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Judgment reserved on 11.12.2024

Judgment delivered on 02.01.2025

**IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL
HON'BLE SHRI JUSTICE MANOJ KUMAR TIWARI,
AND
HON'BLE SHRI JUSTICE PANKAJ PUROHIT**

Writ Petition (M/ S) No. 1656 of 2021

Welham Boys' School Society & others ... Petitioners

Versus

State of Uttarakhand & another ... Respondents

With

Writ Petition (M/ S) No. 1664 of 2021

Present:-

Mr. Kanwaljeet Singh, Mr. Akshay Singh, Ms. Anjali Rana, Advocates
for the petitioners.

Mr. P.C. Bisht, learned Additional C.S.C. for the State of Uttarakhand

Dated: 02.01.2025

The Court made the following:

JUDGMENT: (per Hon'ble Manoj Kumar Tiwari, J.)

JUDGMENT

1. Petitioners are Private Unaided Residential Schools. They have challenged Government Orders dated 15.01.2021 and 22.03.2021 issued by Uttarakhand Government.

2. Since common question of law and fact are involved in these petitions, therefore, they are being heard and decided together. However, for brevity, facts



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of Writ Petition (M/S) No.1656 of 2021 alone are being considered and discussed.

3. In Writ Petition (M/S) No.1656 of 2021, petitioners have sought the following relief:-

a. Issue writ of Certiorari quashing the government order dated 15.01.2021 (Annexure 1) & Government Order dated 22.03.2021 (Annexure 2) with the writ petition and may further be pleased to order that the Respondents have no authority or power to issue any order relating to school fees of private unaided residential schools.

4. The impugned Government Orders are enclosed as Annexure Nos.1 & 2 to the writ petition, which were issued in the backdrop of Pandemic caused by Covid-19 and the lockdown imposed in consequence thereof. The Government Order dated 15.01.2021 refers to order passed by this Court in Writ Petition (M/S) No. 1627 of 2020 and goes on to state that permission for resuming classes for students of 10th and 12th standard in physical mode has now been granted and full Fee shall be chargeable from students of these two classes from the date classes are opened in physical mode, however, for the period of Lockdown, when physical classes were not running, students would be liable to pay Tuition Fee only. In paragraph no.2 of said Government Order, it is provided that, for students other than those studying in 10th and 12th standard, permission for physical classes is not given and education is to be imparted through online mode, therefore, Schools shall charge only Tuition Fee from students, who are getting instructions through online mode.



5. Subsequent Government Order issued on 22.03.2021, also challenged in these writ petitions, refers to directions issued by this Court in Writ Petition (M/S) No.1627 of 2020 and Writ Petition (M/S) No. 1824 of 2020 and provides that since permission for running physical classes for students of 6th, 7th, 8th, 9th & 11th standard is granted vide Government Order dated 08.02.2021, therefore, students studying in these classes will be liable to pay full Fee only from the date classes are resumed in physical mode and, for the period, when instructions were imparted through online mode, students would be liable to pay Tuition Fee only.

6. According to petitioners, the impugned orders are unsustainable, as State Government cannot determine the amount which a Private Unaided Residential School can charge as Fee from its students and interference made by the State Government is not only unwarranted; but, also without any authority of law. According to petitioners, there is no power available to State Government under Disaster Management Act, 2005 and Epidemic Diseases Act, 1897 to regulate the Fee structure of Private Unaided Educational Institutions.

7. Learned counsel for the petitioners submits that, in the absence of any source of power, State Government cannot impose restrictions, as are imposed by the impugned Government Orders. He further submits that the amount payable as Fee for education of a child is determined by contract between the School and the parents of the child and State Government is not a party to the contract, therefore, State



Government cannot decide the amount chargeable as Fee from the students.

8. Per contra, learned State Counsel submits that our Constitution has envisioned concept of Welfare State, in which a Government plays key role in the protection and promotion of the economic and social well being of its citizens. He further submits that Covid-19 Pandemic posed not only existential crises for mankind; but, also unprecedented situation, in which majority of households were left with little or no income. He submits that economic activity in many sections of the economy came to a standstill during Lockdown; while, in other sectors, it was reduced to fragment of what it was earlier, consequently, paying capacity of majority of households suffered a major jolt. He submits that, during those difficult times, State Government had to step-in in keeping with its role as custodian of public good. He submits that concern of the State Government was that education of children is not disrupted, due to reduction in paying capacity of their guardians/parents. He submits that Article 162 of the Constitution of India provides that executive power of a State shall extend to the matters in respect of which State Legislature has power to make laws. He further submits that Education is covered by Entry 25 of List III of Seventh Schedule and by virtue of Article 246(2) of the Constitution; State can also make law with respect to any matter enumerated in List III of the Constitution. He submits that the impugned Government Order is not in conflict with any law or policy made by the Union Government. Thus, he submits that State Government was well within its right



to take policy decision in respect of matters on which State Legislature can make law. He submits that powers available to the State Government under Article 162 of Constitution are plenary in nature and the only limitation is that a policy decision taken by the State Government should not be in breach of a Constitutional or Statutory provision.

9. Regarding the contention that State Government cannot interfere when fee is determined by contract between student/parent and the school, learned State Counsel submits that imparting education is a public function and held to be a charitable activity, as held in the case of *State of Bombay v. R.M.D. Chamarbaugwala* (AIR 1957 SC 699) and due to this reason, a number of benefits, concessions and exemptions are made available to schools under different legislations. He submits that Right to Education has now been elevated to the status of fundamental right and Union Parliament enacted Right of Children to Free and Compulsory Education Act, 2009 to ensure that every child between the ages of 6 to 14 years gets quality education. Thus, learned State Counsel submits that, during difficult times, when the entire country was reeling under the impact of Covid-19 Pandemic and Educational Institutions were shut, Private Unaided Residential Schools were charging from students not only Tuition Fee, but Fee under various other heads like Hostel Fee, Mess and Laundry Charges, Fee for Horse Riding, Development Charges, Swimming Charges etc. He submits that, in keeping within its role as custodian of public good, State Government had to interfere so that Private Residential



Schools, due to their dominant position, are not able to fleece the parents/guardians of students. Thus, he submits that State Government was under constitutional duty to intervene for ensuring that education of children do not suffer a setback due to the financial crisis suffered by their parents during the Pandemic. Learned State Counsel has referred to the order passed by this Court in different writ petitions and he submits that this Hon'ble Court had also asked the State Government to take necessary steps in view of the situation prevailing at that time.

10. There can be no quarrel with the proposition that executive power of the State extends to matters in respect to which the State Legislature has the power to make laws, however, that power is not unfettered.

Hon'ble Supreme Court in the case of "P.H. Paul Manoj Pandian Vs. P. Veldurai", reported in (2011) 5 SCC 214, has considered and discussed contours of executive power of State as provided in Article 162 of the Constitution. Paragraph nos.47 & 48 of the said judgment are extracted below:

"47. Once a law occupies the field, it will not be open to the State Government in exercise of its executive power under Article 162 of the Constitution to prescribe in the same field by an executive order. However, it is well recognised that in matters relating to a particular subject in absence of any parliamentary legislation on the said subject, the State Government has the jurisdiction to act and to make executive orders. The executive power of the State would, in the absence of legislation, extend to making rules or orders regulating the action of the executive. But, such orders cannot offend the provisions of the Constitution and should not be repugnant to any enactment of the appropriate legislature. Subject to these limitations, such rules or orders may relate to matters of policy, may make classification and



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may determine the conditions of eligibility for receiving any advantage, privilege or aid from the State.

48. The powers of the executive are not limited merely to the carrying out of the laws. In a welfare State the functions of the executive are ever widening, which cover within their ambit various aspects of social and economic activities. Therefore, the executive exercises power to fill gaps by issuing various departmental orders. The executive power of the State is coterminous with the legislative power of the State Legislature. In other words, if the State Legislature has jurisdiction to make law with respect to a subject, the State executive can make regulations and issue government orders with respect to it, subject, however, to the constitutional limitations. Such administrative rules and/or orders shall be inoperative if the legislature has enacted a law with respect to the subject. Thus, the High Court was not justified in brushing aside the Government Order dated 16-11-1951 on the ground that it contained administrative instructions.”

11. A Constitution Bench of Hon’ble Supreme Court in the case of “Rai Sahib Ram Jawaya Kapur & others Vs. State of Punjab”, reported in AIR 1955 SC 549, while considering the scope of executive power under Article 162 of the Constitution, has observed as under:

“13. The limits within which the executive Government can function under the Indian Constitution can be ascertained without much difficulty by reference to the form of the executive which our Constitution has set up. Our Constitution, though federal in its structure, is modelled on the British parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State.

The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic



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welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State.”

12. Hon’ble Supreme Court in the case of “Unni Krishnan, J.P. & others Vs. State of Andhra Pradesh, reported in (1993) 1 SCC 645, held that commercialization of education is not permissible and is opposed to public policy and Indian tradition.

13. In the case of “T.M.A. Pai Foundation & others Vs. State of Karnataka & others, reported in (2002) 8 SCC 481, a Eleven Judges Bench of Hon’ble Supreme Court considered & discussed the view taken by Hon’ble Supreme Court in the case of Unni Krishnan, J.P. & others (Supra) and reiterated the principle that there should be no capitation fee or profiteering by private educational institutions.

14. In the case of “Islamic Academy of Education & another Vs. State of Karnataka & others”, reported in (2003) 6 SCC 697, another Constitution Bench of Hon’ble Supreme Court held that with a view to ensure that educational institutions do not indulge in profiteering or otherwise exploiting its students financially; it shall be open to the statutory authorities and, in their absence by the State to constitute an appropriate body, till appropriate statutory regulations are made in that behalf. Paragraph nos.158 & 159 of the said judgment are reproduced below:

“**158.** Profiteering has been defined in Black's Law Dictionary, 5th Edn. as:

“Taking advantage of unusual or exceptional circumstances to make excessive profits;”



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159. With a view to ensure that an educational institution is kept within its bounds and does not indulge in profiteering or otherwise exploiting its students financially, it will be open to the statutory authorities and in their absence by the State to constitute an appropriate body, till appropriate statutory regulations are made in that behalf.”

15. In the case of “Modern Dental College & Research Centre & others Vs. State of Madhya Pradesh & others, reported in (2016) 7 SCC 353, Hon’ble Supreme Court reiterated the earlier view that profiteering and commercialization of education is impermissible. Paragraph nos.71, 72, 78 & 86 of the said judgment are extracted below:

“**71.** We may again remind ourselves that though right to establish and manage educational institution is treated as a right to carry on “occupation”, which is the fundamental right under Article 19(1)(g), the Court in T.M.A. Pai Foundation [T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481 : 2 SCEC 1] had also cautioned such educational institution not to indulge in profiteering or commercialisation. That judgment also completely bars these educational institutions from charging capitation fee. This is considered by the appellants themselves that commercialisation and exploitation is not permissible and the educational institutions are supposed to run on “no profit, no loss basis”. No doubt, it was also recognised that the cost of education may vary from institution to institution and in this respect many variable factors may have to be taken into account while fixing the fee. It is also recognised that the educational institutions may charge the fee that would take care of various expenses incurred by these educational institutions plus provision for the expansion of education for future generation. At the same time, unreasonable demand cannot be made from the present students and their parents. For this purpose, only a “reasonable surplus” can be generated.

72. Thus, in T.M.A. Pai Foundation [T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481 : 2 SCEC 1] , P.A. Inamdar [P.A. Inamdar v. State of Maharashtra, (2005) 6 SCC



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537 : 2 SCEC 745] and Unni Krishnan [Unni Krishnan, J.P. v. State of A.P., (1993) 1 SCC 645 : 1 SCEC 523], profiteering and commercialisation of education has been abhorred. The basic thread of reasoning in the above judgments is that educational activity is essentially charitable in nature and that commercialisation or profiteering through it is impermissible. The said activity subserves the looming larger public interest of ensuring that the nation develops and progresses on the strength of its highly educated citizenry. As such, this Court has been of the view that while balancing the fundamental rights of both minority and non-minority institutions, it is imperative that high standard of education is available to all meritorious candidates. It has also been felt that the only way to achieve this goal, recognising the private participation in this welfare goal, is to ensure that there is no commercialisation or profiteering by educational institutions.

78. As can be seen in T.M.A. Pai Foundation case [T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481 : 2 SCEC 1] itself, this Court has observed that the Government can provide regulations to control the charging of capitation fee and profiteering. Question 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 Court has observed in para 57 of the judgment is instructive for our purposes and the same is reproduced below: (SCC p. 545)

“57. We, however, wish to emphasise 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.”



In para 69 of the judgment, while dealing with this issue, this Court again 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 Court overruled the earlier judgment in Unni Krishnan [Unni Krishnan, J.P. v. State of A.P., (1993) 1 SCC 645 : 1 SCEC 523] , 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.

86. It is, therefore, to be borne in mind that the occupation of education cannot be treated on a par with other economic activities. In this field, the State cannot remain a mute spectator and has to necessarily step in in order to prevent exploitation, privatisation and commercialisation by the private sector. It would be pertinent to mention that even in respect of those economic activities which are undertaken by the private sector essentially with the objective of profit-making (and there is nothing bad about it), while throwing open such kind of business activities in the hands of private sector, the State has introduced regulatory regime as well by providing regulations under the relevant statutes.”

16. From the judgments referred to above, more particularly para 86 of the judgment in *Modern Dental College (supra)*, it is apparent that profiteering and commercialisation of education by private educational institutions is impermissible and State has been assigned the task of preventing exploitation of students/parents for commercial gain by private educational institutions. Thus, the contention raised on behalf of petitioners that State has no authority to intermeddle in the internal affairs of petitioner-schools, cannot be accepted. The source of power for issuing impugned Government Orders can be traced to Article 162 of the Constitution. During Lockdown, when



Schools were completely closed or during the period, when instructions were imparted virtually to students residing at their homes with parents or guardian, as the case may be, and no facility was provided to them by the schools, yet fee was charged from them under various heads, State Government intervened by providing that Schools can demand Tuition Fee and no other Fee from the students. The interference by the State Government cannot be said to be unjust or illegal. Schools can charge Fee/charges only in lieu of services like Hostel, Catering, Laundry etc. provided to the students. Without providing these services, School Management was not justified in demanding Fee for services, which are provided only when the School runs in physical mode and students reside in the hostel. The executive power of the State under Article 162 of the Constitution extends to framing policy and issuing directions in public interest. The impugned Government Orders are referable to Article 162 of the Constitution, which is the source of power, therefore, the contention raised that these Government Orders are without any authority of law, cannot be accepted.

17. Learned counsel for the petitioners placed heavy reliance upon the judgment rendered by Hon'ble Supreme Court in the case of "Indian Schools, Jodhpur & another Vs. State of Rajasthan & others", reported in (2021) 10 SCC 517. In the said case, private unaided schools of State of Rajasthan had challenged the interference made by Rajasthan Government in their fee structure. State of Rajasthan had enacted a Law, namely, Rajasthan School (Regulation of Fee) Act, 2016, which enabled the State Government to regulate



fee structure of private unaided schools. Validity of the said Act was unsuccessfully challenged by certain schools before High Court of Rajasthan and the matter was then taken up before Hon'ble Supreme Court. Hon'ble Supreme Court held that High Court rightly concluded that provisions of 2016 Act as well as 2017 Rules are intra vires the Constitution of India and not violative of Article 13 to 19(1) (g) of the Constitution.

18. Since the executive power available to a State extends to the field of Legislation provided to the State Legislature by Indian Constitution, therefore, view taken in the case of Indian School Jodhpur (supra) is a complete answer to the challenge thrown by petitioner to the competence of State Government to issue the impugned government orders. In paragraph no. 20 of the aforesaid judgment rendered in the case of Indian School Jodhpur (supra), Hon'ble Supreme Court after considering the view expressed in the case of T.M.A. Pai Foundation (supra) has held that though the fee can be fixed by educational institutions and it may vary from institution to institution, depending upon the quality of education provided, however, commercialisation is not permissible; and in order to ensure that the educational institutions are not indulging in commercialisation and exploitation, the Government is equipped with necessary powers to take regulatory measures and to ensure that the private unaided schools play vital and pivotal role in spreading education and not in making money. It was further held that when it comes to the notice of the Government that the institution was charging fee or other charges which are excessive, it has complete authority coupled



with a duty to issue directions to such an institution to reduce the same so as to avoid profiteering and commercialisation. Paragraph no.137 of the judgment rendered in the case of Indian School Jodhpur (supra) is extracted below:-

“137. In law, the school management cannot be heard to collect fees in respect of activities and facilities which are, in fact, not provided to or availed by its students due to circumstances beyond their control. Demanding fees even in respect of overheads on such activities would be nothing short of indulging in profiteering and commercialisation. It is a well-known fact and judicial notice can also be taken that, due to complete lockdown the schools were not allowed to open for substantially long period during the academic year 2020-21. Resultantly, the school management must have saved overheads and recurring cost on various items such as petrol/diesel, electricity, maintenance cost, water charges, stationery charges, etc. Indeed, overheads and operational cost so saved would be nothing, but an amount undeservedly earned by the school without offering such facilities to the students during the relevant period. Being fee, the principle of quid pro quo must come into play. However, no accurate (factual) empirical data has been furnished by either side about the extent to which such saving has been or could have been made or benefit derived by the school management. Without insisting for mathematical exactitude approach, we would assume that the school management(s) must have saved around 15% of the annual school fees fixed by the school/adjudicated by the statutory regulatory authorities for the relevant period.”

19. The reliance by petitioner on the judgment rendered in the case of Indian School Jodhpur (supra) is misplaced for yet another reason, namely, in the said case Hon'ble Supreme Court was dealing with the orders issued by State of Rajasthan regarding deferment of collection of school fee, including reduction of fee. The observations made by Hon'ble Supreme Court in paragraph no. 117 are in the facts and circumstances of that case, as is apparent from



paragraph nos. 99 and 104 of the said judgment, which are reproduced below:-

“99. Another written submission filed for the intervener, Mr Charanpal Singh Bagri, claiming to be parent in a private school in the State of Punjab. He has raised several issues including the questions pertaining to the matters concerning the schools in the State of Punjab which are sub judice. In our opinion, it is not necessary to dilate on this written submission as the present appeals pertain to the issues concerning the private unaided schools in the State of Rajasthan governed by the 2016 Act and the Rules framed thereunder. It will be open to the intervener to pursue all the points raised in the written submission in the proceedings pending in the High Court or this Court concerning the private schools in the State of Punjab. We may not be understood to have expressed any opinion in that regard.

104. At the outset, in this judgment we consciously opt to limit our analysis to the challenge/grounds concerning the legality and justness of the order dated 28-10-2020 issued by the Director, Secondary Education concerning private unaided schools in the State of Rajasthan and as applicable to the academic year 2020-21 only. We do not wish to advert to or analyse any other issue raised by the parties and we may not be understood to have expressed any opinion either way in that regard.”

20. From the aforesaid discussion, it is apparent that challenge by petitioners to the Government Orders dated 15.01.2021 and 23.03.2021 is without any force. State Government was well within its right to issue the orders, in exercise of its power under Article 162 of the Constitution. In view of the emergent situation, which had arisen due to Covid-19 Pandemic and the lockdown imposed consequent thereto, State Government was justified in issuing necessary directions to the private unaided residential schools not to charge fee for services, which were not availed of by the students during the period when the school/hostel were closed and classes were conducted online.



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21. In such view of the matter, the writ petitions fail and are dismissed. No order as to costs.

MANOJ KUMAR TIWARI, J.

PANKAJ PUROHIT, J.

Aswal