IN HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 06TH DAY OF MARCH, 2024

BEFORE

HON'BLE MR JUSTICE RAVI V HOSMANI

WRIT PETITION NO.26489 OF 2023 (EDN-RES)

C/W

WRIT PETITION NO.24745 OF 2023 (EDN-RES)

IN W.P.NO.26489/2023:

BETWEEN:

REGISTERED UNAIDED PRIVATE SCHOOLS
MANAGEMENT ASSOCIATION KARNATAKA ®
A SOCIETY REGISTERED UNDER
KARNATAKA SOCIETIES REGISTRATION ACT, 1960,
NO.40, RING ROAD, NAGADEVANAHALLI,
JNANABHARATHI POST, BENGALURU - 560 056.
REP. BY ITS PRESIDENT, SRI LOKESHWARAPPA S.

…PETITIONER

[BY SRI SUDARSHAN AND
SRI K.V. DHANANJAY, ADVOCATES (PH)]

AND:

1 . STATE OF KARNATAKA,
REP. BY ITS PRINCIPAL SECRETARY,
DEPARTMENT OF SCHOOL EDUCATION & LITERACY,
M.S. BUILDING, DR. AMBEDKAR VEEDHI,
BENGALURU - 560 001.

2 . COMMISSIONER OF PUBLIC INSTRUCTION,
DEPARTMENT OF SCHOOL EDUCATION & LITERACY,
GOVERNMENT OF KARNATAKA,
NRUPATHUNGA ROAD, BENGALURU - 560 001.

3 . KARNATAKA SCHOOL EXAMINATION AND
ASSESSMENT BOARD,
REP. BY ITS CHAIRPERSON,
6TH CROSS ROAD, MALLESHWARAM,
BENGALURU - 560 003.

…RESPONDENTS

[BY SRI VIKRAM HUILGOL, AAG A/W
SMT.MAMATHA SHETTY, AGA FOR R1 TO R3 (PH)]

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 & 227 OF CONSTITUTION OF INDIA, PRAYING TO (a) QUASH THE IMPUGNED CIRCULAR BEARING NO.ED 209 SLB 2023 DATED 06.10.2023 ISSUED BY R1 AT ANNEXURE-E AT PAGE NO.43 (b) QUASH THE IMPUGNED CIRCULAR BEARING NO.EP 209 SLB 2023 DATED 09.10.2023 ISSUED BY R1 AT ANNEXURE-F AT PAGE NO.44 AND ETC.

IN W.P.NO.24745/2023:

BETWEEN:

ORGANISATION FOR UNAIDED RECOGNISED SCHOOLS ®
(OUR SCHOOLS),
A SOCIETY REGISTERED UNDER KARNATAKA SOCIETIES
REGISTRATION ACT, 1960.

SPOORTHI VIDYANIKETAN SCHOOL,
NO.10, RAJAGOPALREDDY EXTENSION,
CIL LAYOUT MAIN ROAD,
CHOLANAYAKANAHALLI (HEBBALA), R.T. NAGAR POST,
VISHWANATHA NAGENAHALLI - 560 032.
REP. BY ITS SECRETARY, SRI N. PRABHAKAR URS.

…PETITIONER

[BY SRI A. VELAN, SRI ANIRUDH A. KULKARNI &
SRI K.V. DHANANJAY, ADVOCATES (PH)]

AND:

1 . STATE OF KARNATAKA,
REP. BY ITS PRINCIPAL SECRETARY,
DEPARTMENT OF SCHOOL EDUCATION & LITERACY,
M.S. BUILDING, DR. AMBEDKAR VEEDHI,
BENGALURU - 560 001.

2 . THE UNDER SECRETARY (HIGHER),
DEPARTMENT OF SCHOOL EDUCATION & LITERACY,
M.S. BUILDING, DR. AMBEDKAR VEEDHI,
BENGALURU - 560 001.

3 . KARNATAKA SCHOOL EXAMINATION AND
ASSESSMENT BOARD,
REP. BY ITS CHAIRPERSON,
6TH CROSS ROAD, MALLESHWARAM,
BENGALURU - 560 003.

…RESPONDENTS

[BY SRI VIKRAM HUILGOL, AAG A/W
SMT.MAMATHA SHETTY, AGA FOR R1 TO R3 (PH)]

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 & 227 OF CONSTITUTION OF INDIA, PRAYING TO QUASH THE IMPUGNED NOTIFICATION DATED 06.10.2023 BEARING NO.EP 209 SLB 2023 AND CORRESPONDING GAZETTE NOTIFICATION DTD 06.10.2023 ANNEXURES-D AND E AT PAGE NOS.115 AND 116 RESPECTIVELY ON GROUND OF VIOLATING MANDATORY PROVISIONS OF SECTION 16 AND 30 OF THE RTE ACT, 2009 AND THE PROVISIONS OF KARNATAKA EDUCATION ACT, 1983 AND KSEAB ACT, 1966 AND FOR SUCH OTHER INFIRMITIES.

QUASH THE IMPUGNED NOTIFICATION DATED 09.10.2023 BEARING NO.EP 209 SLB 2023 AND THE CORRESPONDING GAZETTE NOTIFICATION DATED 09.10.2023 ANNEXURES-F AND G AT PAGE NOS.117 TO 119 ON GROUND OF VIOLATING THE MANDATORY PROVISIONS OF SECTION 16 AND 30 OF RTE ACT, 2009 AND PROVISIONS OF KARNATAKA EDUCATION ACT, 1983 AND KSEAB ACT, 1966 AND FOR SUCH OTHER INFIRMITIES AND ETC.

THESE WRIT PETITIONS HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 06.02.2024 BEFORE THE PRINCIPAL BENCH, COMING ON FOR PRONOUNCEMENT OF ORDERS BEFORE THE DHARWAD BENCH THROUGH VIDEO CONFERENCING, THIS DAY, THE COURT, PRONOUNCED FOLLOWING:

ORDER

These writ petitions are filed seeking for following reliefs:

In W.P.no.26489/2023:

i) Issue a writ in the nature of Certiorari and /or such other writ order or direction, quashing the impugned circular bearing no.ED 209 SLB 2023 dated 06.10.2023 issued by the respondent no.1 at Annexure-E.

ii) Issue a writ in the nature of Certiorari and/or such other writ order or direction, quashing the impugned circular bearing no.EP 209 SLB 2023 dated 09.10.2023 issued by the respondent no.1 at Annexure-F and etc.

In W.P.no.24745/2023:

i) Issue a writ in the nature of Certiorari and /or such other writ order or direction, quashing the impugned notification dated 06.10.2023 bearing no.EP 209 SLB 2023 and the corresponding

Gazette notification dated 06.10.2023 (Annexures-D and E) on the ground of violating the mandatory provisions of Section 16 and 30 of the RTE Act, 2009 and the provisions of Karnataka Education Act, 1983 and KSEAB Act, 1966 and for such other infirmities.

ii) Issue a writ in the nature of Certiorari and/or such other writ order or direction, quashing the impugned notification dated 09.10.2023 bearing no.EP 209 SLB 2023 and Gazette Notification dated 09.10.2023 (Annexures-F and G) on the ground of violating the mandatory provisions of Section 16 and 30 of RTE Act, 2009 and the provisions of Karnataka Education Act, 1983 and KSEAB Act, 1966 and for such other infirmities.

2. Sri K.V. Dhananjay, learned counsel appearing for Sri Sudarshan, advocate for petitioners submitted that petitioner was association of private unaided schools in Karnataka challenging impugned Notifications, whereunder respondents seek to impose Board Examinations to students of Classes-5, 8, 9 and 11 in schools affiliated to Karnataka Secondary Education Examination Board. It was submitted, as mentioned in impugned Notifications they were issued under Section 22 of Karnataka Education Act, 1983 (for short '**Education Act**'), which reads as under:

"22. Examinations.-
(1)....

(2) Government may make rules for all matters connected with implementation of examination system and conduct of examination and pattern of examination system to which different classes of educational institutions should conform."

3. It was submitted, a plain reading of above indicates that such power could be exercised only by framing 'Rules' and not otherwise. Word 'may' in Section 22 (2) of Education Act, does not dispense with requirement of framing Rules. It was submitted, Section 22 confers power to regulate 'examinations', where it affects large number of students and therefore cannot be exercised without framing Rules. On other hand, use of word 'shall' instead of 'may' in Section 22 (2) of Education Act, would force Government to mandatorily frame Rules for every aspect of examination including aspects covered in Sections 23 to 28 of Education Act, which would render said provision absurd or impractical. It was submitted, if word 'may' is read as 'shall', same would be reasonable alternative construction.

4. It was submitted that ordinarily any scheme of 'examination' would involve collection of 'examination fees', though impugned Notifications do not insist on any 'examination fees', fact that while introducing scheme of examination previously Government had mandated payment of fees by framing Rules, assumption of such power under executive fiat in instant case would give scope for challenge.

5. It was next contended that impugned Notifications do not have binding force in law. It was submitted, Section 128

of Education Act provides for penalty in case of violation of provisions of Education Act (including Rules). But there was no corresponding provision in case of violation of a 'Notification' issued under Section 22, especially as said provision was not self-executing. Thus, for want of enforcement mechanism impugned Notifications are not lawfully binding on schools. On other hand, they would be applicable only in case of subscription or consent by individual schools/institutions. Thus, requirement of Board Examinations would not be universally applicable.

6. It was submitted, though specific prayer for declaring impugned 'Notifications' as not mandatory and as subscriptive was not sought, this Court was empowered to issue such declaration by considering residuary prayer. It was submitted, such declaration could be granted without quashing impugned Notifications and exercise of power in such manner by this Court would be fully justified.

7. It was submitted framing of Rules governing several aspects including scheme of examinations and evaluation, was mandated by Section 7 of Education Act also. It was submitted

ratio in case of **OSPCB**[1] sought to be relied upon to support contention that Board Examination could be introduced without framing 'Rules', would be contrary to context of case. It was submitted that in case of **Consumer**'s case[2], Hon'ble Supreme Court was considering validity of levy of development fees on embarking passengers by lessees of Airports Authority of India at Indira Gandhi International Airport, New Delhi and Chhatrapathi Shivaji International Airport, Mumbai. Principle ground of challenge was that such levy could be authorized only by Rules framed under Airports Authority of India Act, 1994 (for short '**AAI Act**') or determined by regulatory authority under provisions of Airports Economic Regulatory Authority of India Act, 2008 (for short '**AERAI Act**'). Section 12 of AAI Act, empowered Airport Authority to manage airports, civil enclaves and aeronautical communication stations, subject to rules, if any, made by Central Government. Section 22 thereof authorized, Airports Authority to charge fees, rent etc., with previous approval of Central Government. While amended Section 22-A expressly empowered Airports Authority to levy and collect development fees from embarking passengers at airport at rate as may be prescribed. It was submitted, after

1 Orissa State (Prevention & Control of Pollution) Board vs. Orient Paper Mills, (2003) 10 SCC 421
2 Consumer Online Foundation vs. Union of India, (2011) 5 SCC 360

evaluation of provisions of AAI and AERAI enactments, Hon’ble Supreme Court had held development fees levied and collected on authority of two Letters of Central Government was unsustainable and such levy could only be after regulatory authority determined the rates of development fee. It was submitted, Hon'ble Supreme Court had held exercise of power under Section 22-A of AAI Act, was permissible only by framing of 'Rules'.

8. It was submitted, in present case, neither Section 22 nor Section 7 of Education Act could be construed as complete and conferring such power as Section 7 merely authorises government to issue 'orders' where it sees a need for an order, but by providing that same was 'subject to Rules as may be prescribed'. It was submitted, no provision of a statute could be construed in isolation and that a statute has to be read as a whole.

9. It was submitted that Section 145 of Education Act, empowered Government to frame Rules in respect of several subjects enumerated therein, which reads as follows:

> *“Section 145: Power to make rules. –*
>
> *(2) in particular and without prejudice to the generality of foregoing power, such rules may provide for :*

> *(xxxii) qualifications necessary and other conditions to be fulfilled for appearing at examinations conducted by authorities under this Act and method of valuation or revaluation of answer scripts;*
>
> *(xxxviii) scale of fees or charges or manner of fixing fees or charges payable in respect of any certificate, permission, marks lists or other document for which such fees may be collected;*
>
> *(xl) all matters expressly required or allowed by this Act to be prescribed or in respect of which this Act makes no provision or makes insufficient provision and a provision is, in opinion of State Government, necessary for proper implementation of this Act;"*

10. It was submitted, interpretation canvassed by Government to sustain impugned Notifications would render Section 145 of Education Act, otiose, as Section 145 (2) *(xxxii), (xxxviii) and (xl)* specifically require Government to frame 'Rules' after 'previous publication' insofar as *qualifications necessary and other conditions to be fulfilled for appearing at examinations* conducted by authorities under this Act and method of valuation or revaluation of answer scripts as well as fees or charges or manner of fixing them and in respect of such other matters for which there was no provision or insufficient provision or where provision was necessary for proper implementation of Act.

11. It was submitted, phrase *'previous publication'* contained in Section 145 of Education Act would in turn mandate compliance with procedure stipulated for framing Rules or Bye-laws as per Section 23 of Karnataka General Clauses Act, 1899 (hereinafter '**KGC**' Act for short). Accordingly, draft Rules were required to be published in Official Gazette inviting objections/suggestions of stakeholders mentioning date on which draft Rules would be taken up for consideration, and requiring authority empowered to frame Rules to consider objections before such date. It was submitted, as per Section 23 (5) of KGC Act, unless there was compliance with above procedure, it could not held that requirement of '*previous publication*' was met, rendering such Rules open for challenge on ground of violation with mandatory procedure.

12. It was submitted, requirement of '*previous publication*' emphasised democratic and participative process of rule-making and that need for holding of Board Examination especially children of tender minds - even where they are not failed – would be a matter on which reasonable minds could have divergent views. And adherence to Rule making procedure would secure to Government, views of stakeholders. And when

introduction of new 'scheme of examination' affected large number of students, compliance with Section 145 was mandatory. In this regard, learned counsel relied on decisions in case of '**Ramakrishna Mission**[3] and **Misbahul Hassan**'s cases[4].

13. In **Ramakrishna Mission**'s case (*supra*), Hon'ble Supreme Court while interpreting requirement of publication of 'Special Rules' framed under Rule 33 of West Bengal Board of Secondary Education Act, 1963, had held, said requirement would be mandatory requiring strict compliance by referring to Section 24 of Bengal General Clauses Act, 1899. It was held that mere approval by State Government would not be sufficient. Likewise, in **Misbahul Hassan**'s case *(supra)*, Hon'ble Supreme Court interpreted words 'State Government may after previous publication' in Section 433 of Madhya Pradesh Municipal Corporations Act, in light of Section 24 of MP General Clauses Act, 1957 as mandatory requiring strict compliance. It was observed that legislative procedure envisaged under Section 24 of General Clauses Act was in consonance with notions of justice and fair play as it would enable persons likely to be affected to be informed.

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3 Ramakrishna Vivekananda Mission vs. State of West Bengal, (2005) 9 SCC 53
4 Municipal Corporation Bhopal, Madhya Pradesh vs. Misbahul Hassan, (1972) 1 SCC 696

14. In **Utkal Contractor**'s case[5], Hon'ble Supreme Court observed that a statute is best understood if we know reason for it, which would be safest guide to its interpretation. Words of statute take their colour from reason for it and no provision should be construed in isolation. And every provision and every word must be looked at generally before any provision or word is attempted to be construed. It was observed that setting and pattern are important. Further, in **Sanjeevayya**'s case[6], it was held, it is a well-settled rule of construction that provisions of a statute should be so read as to harmonise with one another and provisions of one Section cannot be used to defeat those of another unless it was impossible to effect reconciliation between them. By referring to Crawford's Statutory Construction, it was observed Court should attempt to avoid absurd consequences in any part of statute and refuse to regard any word, phrase, clause or sentence superfluous, unless such result is clearly unavoidable.

15. It was submitted, as per respondents, provisions of Section 22 granted option to Government to regulate subjects mentioned therein by either framing Rules or by way of

5 Utkal Contractors and Joinery Pvt. Ltd. vs. State of Orissa, (1987) 3 SCC 279
6 D. Sanjeevayya vs. Election Tribunal, Andhra Pradesh, (1967) 2 SCR 489

executive fiat would render Sections 22 and 7 of Education Act, vulnerable to attack on ground of excessive delegation. Such interpretation should be avoided.

16. It was submitted that Apex Court in **Ajoy Kumar Banerjee**'s case[7], had observed that duty of Court in interpreting or construing a provision is to read Section and understand its meaning in context. Interpretation of a provision is not mere exercise in semantics, but an attempt to find out meaning of legislation from words used, understand context and purpose of expression used and then to construe expressions sensibly. It was submitted that scope and ambit of delegated authority must be so construed, if possible, as not to make it bad because of vice of excessive delegation of legislative power. Construction if possible should be in such manner that it does not suffer from vice of delegation of excessive legislative authority.

17. Reliance was also placed on decision in **Basant Nahata**'s case[8], wherein reference was made to ratio in **Re Delhi Laws** case to hold that essential legislative function cannot be delegated and unless while delegating Legislature

7 Ajoy Kumar Banerjee vs. Union of India, (1984) 3 SCC 127
8 State of Rajasthan vs. Basant Nahata, (2005) 12 SCC 77

lays down criteria or standards within which delegatee has to act, such unguided, uncanalised and vague delegation would render provisions/statute unconstitutional and contention that defence of such delegation on ground that scope for abuse by Government being higher authority would be minimal was rejected outright.

18. It was also submitted that Karnataka Education Act, 1983, was passed by State Legislature much later than 1983 and brought into force from year 1995. It was submitted that in several decisions, Hon'ble Supreme Court had emphasised on making of Rules, placing of such Rules before Legislature and legislative veto over such Rules had preceeded enactment of Education Act. Section 145 and specifically, Section 145 (4) help to insulate Sections 22 and 7 against an attack on ground of excessive delegation. Hence, Sections 22 and 7 cannot be interpreted as sought by State Government in this case. Learned counsel relied on decisions in **D.S. Garewal**[9], **Devi Das Gopal Krishnan**[10] and **M.K. Papaiah**'s cases[11] for proposition that delegation of essential legislative power without framing Rules providing for guidelines as being unsustainable on ground of excessive delegation.

9 D.S. Garewal vs. State of Punjab, (1959) SCR Supp. (1) 792
10 Devi Das Gopal Krishnan vs. State of Punjab, (1967) 3 SCR 557
11 M.K. Papaiah and Sons vs. Excise Commissioner,(1975) 1 SCC 492,

19. Alternatively, learned counsel for petitioner submitted that impugned Notifications could be arraigned even on ground that they were violative of provisions, nature and spirit of Right to Education Act (for short '**RTE'** Act), which was a Central Statute, even though it had no application to Class 9 and 11. It was submitted, argument of State Government that bar under Section 30 is against forcing students in elementary education (Classes-1 to 8) to pass a Board Examination, since it is clarified that children taking Board Examinations would not be failed, misses true purpose of Section 30 of RTE Act, reads as under:

> *"Section 30. Examination and completion certificate.-*
>
> *(1) No child shall be required to pass any Board examination till completion of elementary education."*

20. If Section 30 would be interpreted literally, it would undoubtedly produce an absurd or anomalous result when seen against what is provided in Section 16 of RTE Act. All provisions of a statute deserve to be read together. Section 16 of RTE Act was amended in year 2019 and lays down that:

> *"16. Examination and holding back in certain cases.-*

> *(1) There shall be a regular examination in fifth class and in eighth class at end of every academic year.*
>
> *(2) If a child fails in examination referred to in sub-Section (1), he shall be given additional instruction and granted opportunity for re-examination within a period of two months from date of declaration of result.*
>
> *(3) appropriate Government may allow schools to hold back a child in fifth class or in eighth class or in both classes, in such manner and subject to such conditions as may be prescribed, if he fails in re-examination referred to in sub-Section (2):*
>
> *Provided that appropriate Government may decide not to hold back a child in any class till completion of elementary education.*
>
> *(4) No child shall be expelled from a school till completion of elementary education."*

21. Prior to its amendment, Section 16 read as under:

> *"16. Prohibition of holding back and expulsion.- No child admitted in a school shall be held back in any class or expelled from school till completion of elementary education."*

22. Therefore, after amendment of Section 16 in 2019, Parliament no longer disapproves of children being failed when they do not secure requisite marks in a 'regular examination' held at end of Classes-5 and 8, as and when State Government frame Rules to authorise such detention.

23. From a joint reading of both Sections 16 and 30, it can be deduced that Parliament cannot be said to be against

failing children in elementary education in 'regular examinations' conducted by schools, but it disapproves they being failed in Board Examination. RTE Act is a beneficial legislation dealing with well-being of children, Section 30 thereof deserves to be read as disapproving elementary school children being subjected to Board Examination in entirety and not just with requirement of passing Board Examination. Reference was made to following observations made in **Sheikh Gulfan**'s case[12]**:**

> *"18. The words used in Section 30(c) of the Act are, in a sense, simple enough; but it must be conceded that the problem of their construction is not very easy, and so, we might attempt to resolve this problem by considering what our approach should be in construing the relevant provision. Normally, the words used in a statute have to be construed in their ordinary meaning; but in many cases, judicial approach finds that the simple device of adopting the ordinary meaning of words does not meet the ends of a fair and a reasonable construction. Exclusive reliance on the bare dictionary meaning of words may not necessarily assist a proper construction of the statutory provision in which the words occur. Often enough, in interpreting a statutory provision, it becomes necessary to have regard to the subject-matter of the statute and the object which it is intended to achieve. That is why in deciding the true scope and effect of the relevant words in any statutory provision, the context in which the words occur, the object of the statute in which the provision is included, and the policy underlying the statute assume relevance and become material. As Halsbury has observed, the words "should be construed in the light of their context rather than what may be*

12 Sheikh Gulfan vs. Sanat Kumar Ganguli, in 1965 SCC OnLine SC 30

> *either their strict etymological sense or their popular meaning apart from that context [Halsbury's Laws of England, Vol. 36, p. 394, para 593]". This position is not disputed before us by either party."*

24. It was submitted, present case was a deserving case, where interpretation of a statutory called for departure from strict etymological approach. It was further submitted that a disjointed reading of statutory provisions is not desirable by referring to following observations in **Vacuum Oil Company**'s case[13]:

> *"Their Lordships are unable to subscribe to these views of the learned Chief Justice. He has only, as they think, been able to reach them by dealing separately with the terms of an enactment which is in its nature composite. He has not availed himself, as an aid to construction, of the light thrown upon each of its expressions by the presence within it of the others. Further in his construction of the words he has, they think, hardly had sufficient regard to the setting in which they are found. In these respects, in their Lordships' view, the method of analysis adopted by the learned Chief Justice is on principle open to objection, and it has resulted in a meaning being attributed to the enactment which is not as they think otherwise obtainable."*

25. Reliance was also placed on decisions in **Pratap Singh**[14] and **Indian Handicrafts Emporium**'s cases[15], for proposition that strict literal interpretation may not always be

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13 Vacuum Oil Company vs. Secretary of State For India in Council (PRIVY COUNCIL), ILR (1932) 56 Bom 313
14 Pratap Singh vs. State of Jharkhand, (2005) 3 SCC 551
15 Indian Handicrafts Emporium vs. Union of India, (2003) 7 SCC 589

desirable, that for purpose of interpretation of a statute, same is to be read in its entirety and purport and object of Act must be given its full effect.

26. It was submitted Section 16 (1) of RTE Act was is self-executory and mandates all schools to conduct 'regular examinations' at end of Classes-5 and 8. Therefore, Board Examination sought to be imposed under impugned Notifications would be in addition to regular examination, literally subjecting children to two annual examinations. It was submitted, State Government neither had power to exempt member schools from penal action by Central Government by failing to conduct 'regular examinations' mandated in Section 16 (1) of RTE Act, nor had it obtained waiver from Central Government against conducting 'regular examinations'. It was submitted, option given to State Government was for framing 'Rules' regarding procedure for detention of children, who fail in Regular Examinations. No such 'rules' would be necessary to simply give effect to Section 16 (1) of RTE Act, as RTE Act is an independent and disassociated Central legislation. Therefore, member schools were faced with situation, wherein they would either have to conduct two examinations or risk losing permission for violating Section 16 (1) of RTE Act.

27. It was submitted that all member schools of petitioners had expressed that they would be holding their own 'regular examinations' to children of Classes-5 and 8 - irrespective of whether those very children were subject to proposed Board Examinations under impugned Notifications. Hence, Board examination under impugned Notification can only be seen as a violation of provisions of RTE Act and liable to be quashed. For aforesaid reasons, impugned Notifications deserve to be quashed.

28. On other hand, Sri Vikram Huilgol, learned Additional Advocate General (‘AAG’ for short) appearing for Smt.Mamatha Shetty, learned Additional Government Advocate for respondents sought to oppose writ petitions.

29. It was submitted, as a sequel to issuance of impugned Notifications at Annexures-E and F dated 06.10.2023 and 09.10.2023 respectively, Government had issued Order dated 16.11.2023 produced as Annexure-R1, whereunder, KSEAB was authorized to conduct Summative Assessments (SA-2) for Classes-5, 8 and 9 and Annual Examinations for Class-11 for academic year 2023-24, subject to conditions laid down therein. It was submitted present writ petitions were filed

without challenging G.O. at Annexure-R1. Hence, writ petitions challenging only Notifications at Annexures-E and F were untenable and liable to be dismissed at threshold.

30. Even grounds on which impugned Notifications were challenged were without merit. Insofar as contention that they were contrary to Section 16 of RTE Act, it was submitted, mere mention of 'regular examination' in Section 16 (1) of RTE Act, cannot be taken as bar against conducting Board Examination.

31. It was further submitted, even prescription against requirement of passing Board Examination till completion of elementary education could not be construed as bar against requiring students to undergo Summative Assessment by KSEAB, especially with clear stipulation against detaining any student on basis of such assessment.

32. It was submitted, contention that it was mandatory to frame Rules for giving effect to provisions of Act by referring to general provision such as Section 38 (4) of RTE Act, would be farfetched as power to issue Notifications was very much available under provisions of Education Act. It was submitted, contention that Section 22 (2) of Education Act, contemplates framing Rules and not issuance of Notifications, by relying upon

decision of this Court in case of **KUSMA**'s case[16] was also misconceived, when it was prerogative of Government to determine whether, and at what stage and for what purpose, framing of Rules was necessary. Section 22 of Education Act being an enabling provision has to be read as another option and not as mandatory requirement to frame Rules. It was submitted, when Section 22 is read with Section 7, it enables Government by order to specify scheme of examinations and evaluation. Therefore, it can be safely concluded that framing of Rules was not mandatory.

33. Insofar as decision relied upon, it was submitted, Court therein had observed normal usage of word '*may'* was directory and not mandatory, but, as State had sought to *overhaul entire system of examination for Class-7, that too on eve of Examinations*, it was opined under such specific circumstances that framing of Rules would have been more appropriate. It was submitted, in present case, Annexure-R1 required only a portion of assessment to be by KSEAB, which would be 20% of total marks for Class–5; 30% for Class-8; 20% for Class-9 and 100% in case of Class-11, with clarification that there would be no provision for detaining

16 Karnataka Unaided Schools (Recognised) Management Association (Regd.,) Bangalore vs. State of Karnataka 1997 (5) KLJ 423

students on basis of SA-2 marks. Under such circumstances, said decision would favour respondents' contentions.

34. Even contention that 'Summative Assessment' contemplated under impugned Notifications had all trappings of Board Examinations conducted by CBSE or ICSE for Class-10 students and therefore violative of RTE Act, was sought to be downplayed. It was submitted, proposed assessments had to be viewed only as preparatories, designed to equip students to meet challenges of Board Examinations in Classes-10 and 12 and were mainly aimed at bringing uniformity in standards of Education in entire State and assessment proposed was an effective tool for achieving said goal. Data collected would enable State to focus attention to meet identified areas/subjects in which students require additional attention, which would guide teacher training. It was fervently submitted that scheme assessment was modeled in such a way that scores in SA-2 component would not have significant implications on overall scores of students and without having any bearing on promotion of students to next Class. It was submitted, according only 20% weightage to SA-2 marks in case of Class-5 and 30% in case of Class-8 would not justify challenge.

35. In response to contention that impugned Notifications were contrary to decision in W.P.no.1699/2023 (**Registered Unaided Private School Management Association Karnataka Vs. Union of India and Ors.**, disposed of on 10.03.2023, hereinafter referred to as "**RUPSMA**'s case"), it was submitted interference with Circular issued earlier was primarily on ground that it was without following procedure under RTE Act. Said decision would have no bearing on present case, where Section 22 read with Section 7 of Education Act are invoked for issuing impugned Notifications. Learned AAG further pointed out that there was virtual admission in said matter that Circular impugned therein was issued under provisions of RTE Act, consequently confining scrutiny by learned Single Judge with reference to procedure under provisions of RTE Act.

36. It was further contended, though provision referred to in impugned Notifications was Section 22 of Education Act, power to govern Examinations, without framing Rules, could be traced to Section 7 of Education Act, which reads as under:

> *"7. Government to prescribe curricula, etc.- (1) Subject to such rules as may be prescribed, State Government may, in respect of educational institutions, by order specify,-*

(a) curricula, syllabi and text books for any course of instruction;

(b) duration of such course;

(c) medium of instruction;

(d) scheme of examinations and evaluation;"

(emphasis supplied)

37. It was submitted, Hon'ble Supreme Court had occasion to consider similar provisions as contained in Section 22 of Education Act, in case of **OSPCB** (supra). It was submitted, Section 54 of Air (Prevention and Control of Pollution) Act, 1981 (for short '**Air Act**'), contained phrase 'State Government may, by Notification in Official Gazette make Rules' to carryout purposes of Act'. It was observed proposition that power of State Government to notify any area in Official Gazette as an air pollution control area to be dependent solely on framing of Rules did not seem to be correct. It was held, when Section 19 of Air Act, empowered State Government to issue Notification, phrase '***State Government may, by Notification in Official Gazette make Rules' to carryout purposes of Act***', would provide option either to frame Rules or issue Notification, without facing challenge on ground of being in violation of Section 54 of Air Act.

38. Heard learned counsel and perused writ petition records.

39. From above, it is seen that petitioners who are Associations of Private Unaided Recognised Schools seeking to question Notifications at Annexures-E and F dated 06.10.2023 and 09.10.2023 respectively.

40. Challenge apparently is two pronged i.e. with reference to provisions of Education Act and with reference to provisions of RTE Act respectively. It is firstly contended that imposition of Board Examinations by impugned Notifications without framing Rules, was contrary to Section 22 of Education Act under which they were issued. Secondly, there was failure to follow mandatory procedure of previous publication and laying before legislature prescribed under Section 145 (4) of Education Act. Thirdly, scheme of examinations would involve collection of examinations fee which would necessitate framing of Rules. Fourthly, Section 128 of Education Act does not prescribe penalty for violation of Notifications, which would mean they cannot be enforced making them non-compulsory. Fifthly, ratio in **OSPCB**'s case (*supra*) was over shadowed in **Consumer**'s case (*supra*) etc.

41. Sixthly, provisions in Section 7 i.e. "subject to Rules, as may be prescribed" could not be read in isolation and when read as part of statute as a whole, regulation of 'Examination System' by issuing Notifications only was impermissible. Seventhly, both Sections 22 as well as 145 of Education Act authorize Government to frame Rules on specified subjects including 'Examinations', 'after previous publication' which in turn mandate following procedure in Section 23 of KGC Act, and on ground that non-harmonious interpretation of Sections 7 (1) (d), 22 (2) and 145 (4) as sought for by Government would lead to absurd results, wherein Section 145 (4) would become otiose.

42. Second branch of challenge is with reference to RTE Act. According to petitioners, provisions of RTE Act i.e. Sections 16 (1) and 30, when read together prohibit holding of Board Examinations altogether. According to them prior to amendment of Section 16 of RTE Act, it prohibited detention or expulsion of students until completion of elementary education; but after amendment, it gave option to State Government to exempt students from being failed or follow condition of holding re-examination after providing additional instructions, before

failing students. Since, amended Section 16 (1) insisted on 'regular examinations'; while Section 30 (1) of RTE Act prohibited insistence on passing Board Examinations, combined effect of said provisions would be prohibition against holding Board Examinations altogether.

43. There are also ancillary grounds of challenge by reference to earlier decisions on Board Examinations in **KUSMA** and **RUPSMA**'s cases *(supra)*.

44. Mainstay of respondents' contention is that power to issue impugned Notifications was in Section 7, while Sections 22 and 145 of Education Act provided additional options for achieving same result. According to them, Section 7 permitted regulation of 'Examinations' by issuing Notifications without framing Rules, as held permissible in **OSPCB**'s case (*supra*). They also contend, requirement of Uniform Summative Assessment, without possibility of detention, for negligible percentage of total marks, with intention of providing uniform assessment, to identify areas for special attention, to formulate teacher training programmes and to prepare students for formative Board Examinations i.e. Classes-10 and 12, was not violative of any provisions of RTE Act.

45. To begin with precedents, in **KUSMA**'s case (*supra*), challenge against was on two grounds; namely, that change insisted upon was drastic measure on eve of examinations and secondly without adherence to requirement of framing Rules as required under Sections 7, 22 and 145 of Education Act. This Court observed that Government did not have absolute freedom in absence of pre-determined Rules to take whatever steps they like *insofar as major decisions are concerned*, but upheld decision of State Government to conduct Board Examinations at end of Class-7 from next academic year.

46. Ratio deducible from above would be that in cases involving *major decisions*, Government would have to be guided by prior framed Rules. Said decision would also be precedent for proposition that drastic changes in Examination System, if sought to be brought about on eve of Examinations, would face risk of being deferred in implementation from subsequent academic year.

47. In **RUPSMA**'s case (*supra*), challenge was against Circulars issued by Government for mandating holding of Board Examinations for Classes-5 and 8 students, on ground that they were violative of Sections 16, 30 and 38(4) of RTE Act, as well as Section 145 of Education Act. This Court upheld challenge.

48. Ratio deducible from said decision would be that Summative Assessment even in respect of small portion of total marks of assessment would be violative of Sections 16 and 30 of RTE Act and Circulars could not supplant Rules required to be framed under Section 38 (4) of RTE Act read with Section 145 of Education Act.

49. For testing impugned Notifications on basis of above ratio, perusal of Annexure-R1, reveals that SA-2 component in total assessment marks is 20% for Class-5, 30% for Class-8, 80% in case of Class-9, while entire extent in case of Class-11. As per statement of objections, SA-2 Examinations are proposed to be conducted for 100 marks and thereafter scaled down to above percentages. Admittedly, hitherto students of Classes-5, 8, 9 and 11 have not been subjected to Board Examinations. In **KUSMA**'s case (*supra),* number of affected Class-7 students alone was stated to be 10 Lakhs. Making provision for proportionate increase in population since year 1996 (i.e. for 28 years), number of students that would be affected by proposed change herein, would be substantially higher, attracting ratio in **KUSMA**'s case (*supra),* and has observed therein regardless of howsoever laudable, the object

may be. In case of *major decisions*, Government would have to be guided by prior framed Rules. Since impugned Notifications are not guided by prior framed Rules, they would fall foul of said ratio. In **KUSMA** as well as in **RUPSMA**'s cases, mandate of Section 145 of Education Act has been well appreciated.

50. On other hand, contention of Government that provisions similar to Section 7 of Education Act, has been interpreted by Apex Court in **OSPCB**'s case (*supra*), as providing option to Government to issue Notifications to regulate subject matter, without recourse to framing Rules, would nevertheless, fall foul of specific provisions in Section 145 (4) of Education Act. Said provision provides procedure for issuance of 'Notifications', i.e. by 'previous publication', which as rightly contended by petitioners has to follow rigours, contemplated in Section 23 of KGC Act. As stated in said provision, in event of failure to follow procedure in Section 23, Notifications cannot be stated to be validly issued.

51. Consequently, when respondents have not made any effort to justify impugned Notifications as compliant with requirement of Section 145 (4) of Education Act, they would have to be held as unsustainable.

52. Said conclusion would dispense with requirement of examining true intent of Sections 7 and 22 (2) of Education Act, or Section 38 (4) of RTE Act or Section 35 (4) of KSEAB Act, by applying various principles of interpretation as sought.

53. Insofar as challenge by petitioners on ground that impugned Notifications are violative of Section 38 (4) of RTE Act, reference to said provision would be necessary. It reads as follows:

> *"(4) Every rule or notification made by the State Government under this Act shall be laid, as soon as may be after it is made; before the State Legislatures."*

54. On perusal, it wouldn't be hard to gauge intent of above provision is same as Section 145 (4) of Education Act, though not equally elaborate.

55. Admittedly, in **RUPSMA**'s case (*supra)*, similar attempt to impose Summative Assessment in respect of Classes-5 and 8 by issuing Circulars has been shot down as violative of provisions of RTE Act. Therefore, Government has perhaps sought to justify impugned Notifications under provisions of Education Act. But, then they cannot escape compliance with Section 145 (4) of Education Act. Even though impugned Notifications are Gazetted, they have not been

issued after following procedure contemplated in Section 145 (4) of Education Act. Hence, impugned Notifications are liable to be quashed in entirety.

56. At this stage, it would be uncharitable of this Court not to cite efforts of learned AAG to elaborately and painstakingly explain to this Court, policy, object and necessity for mandating Uniform Summative Assessment of all students of Classes-5, 8, 9 and 11. But, as held in **KUSMA** and **RUPSMA**'s cases (*supra*), object, howsoever laudable cannot cure procedural defects suffered by impugned Notifications.

57. When Government intends to bring changes to examination system affecting such large number of students, it would be desirable as well as mandatory to follow democratic procedure stipulated. And in case of failure, there need be no further justification to set such faulty measures at naught, regardless of merit policy and object behind such measures.

58. Insofar as preliminary ground regarding maintainability of challenge against bare Notification without questioning Government Order at Annexure-R1 urged by learned AAG, it is seen that impugned Notifications are policy decision expressions, while G.O. at Annexure-R1 is consequent

executive order. While, in absence of Annexure-R1, it could be contended that there was no cause of action for petitioners and that petitions were premature; with issuance of Annexure-R1, said technical defect, stands cured. Failure to question it would thus not have any bearing on merits. Therefore, contention urged regarding maintainability would not hold much water.

59. In view of above conclusions, I pass following:

ORDER

i. Both writ petitions are allowed.

ii. Impugned Notification no.EP 209 SLB 2023 dated 06.10.2023 (Annexure-E) and Notification no.EP 209 SLB 2023 dated 09.10.2023 (Annexure-G) issued by respondent-Government are quashed.

iii. No order as to costs.

Sd/-
JUDGE

GRD/psg