solanki dealt with the constitutional validity of Section 211 of the Gujarat Land Revenue Code on the ground that though the authority concerned under Section 211 discharges quasi judicial function, it is not appointed in consultation with the Chief Justice of the state and therefore the said section is ultra vires in view of the decision rendered by the Hon'ble Supreme Court in the case of Madras Bar Association (supra). The Division Bench of this Court after considering various decisions rendered by the Hon'ble Supreme Court, observed in para 12 and 13 as under:

> *"12. The Gujarat Revenue Tribunal is constituted under the Bombay Revenue Tribunal Act, 1957. Section 3 of the said Act provides that there shall be established for the State of Gujarat, a Tribunal, to be called the Gujarat Revenue Tribunal. The Tribunal would consist of the President and such number of other members as may be appointed by the State Government. Section 9 of the said Act pertains to jurisdiction of the Tribunal. Sub-section(1) of section 9 provides that subject to the provisions of the section, the Tribunal shall have jurisdiction to entertain and decide appeals from and revise decisions and orders of officers, not below the rank of a Collector or Deputy Commissioner, in respect of cases arising under the provisions of the enactments specified in the First Schedule. First Schedule to the Bombay Revenue Tribunal Act, 1957 lists enactments and sections under which orders or decisions of the authorities would be appealable or revisable before the Revenue Tribunal. Perusal of such schedule would*

*demonstrate that the Gujarat Revenue Tribunal would be concerned with deciding important issues of private as well as public nature. For example in matters arising out of Bombay Land Revenue Code, an order under section 37(2) of the Code would be subject to appellate or revisional jurisdiction of the Tribunal. Section 37(2) of the Bombay Land Revenue Code pertains to the power of the Collector to conduct a formal inquiry and to decide the claim over any property or any right in or over any property when any dispute regarding whether such property is a Government property or a private property arises. Independently of the Bombay Revenue Tribunal, Act 1957, various proceedings arising out of the Bombay Tenancy & Agricultural Lands Act would also be subject to revisional jurisdiction of the said Tribunal. Such issues would concern whether a person is or is not a tenant, a deemed tenant or a permanent tenant. Such issues thus would have far reaching effect on rights interparte. Jurisdiction of the Gujarat Revenue Tribunal thus cannot be equated with that of the Secretary exercising jurisdiction under section 211 of the Bombay Land Revenue Code. Appeal or revision is creation of the statute. No party who does not have such a right to appeal under the Act can insist on right of appeal. In case of L. Chandra Kumar v. Union of India and others (supra), the nine Judge Bench of Supreme Court was considering various facets of Central Administrative Tribunal constituted under the Administrative Tribunals Act 1995. In such context, the Supreme Court held that judicial review being a basic feature of Constitution, the judgement of the Tribunal would be under review by the High Court in exercise of writ jurisdiction under Article 227 of the Constitution of India. It was held that such superintending powers of High Court cannot be taken away even by an amendment. We may recall that Administrative Tribunals were provided as a substitution of the High Court for its writ jurisdiction under Article 226 of the Constitution of India. Section 28 of the Administrative Tribunals Act bars the jurisdiction of any other Court except that of the Supreme Court under Article 136 of the Constitution pertaining to matters in relation to recruitment and matters concerning recruitment to any service or post or service matters concerning members of any service or persons appointed to any service or post.*

*13.Likewise, in case of Union of India v. R.Gandhi, President, Madras Bar Association (supra), question pertained to certain judicial functions being transferred to a Tribunal. It was a case*

*where the constitution of the National Company Law Tribunal was under challenge. The creation of the Tribunal in that case also excluded the jurisdiction of High Court in matters which were within the purview of the said Tribunal. It was in this background that the Supreme Court held that such Tribunal cannot be manned by persons who are not suitable or qualified or competent to discharge such judicial powers or whose independence is suspect. Issues involved in neither of these two decisions can be compared with the present case where we have noticed contours of power of Secretary under section 211 of the Bombay Land Revenue Code. We are not satisfied with the petitioner's challenge to the vires of the said section and we therefore, reject the prayer concerning the declaration that same is unconstitutional."*

[51.5] In the recent decision rendered by the Hon'ble Supreme Court in the case of **Satyapal Anand v. State of Madhya Pradesh, reported in (2014) 7 SCC 244**, it has been held by the Hon'ble Supreme Court in para 11, 12, 18 and 19 as under:

*"11. We have already taken note of the Scheme of the Act and the role and functioning of the office of the Registrar under the said Scheme. Most of the powers of the Registrar are administrative in nature. While exercising those powers the Registrar is not deciding any lis. He is one of the main administrative functionaries for the purposes of carrying out the objectives of the said Act. At the same time, the Registrar is also give some quasi-judicial powers. He, also for that matter Additional/Joint/Deputy/Assistant Registrar are, therefore, wearing two hats, with predominant role of the administrators. It is not the case of the petitioner that the judicial function should be taken away from the Registrar and assigned to some other authority. The petitioner has pleaded for appointment of a person with legal background as Registrar etc. to enable him to decide the dispute between the parties more effectively, as according to him, any person with no legal/judicial background is incapable of deciding those cases. However, same arguments can be pressed by other side in a reverse situation. If a person with legal background is appointed to any of these posts, then his appointment can be challenged on the ground*

*that such a person though would be fit to discharge the quasi judicial duties, but totally unfit to discharge other administrative duties which are the primary and day to day duties attached to the said office.*

*12. We would have still given some weightage to the argument of the petitioner, had it been a case where order of the Registrar, deciding the dispute, was made final. That is not so. In fact, under Chapter X of the Act, M.P. State Cooperative Tribunal is constituted. This Tribunal consists of the Chairman and two other Members. In so far as Chairman is concerned, Section 77 (3) (a) unambiguously provides that no person shall be qualified to be the Chairman of the Tribunal unless he had been a Judge of a High Court or has held the office of a District Judge for not less than 5 years. Likewise, in respect of two Members of the Tribunal, Section 77 (3) (b) contains a clear stipulation that one of them shall be an officer of Cooperative Department not below the rank of Joint Registrar, and the other shall be non-official closely associated with the cooperative movement or an Advocate or a pleader having practical experience for a period of not less than 15 years. With such a composition of the Tribunal, which is given power to hear appeals from the orders of the Registrar or his nominee, the apprehension of the petitioner is adequately taken care of . We find that in addition to hearing the appeals from the orders of the Registrar, the Tribunal is also given power of revision and review. Similar schemes are provided in various other statutes wherein at the first ladder of the lis, powers are given to the administrative authorities to decide the same with provision for appeal against those orders. One example is Public Premises (Eviction of Unauthorized Occupants) Act 1971. In such cases the orders are passed by the Estate Officer and the order of the Estate Officer is made amenable to challenge before the District Judge under Section 9 of that Act. Similar position can be found under the Land Reforms Act and various other Acts."*

*xx xx xx*

*18. Insofar as judgment in the case of Mukri Gopalan is concerned, the Court therein discussed the power of the appellate authority constituted under Section 18 under Kerala Building Lease Rent Control Act. In the instant case, the*

*appellate authority is the tribunal which is headed by a judicial person. The judgment in R.Gandhi (supra) again pertains to the National Company Law Tribunal and the law stated therein, emphasizing the need for person with judicial background, is in the context of a tribunal. Same is the position in the matter of Gujarat Revenue Tribunal Bar Association case (supra). In so far as Namit Sharma (supra) is concerned, much of what is stated therein is watered down in the decision dated September 3, 2013 rendered in the Review Petition (C) No. 2309 of 2012 titled Union of India v. R.Gandhi. The Court has gone to the extent of holding that CIC is not discharging judicial duties.*

*19. We would like to point out that such quasi judicial powers are given even to the Election Commission under the Representation of People Act, 1951 in a matter where it decides as to whether to register a political party or not. This was so made clear in the case of Indian National Congress (I) vs. Institute of Social Welfare & Ors. 2002 (5) SCC 685. Notwithstanding that Election Commission under Section 29-A of the said Act is required to act judicially and the act of Commission, in that capacity, is quasi judicial, nobody has ventured to say that such functions be discharged only by a person with judicial/legal background."*

[51.6] Similarly, in the case of ***Just Society v. Union of India*, reported in *AIR 2017 SC 2428***, the Hon'ble Supreme Court has observed in para 3 as under:

*"3. The fact that primacy of the opinion of the Chief Justice or his nominee is accorded by certain statutes by use of the expression "in consultation", which expression has been understood by judicial opinion to confer primacy to the opinion of the Chief Justice, the absence thereof in the Act, by itself, will not render Section 4(1) (d) thereof ultra vires the basic structure of the Constitution. If the Legislature in its wisdom had thought it proper not to accord primacy to the opinion of the Chief Justice or his nominee and accord equal status to the opinion rendered by the Chief Justice or his nominee and treat such opinion at par with the opinion rendered by other members of the Selection Committee, we do not see how such legislative wisdom can be questioned on the ground of*

> *constitutional infirmity. It is not the mandate of the Constitution that in all matters concerning the appointment to various Offices in different bodies, primacy must be accorded to the opinion of the Chief Justice or his nominee. Whether such primacy should be accorded or not is for the legislature to decide and if the legislative opinion engrafted in the present Act is in contrast to what is provided for in other Statute(s), such legislative intention, by itself, cannot be understood to be constitutionally impermissible."*

[52] At this stage, it is also required to be noted that the respondent State has submitted compilation (v) during the course of hearing of these petitions wherein it has been pointed out that Chairpersons of four Fee Regulatory Committees in the State have been appointed, who are the former District Judges, whereas the Chairperson of Fee Regulatory Committee for Ahmedabad zone is an experienced former bureaucrat who has vast experience in acting as Chairman, Gujarat State Environment Assessment Authority and as President of Gujarat Civil Services Tribunal for a period of five years. Similarly, the Fee Revision Committee is headed by the retired Judge of this Court. Thus, the presence of legal mind and experience of acting as a quasi judicial authority is very much available. It is also required to be noted that the function which is required to be performed by the members of the Fee Regulatory Committee under the impugned Act cannot be compared with the Revenue Tribunal constituted under the provisions of the Gujarat Revenue Tribunal Act, 1957, inasmuch as the complicated questions of law which arise before the Revenue Tribunal can never arise

before the aforesaid Committee. Thus, the submissions canvassed by the learned advocates appearing for the petitioners on this aspect are misconceived.

[52.1] At this stage, it is also required to be noted that the reliance placed by the petitioners upon the decision rendered by the Hon'ble Supreme Court in the case of Namit Sharma v. Union of India, reported in (2013) 1 SCC 745, is misconceived because the aforesaid judgment has been reviewed by the Hon'ble Apex Court in the case of Union of India v. Namit Sharma reported in (2013) 10 SCC 359.

[53] In one of the petitions filed by the parents, it has been contended that the impugned Act of 2017 has been enacted with a view to protect the interest of the students and the parents and therefore in the Fee Regulatory Committee, representative of the parents shall be included. In support of the said contention, learned advocate for the petitioner has placed reliance upon the similar Acts enacted by different States i.e Maharashtra Educational Institutions (Regulation of Fee) Act of 2014 and Karnataka Educational Institutions (Classification, Regulation and Prescription of Curricula etc.) Rules of 1995. It is true that the ultimate object of the impugned Act of 2017 is to see that the self-financed schools shall not charge the capitation fee and excessive fees and thereby to protect the interest of the parents and the students

studying in such schools. However, under Section 3 of the Act of 2017 the legislature has taken sufficient care for appointment of the concerned experts. Thus, merely because the representative of the parents is not included in the Fee Regulatory Committee, it does not mean that such provision is arbitrary and unconstitutional, as contended by the petitioners. Thus, we are of the view that said contention is misconceived and required to be rejected.

[54] Keeping in view of the aforesaid decisions rendered by the Hon'ble Supreme Court if the provisions of constitution of Fee Regulatory Committee and Fee Revision Committee are considered, we are of the view that the said provisions cannot be said to be arbitrary and unconstitutional.

[55] **Point No.(E)**

Whether the provisions of the impugned Act and Rules are retrospective in nature?

Rule 8 of Rules of 2017 provides as under:

> *"8. Special Provisions for Fee or Fee Structure for Academic Year 2017-18.-(1) Within a period of thirty days from the commencement of these rules, the self financed school shall submit to the Fee Regulatory Committee a proposal for fixation of fees or fee structure in FORM - II alongwith the following information, namely:-*

*(i) audited accounts for the last two financial years i.e. 2014-2015 and 2015-16; and provisional accounts of financial year 2016-17 alongwith a certificate of Chartered Accountant showing the income and expenditure;*
*(ii) fee collected from the students for the previous academic year and also fee collected for the academic year 2017-18;*
*(iii) detailed justification for proposed fee or fee structure shall be given along with necessary accounts and statements relating to income and expenditure and such other matters as may be required by the Fee Regulatory Committee;*
*(iv) an undertaking to the effect that if the self financed school has collected the fee at the rates of previous academic year and such fee being in excess of the fees fixed by the Fee Regulatory Committee, the difference of the fee collected and fee structure determined by the Fee Regulatory Committee, shall be adjusted in the remaining quarters of the academic year. In case annual fee is taken in advance, excess fee shall be refunded within thirty days.*
*(2) The Fee Regulatory Committee shall scrutinise the proposal and after giving an opportunity of being heard take a decision within a period of ninety days from the receipt of the proposal."*

[55.1] It is contended by the petitioners that Rule 8 is ultra vires the provision of the impugned Act of 2017. It is submitted that a statute is presumed to be prospective unless held to be retrospective, either expressly or by necessary implications. A substantive law is presumed to be prospective. It is submitted that in the present case a plain and conjoint reading of Section 2(a) which recognizes that academic year for schools affiliated to different Board would be different, read with Sections 3, 8, 10 and 11 indicate that the Act of 2017 is prospective in nature and can only apply and come into effect from the next academic year i.e. 2018-19. It is further contended that the schools affiliated to CBSE Board have started their academic year from end of

March/beginning of April 2017. It is further stated that after announcing the fees in November 2016, implemented and collected fees for the academic year 2017-18. Thereafter Rule 8 of Rules of 2017 came into force on 25.04.2017 after the implementation and collection of fees for the academic year 2017-18. However, it contemplates fee structure for academic year 2017-18 which is retrospective in nature and goes beyond the scheme of the Act of 2017 and therefore the same is ultra vires the impugned Act. The petitioners have placed reliance upon the decisions rendered by the Hon'ble Supreme Court in the case of Hukum Chand v. Union of India, reported in AIR 1972 SC 2427, in the case of Ashok Lanka v. Rishi Dixit, reported in (2006) 9 SCC 90, in the case of State of Punjab and others v. Bhajan Kaur and others, reported in (2008) 12 SCC 112 and in the case of Mahabir Vegetable Oils Private Ltd. v. State of Haryana, reported in (2006) 3 SCC 620.

[55.2] From the record, it appears that so far as CBSE Board is concerned, academic year commences from the month of April. As per affiliation bye-law, the 'session' of CBSE is for the duration of 12 months when instructions are provided to the students normally from April to March. So far as the Gujarat Board is concerned, the term commences from mid-June of the year. From the facts discussed hereinabove, it is revealed that Gujarat Bill No.22/2017 relating to fixation of fees for the self-financed schools came to be published in the official gazette on

23.03.2017 for the information of the general public. The said bill was passed in State assembly on 30.03.2017 and a press-note came to be issued by the State authority. Thereafter, on 07.04.2017, a circular came to be issued by the State authorities informing all the schools to collect fees at old rates for three months with certain conditions and thereafter the Hon'ble Governor gave assent to the Act of 2017 on 12.04.2017. The notification came to be issued by the State Government while exercising powers under the Act of 2017 on 20.04.2017 and the Rules of 2017 are published in the gazette on 25.04.2017. At this stage, it is also required to be noted that Rule 8(ii) of the Rules of 2017 expressly refers to the fee collected/to be collected for the academic year 2017-18. The affidavit in the prescribed form i.e. Form – IV appended to the Rules of 2017 and to be filed by any school clearly requires the school to indicate categorical information about the fees collected or to be collected for the academic year 2017-18 in column 7 of the table. Further, the circular dated 07.04.2017 issued by the respondent State specifically declares for the information of all the schools of the State to collect fees at old rates for a period of three months with a condition that after determination of fees by the Fee Regulatory Committee excess fees collected shall either be refunded or adjusted.

[56] Thus, in view of the aforesaid, we are of the view that the contention of the petitioners that Rule 8 is retrospective in nature is

misconceived. There is no dispute with regard to the proposition of law laid down by the Hon'ble Supreme Court in the aforesaid decisions relied upon by the learned advocates appearing for the petitioners. However, in view of the aforesaid discussion such decisions would not render any assistance to the petitioners in the facts of the present case.

[57] **Point No.(F)**

Whether Notification dated 25.04.2017 issued by the respondent State in exercise of powers under sub-section (1) of section (9) of Gujarat Self Financed Schools (Regulation of Fees) Act, 2017 is illegal, arbitrary and fit to be quashed?

As per provision of Section 9 of the Act, 2017, the Fee Regulatory Committee is empowered to exempt such self financed schools that charge amount of fee lower than the fee prescribed by the Government by notification in the official gazette, from the determination of fee. Such self financed schools are required to file affidavit to that effect. Further as per first provisio to section 9(1), if any school desires to revise the fees, it has to follow the procedure as laid down in section 8 of the Act. As per second provisio to section 9(1), exclusive pre-primary classes / play groups / creches / not attached to any school are exempted from the application of the provisions of the Act. Such exemption notification shall remain operative till the prescribed fee is revised by the

Government.

[57.1] In exercise of powers under section 9(1) of the Act, the Education Department of the State has issued following notification which reads as under :-

"EDUCATION DEPARTMENT
NOTIFICATION
Sachivalaya, Gandhinagar, 25th April, 2017.

**GUJARAT SELF FINANCED SCHOOLS (REGULATION OF FEES) ACT, 2017.**

No.GH/SH/20/BMS/1117/83/CHH:- In exercise of the powers conferred by sub-section (1) of Section 9 of the Gujarat Self financed Schools (Regulation of Fees) Act, 2017 (Guj.20 of 2017), the Government of Gujarat,-

(i) hereby specifies that the self financed schools specified in column (2) charging the fee lower than the fee specified in column (3) of the Table shown below, shall be exempted from the determination of fee;

(ii) directs that the schools which are charging the fee more than the fees specified in column(3) of the said Table shall require to submit the proposal for approval and fixation of fee in accordance with provisions of the said Act.

**TABLE**

| Sr. No. | Category of self financed school | Amount of fee (per annum) |
|---|---|---|
| **1** | **2** | **3** |
| 1 | Pre-Primary and Primary Schools | Rs.15,000/- |
| 2 | Secondary and Higher Secondary Schools (General Stream) | Rs.25,000/- |
| 3 | Higher Secondary Schools (Science | Rs.27,000/- |

| | | |
|---|---|---|
| | Stream) | |

The fee shall be applicable from the academic year 2017-18.

By order and in the name of the Governor of Gujarat,

AJAY BHATT

Deputy Secretary to Government.

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[57.2] With reference to aforesaid amount of fees which is notified by the respondent for pre-primary and primary schools, secondary and higher secondary schools (general stream) and higher secondary schools (science stream), it is argued by learned counsel appearing for the petitioners that under section 9 of the Act, 2017 there are no guidelines for fixation of fees and figures arrived in the notification dated 25.4.2017 for exempting schools are illegal and arbitrary. It is submitted that fee notified by the Government barely meets the salary expenses alone. It is submitted that while issuing such notification, the Government has not taken into account the expenditure which would be incurred by the schools per annum. It is submitted that over and above minimum number of teachers per class in self financed schools, the self financed schools also employ Computer Teacher, Music Teacher, Dance Teacher, sports coach etc., who all together contribute and achieve a holistic development of a child studying in self financed schools, which is distinctly different from the development of child who has studied in

Government run school. It is submitted that fee fixed under section 9(1) is too below the actual expenditure and such fixation is arbitrary and illegal. Hence, such notification is fit to be quashed, as such notification is issued without collecting data from various categories of schools.

[57.3] The Deputy Secretary of Education Department of respondent State has filed an affidavit in June 2017 in the present proceedings, wherein in para 8, it has been pointed out that how the State has arrived at figures mentioned in the notification issued under Section 9(1) of the Act. It is stated that under Section 12(2) of RTE Act, 2009 read with Rules of 2012 framed thereunder, the State Government is required to reimburse the expenditure incurred towards the students of economically weaker section and disadvantaged group of the society studying in unaided primary schools to the extent of amount actually incurred by the Government Schools per student or the actual amount incurred by the unaided school, whichever is less. It is stated that for the said purpose, a committee consisting of five members under the Chairmanship of the Director, Primary Education was formed to determine the amount to be reimbursed to the unaided schools by the State Government. It is stated that the said committee in its meeting dated 09.09.2016 has examined the issue taking into consideration the estimated expenditure incurred towards the payment of pay and

allowances, free text book, sanitation and first aid during the years 2013-14, 2014-15 and 2015-16 by the District Panchayats and Nagar Prathmik Education Committees. It is stated that the cost of expenditure per student was arrived at Rs.13,894/-. Hence, the committee has resolved to reimburse Rs.13,500/- per student by the State Government. Considering the said decision of the committee, the State Government has prescribed Rs.15,000/- as the cut off amount of fees for the primary schools in the Government Notification dated 25.04.2017.

[57.3] Though it is pleaded by learned counsel for the petitioners that notification dated 25.04.2017 fixing fees, which is issued in exercise of powers under section 9(1) of the Act coupled with Rule 11 of the Rules, is without any guidelines and same is illegal and arbitrary, but it is to be noticed that by such notification bare minimum standard of fees has been provided as cut off amount for the purpose of applying provisions of the Act.

[58] Though learned counsel for the petitioners have relied on the judgments in the case of **Krishna Mohan Pvt. Ltd. v/s. Municipal Corporation of Delhi and others, reported in AIR 2003 SC 2935, State of Kerala and others v/s. M/s. Tranancore Chemicals and Manufacturing Co. and another, reported in AIR 1999 SC 230 and District Registrar and Collector, Hyderabad and another v/s. Canara**

**Bank reported in AIR 2005 SC 186** in support of their argument that notification issued under section 9(1) of the Act is to be declared illegal as they are not guided by any rules, but it is to be noticed that all the above case law cited by learned counsel for the petitioners relates to statute with reference to fiscal legislation. So far as fiscal legislation is concerned, it is settled law that there should be specific guidelines, authority and powers to back the levy. A plenary legislation like the impugned one and the provisions of the Act cannot be struck down only on the ground that such provisions do not provide any guidelines and Rules for the purpose of fixation of exemption limit, under section 9 of the Act.

[59] In view of reply affidavit, on the allegations made by the petitioners, explaining method and procedure for arriving at cut off limit of fees to apply exemption, it cannot be said that such procedure is either illegal or arbitrary, so as to accept the case of the petitioners to quash provision of section 9 or consequential notification dated 25.04.2017, which is issued in exercise of powers under section 9(1) of the Act read with Rule 11 of the Rules. Said provision cannot be said to be conferring unguided and arbitrary powers, more particularly, when the nature of exercise is undertaken for working out bare minimum standard of fees (cut off) for the purpose of applying the provisions of

the Act. If the self financed school, which wants to charge more fee than the specified cut-off amount, then it is required to submit a proposal to the Fee Regulatory Committee for approval and determination of fees in accordance with the provisions of the Act.

[60] It is also clear from the very section 9(1) of the Act itself, that exemption limit notified under section 9(1) of the Act will remain operative till prescribed fees are revised by the Government. In that view of the matter, we are of the view that if any other aspects are required to be taken into consideration, for the purpose of issuing notification under section 9(1) of the Act notifying exemption limit, we permit the Association of Schools, of each category, to file representations before the competent authority seeking revision of annual exemption fee limit notified vide Notification dated 25.04.2017. Such representations are to be filed only through Association of various categories of schools indicating various factors to be considered for fixing fee limit within a period of six weeks from today. If such representations are filed, the Competent Authority to examine such representations and pass appropriate orders within a period of six weeks thereafter. If the Competent Authority finds that exemption fee limit requires revision, it would be open for the Competent Authority to issue revised notification under section 9(1) of the Act, which would be effective from the next

academic year i.e. 2018-19.

61. In view of the aforesaid discussion and reasons, we arrive at the following conclusion on various issues raised by the petitioners :-

(A) The respondent State has legislative competence to enact the Gujarat Self Financed Schools (Regulation of Fees) Act, 2017 and the Rules framed thereunder, including for the schools affiliated to CBSC, ICSE and IB and the provisions of said Act and Rules framed thereunder are also not repugnant to the Right of Children to Free and Compulsory Education Act, 2009.

(B) Sections 2(g), 2(r), 2(t), 2(u), 3, 8, 9, 10, 11 and 12 of the Gujarat Self Financed Schools (Regulation of Fees) Act, 2017 and the Rules 6,7 and 8 and Form II and its Annexures of the Gujarat Self Financed Schools (Regulation of Fees) Rules, 2017 are not violative of Article 14 and 19(1)(g) of the Constitution of India and the various restrictions in the above said provisions of the Act and Rules framed thereunder are reasonable restrictions, within the meaning of Article 19(6) of the Constitution of India.

(C) The provisions of the Gujarat Self Financed Schools (Regulation of Fees) Act, 2017 and the Rules framed thereunder are not violative of the rights guaranteed under Article 30 of the Constitution of India with regard to the minority institutions.

(D) Constitution of Fee Regulatory Committee, and Fee Revision Committee under Sections 3 and 12 of the Gujarat Self Financed Schools (Regulation of Fees) Act, 2017 are not unconstitutional, as contended by the petitioners.

(E) Provisions of the Gujarat Self Financed Schools (Regulation of Fees) Act, 2017 and the Rules framed thereunder are not retrospective in nature, as pleaded by the petitioners.

(F) Notification dated 25.04.2017 issued section 9(1) of the Gujarat Self Financed Schools (Regulation of Fees) Act, 2017 is valid. However, we permit the Association of various categories of schools to file representation to the Competent Authority within a period of six weeks from today for modification of exemption limit notified in the

notification. If such representations are filed, the Competent Authority to consider such representations and pass appropriate orders within a period of six weeks thereafter. If the Competent Authority comes to the conclusion that exemption limit is required to be revised, it shall take necessary steps to issue necessary notification by publication in official gazette and same would be effective from the academic year 2018-19.

(G) We further make it clear that it is open to the Self Financed Schools which are required to submit proposal in Form II to the Fee Regulatory Committee for fixation of fees to propose fees not restricting to various types of fees notified under section 2(g) of the Gujarat Self Financed Schools (Regulation of Fees) Act, 2017 or type of income shown in Part -IV (Annexure- II) of financial information in the Rules, 2017. It is further open for such schools to propose any other fees to improve the quality of education and standard of schools. At the same time, such proposal should not amount to charging of exorbitant fees, or profiteering within the meaning of section 2(r) of the Gujarat Self Financed Schools (Regulation of Fees) Act, 2017.

(H) We permit the Self Financed Schools to submit their proposal to the competent authority within a period of three weeks from today. The Self Financed Schools, which have already submitted proposals, are also permitted to file further documents, if any, within a period of three weeks from today. On such proposals, it is open for the competent authority to take further steps in accordance with law.

With above conclusion and directions, this batch of petitions is disposed of. No order as to costs. Consequently, Civil Applications stand disposed of.

**(R. SUBHASH REDDY, CJ)**

**(VIPUL M. PANCHOLI, J.)**

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