

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP Nos. 2202 and 2322 of 2020

Reserved on: 17.8.2020.

Decided on: 24.8.2020.

1. CWP No. 2202 of 2020

Independent Schools AssociationPetitioner.

Versus

State of Himachal Pradesh & anr.Respondents.

2. CWP No. 2322 of 2020

Sh. Deepak GuptaPetitioner.

Versus

State of Himachal Pradesh & anr.Respondents.

Coram

The Hon'ble Mr. Justice Tarlok Singh Chauhan, *Judge.*

The Hon'ble Ms. Justice Jyotsna Rewal Dua, *Judge.*

Whether approved for reporting?¹ Yes.

For the petitioner(s) : Mr. R.K. Gautam, Senior Advocate with Ms. Radhika Gautam, Advocate in CWP No. 2202 of 2020.

Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate in CWP No. 2322 of 2020.

For the respondents : Mr. Ashok Sharma, Advocate General with Mr. Ranjan Sharma, Mr. Vinod Thakur, Addl. AGs and Ms. Seema Sharma, Dy. AG, for respondent-State in both the petitions.

Mr. B.C. Negi, & Mr. Sanjeev Sharma, Senior Advocates with Mr. Umesh Kanwar, Advocate, for respondent No. 2 in CWP No. 2322 of 2020.

¹ *Whether the reporters of the local papers may be allowed to see the Judgment?*

Jyotsna Rewal Dua, Judge

Central point of both these writ petitions is a notification dated 27.5.2020 issued by the Director, Higher Education, Himachal Pradesh regarding collection of fee and other charges by the Privately Managed Schools in the respondent-State during COVID-19 lockdown period. Therefore, these writ petitions are taken up together for disposal.

2. Facts common to both the writ petitions are;

2(i) Due to nationwide lockdown and curfew imposed in the respondent-State because of unprecedented situation emerging from COVID-19 pandemic, all the schools in the State were ordered to be closed w.e.f. 14.3.2020. On account of its geographical location, State of Himachal Pradesh has Winter Closing Schools with academic session from January to December well as Summer Closing Schools. Academic session in the winter closing school had already started by the time of imposition of lockdown.

2(ii) On 27.3.2020, Director of Higher Education, Himachal Pradesh taking note of 21 days nationwide lockdown imposed by Government of India and subsequent directions/advisories issued by Government of India as well as by Government of Himachal Pradesh, addressed a communication to the managements of all private schools irrespective of their affiliations, to extend the last

date to deposit school fees from 30.3.2020 to 30.4.2020 without charging any late fee. The direction was reiterated in communication dated 2.4.2020 and all privately managed schools were directed to adhere to it. This was followed by another letter dated 25.4.2020 whereby private schools were restrained from forcing the parents to deposit the school fees/funds as well as from hiking the same till further orders.

2(iii) On 26.5.2020 approval of the Governor to implement specific proposals of Education Department during lockdown, in all private schools imparting education from 1st to 12th class was communicated to the Director(s) of Higher Education as well as of Elementary Education. The eight points proposal approved by the Governor was circulated by the Director of Higher Education in the form of directions for compliance, to all the private schools vide communication dated 27.5.2020. All private schools were ordered to ensure strict adherence to the directions. The contents of letter dated 27.5.2020 being germane to the writ petitions are re-produced hereinafter:

"Most Urgent"

No.EDN-HE(21)A(PS-16/2019-General Instructions-
Directorate of Higher Education,
Himachal Pradesh, Shimla-1

Tel:0177-2653120,Extn.234,eMail:Dhe-sml-hp@gov.in
Dated Shimla-I, the 27th May, 2020

To

The Principals/Headmasters
All Private Schools in Himachal Pradesh

Subject: Regarding Collection of Fee by
Private Schools During COVID-19 Lockdown

Memo:

With the prior approval of the competent authority conveyed vide GOHP letter No. Shiksha-II-Chha(11)-1/2006-Loose, dated 26.05.2020 and in view of the announcement of lockdown w.e.f. 24.03.2020 due to outbreak of Novel Corona Virus (COVID-19) and in exercise of the powers conferred Under Section-14 of HP Private Educational Institution (Regulation) Act 1997 read with rule 15 & 16 of the Himachal Pradesh Educational Institutions (Regulations) Rules, 2003; corrigendum 2008 and other enabling provisions of the above Act and Rules, following directions are hereby issued for compliance:-

- 1. No fee except "Tuition Fee" shall be charged from the parents. The tuition fee shall not be demanded and collected on quarterly basis. The tuition fee shall be collected only on monthly basis.*
- 2. The tuition fee shall be collected only from the classes which have been provided online learning material/classes.*
- 3. There shall be no increase in tuition fees and no addition of any other fee/hidden charges in tuition fee.*
- 4. Other funds like building fund, maintenance fund, sports fund, computer fee, co-curricular fee etc. may be deferred during the period of lockdown.*
- 5. No transportation Fee shall be charged during the period of lockdown.*
- 6. No students shall be deprived of online classes/reading material in case of inability to pay the fee because of financial crisis due to lockdown.*
- 7. If any parent did not deposit the tuition fee during the lockdown period, no fine be charged and name of the students may not be struck off from the school roll.*
- 8. Private Schools/Management/Trust shall neither stop payment of monthly salary nor reduce the existing total emoluments being paid to the teaching and non-teaching staff of their schools in the name of non-availability of funds and arrange the funds in case of any shortfalls from the Society/Trust running the school.*

Therefore, Principal/Headmasters of all the privately managed Senior Secondary/High Schools and others in the State are hereby directed to ensure the strict compliance of all the above mentioned provisions (Sr. No. 1 to 8) in letter & spirit. Any defiance in the matter shall be viewed seriously.

These instructions shall apply to all private schools functioning in Himachal Pradesh and affiliated to any board (CNSE/ICES/HPBOSE).

(Dr. Amarjeet Kumar Sharma)
Director of Higher Educational
Himachal Pradesh.”

3. CWP No. 2202 of 2020 has been preferred by a registered association of 45 private schools of Himachal Pradesh, affiliated to Central Board of Secondary Education. The writ petition primarily seeks to quash the above extracted communication dated 27.5.2020 whereas CWP No. 2322 of 2020 preferred by a parent seeks enforcement of the same qua a specific private residential/boarding school, where his ward was admitted as a student. We may now separately take up these writ petitions:-

4. **CWP No. 2202 of 2020.**

4(i) Quashing of communications/notifications dated 9.4.2020, 25.4.2020 and 27.5.2020 is being sought on the grounds that;

(a) Notifications have been issued contrary to various pronouncements of Hon'ble Apex Court and are also in violation of Article 19(1)(g) of the Constitution of India.

(b) Notification dated 27.5.2020 has been issued by the State without there being any statutory authority vested in it.

(c) The directions contained in the notification dated 27.05.2020 are harsh, unreasonable and oppressive. Adherence to the same will ultimately lead to closure of private schools.

4(ii) Notification vis-a-vis judgments delivered by the Hon'ble Apex Court.

4(ii)(a) It has been asserted by learned Senior Counsel on behalf of the petitioner-school association that Hon'ble Apex Court in *T.M.A. Pai Foundation vs. State of Karnataka* reported in (2002)8 SCC 481 and in (2005) 6 SCC 537, titled *P.A. Inamdar vs. State of Maharashtra* has held that any action of the State seeking to regulate or control admissions including interference in fee structure of private unaided educational institutes will constitute a serious encroachment on the right and autonomy of such institutions. State cannot interfere in the day-to-day administration of private unaided educational Institutions in respect of admission of students, recruiting of staff and quantum of fee to be charged. Regulatory measures of the State cannot control these aspects. By issuing impugned communications, State has imposed conditions upon privately managed schools with respect to fee and other charges being levied by them, which are in violation of pronouncements of Hon'ble apex Court, therefore, it has been contended that the impugned communications are liable to be struck down on this very ground that:-

4(ii)(b) It will be appropriate at this stage to take note of relevant paras of *T.M.A. Pai Foundation's* case:

"54. 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. 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.

61. In the case of unaided private schools, maximum autonomy has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fees to be charged. At the school level, it is not possible to grant admissions on the basis of merit. It is no secret that the examination results at all levels of unaided private schools, notwithstanding the stringent regulations of the governmental authorities, are far superior to the results of the government-maintained schools. There is no compulsion on students to attend private schools. The rush for admission is occasioned by the standards maintained in such schools, and recognition of the fact that state-run schools do not provide the same standards of education. The State says that it has no funds to establish institutions at the same level of excellence as private schools. But by curtailing the income of such private schools, it disables those schools from affording the best facilities because of a lack of funds. If this lowering of standards from excellence to a level of mediocrity is to be avoided, the state has to provide the difference which, therefore, brings us back in a vicious circle to the original problem, viz., the lack of state funds. The solution would appear to lie in the States not using their scanty resources to prop up institutions that are able to otherwise maintain themselves out of the fees charged, but in improving the facilities and infrastructure of state-run schools and in subsidizing the fees payable by the students there. It is in the interest of the general public that more good quality schools are established; autonomy and non-regulation of the school administration in the right of appointment, admission of the students and the fee to be charged will ensure that more such institutions are established. 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."

It has been clearly held by the Apex Court that right to establish an educational institution can be regulated but such regulatory measures can be for ensuring maintenance of proper academic standard, atmosphere and infrastructure. Fixation of 'rigid' fee structure by State would be an unacceptable restriction in the exercise of right by such institutions. Privately managed institutions have the right to fix their fee in accordance with parameters prescribed by law. The government can provide regulations for ensuring excellence in education, while forbidding the charging of capitation fee and profiteering in respect of schools. Right of private schools to fix the fee, actually fixation of fee by them, quantum thereof are not in dispute, therefore, we need not go into these aspects any further.

The above position has not even been disputed by learned Additional Advocate General appearing on behalf of the respondent-State. There can be no quarrel with the settled legal position that respondent-State has no right to interfere in the fee structure determined by a private school in accordance with the parameters. Against the above backdrop, the grievances raised by the petitioner association prima-facie appear to be technically correct, as the conditions imposed in the impugned notifications, interfere in the domain of private schools. However, there is considerable force in the stand of the State, with which we are in agreement that in issuing the impugned notifications, the State

has not actually encroached upon the specific domain of the private schools with respect to fixation of fee and other charges by them. The notification in question (*already extracted above*) has only deferred the collection of some fees and charges usually levied by the schools, while permitting them to collect only the tuition fee during the lockdown period. This was only a restriction imposed upon such schools. By imposing such restriction State has not encroached upon the right of the schools to fix their fee structure. The need and necessity for temporarily restricting the right of schools for realizing the fee/charges and the authority behind imposing such restrictions is being discussed hereinafter.

4(iii) Notification issued by the State without there being any statutory authority.

4(iii)(a) The impugned notification has been issued in exercise of powers conferred under Section 14 of H.P. Private Educational Institutions (Regulation) Act 1997 (In short Act of 1997) read with Rule 15 & 16 of the Himachal Pradesh Educational Institutions (Regulations) Rules, 2003 (in short 2003 Rules) and other enabling provisions of this Act and Rules framed thereunder. These provisions of the Act and Rules are extracted hereinafter:

*“Section-14. Direction of the competent authority:-
Without prejudice to the provisions of Section 13, the competent authority may, from time to time, issue such directions regarding the management (including accommodation and infra structural*

facilities) of a private educational institution as it may think fit and it shall be the duty of the manager of such private educational institution to carry out such directions within such time as may be fixed by the competent authority in this behalf."

Rules 15 and 16 of the 2003 Rules read as under:

"15. Every private educational institutions shall bring out prospectus giving detail of the management running the institution, detail of the staff their qualifications, fees, funds and donations to be charges from the students and other relevant information about the institution and shall also contain the permission of the Govt. to establish and run the institution.

16. Proper record of the receipt books to be used for charging fees and funds and other income etc. shall be maintained."

The above provisions do not reflect specific reservation of any power by the State, to regulate the payment of fee and other charges determined by the private schools. However, the envisaged object of the Act of 1997 is *"An Act to provide for the regulation of private educational institutions in the State of Himachal Pradesh"*.

It is contended on behalf of the State that the restrictions imposed on private schools under impugned notifications are within the ambit and scope of the object of the 1997 Act. State has neither the right to encroach upon the power of the schools to fix the fee structure in accordance with the parameters prescribed in the judicial pronouncements nor the State has interfered with the fee and charges fixed by the unaided privately managed schools but has only 'regulated' the

realization thereof during the period for which the schools are to remain closed on account of COVID-19 pandemic.

Learned Additional Advocate General further submitted that though the impugned notifications have not specifically been stated to have been issued under Disaster Management Act, 2005 and Epidemic Disease Act, 1897, but the fact remains that various emergent measures were taken by the State under the provisions of these two enactments for reducing and containing the spread of COVID-19 virus, which resulted in lockdown, forced closure of all business, economic resources, gradually affected possibly every single life in many ways and caused loss of earning/income/business. Schools were not any exception and had to be closed down w.e.f. 14.3.2020. He referred to Sections 23 and 40 of Disaster Management Act in support of issuance of the notifications:

23. State Plan.—(1) There shall be a plan for disaster management for every State to be called the State Disaster Management Plan.

(2) The State Plan shall be prepared by the State Executive Committee having regard to the guidelines laid down by the National Authority and after such consultation with local authorities, district authorities and the people's representatives as the State Executive Committee may deem fit.

(3) The State Plan prepared by the State Executive Committee under sub-section (2) shall be approved by the State Authority.

(4) The State Plan shall include,—

(a) the vulnerability of different parts of the State to different forms of disasters;

(b) the measures to be adopted for prevention and mitigation of disasters;

(c) the manner in which the mitigation measures shall be integrated with the development plans and projects;

(d) the capacity-building and preparedness measures to be taken;
 (e) the roles and responsibilities of each Department of the Government of the State in relation to the measures specified in clauses (b), (c) and (d) above;

(f) the roles and responsibilities of different Departments of the Government of the State in responding to any threatening disaster situation or disaster.

(5) The State Plan shall be reviewed and updated annually.

(6) Appropriate provisions shall be made by the State Government for financing for the measures to be carried out under the State Plan.

(7) Copies of the State Plan referred to in sub-sections (2) and (5) shall be made available to the Departments of the Government of the State and such Departments shall draw up their own plans in accordance with the State Plan.

40. *Disaster management plan of departments of State.*—(1) Every department of the State Government, in conformity with the guidelines laid down by the State Authority, shall—

(a) prepare a disaster management plan which shall lay down the following:—

(i) the types of disasters to which different parts of the State are vulnerable;

(ii) integration of strategies for the prevention of disaster or the mitigation of its effects or both with the development plans and programmes by the department;

(iii) the roles and responsibilities of the department of the State in the event of any threatening disaster situation or disaster and emergency support function it is required to perform;

(iv) present status of its preparedness to perform such roles or responsibilities or emergency support function under sub-clause (iii);

(v) the capacity-building and preparedness measures proposed to be put into effect in order to enable the Ministries or Departments of the Government of India to discharge their responsibilities under section 37;

(b) annually review and update the plan referred to in clause (a);
 and

(c) furnish a copy of the plan referred to in clause (a) or clause (b), as the case may be, to the State Authority.

(2) Every department of the State Government, while preparing the plan under sub-section (1), shall make provisions for financing the activities specified therein.

(3) Every department of the State Government shall furnish an implementation status report to the State Executive Committee regarding the implementation of the disaster management plan referred to in sub-section (1)."

The words 'disaster management' and 'mitigation' have been defined in Section 2 of the Disaster Management Act as follows:

"2(e) "disaster management" means a continuous and integrated process of planning, organizing, coordinating and implementing measures which are necessary or expedient for-

- (i) prevention of danger or threat of any disaster;
- (ii) mitigation or reduction of risk of any disaster or its severity or consequences;
- (iii) capacity building;
- (iv) preparedness to deal with any disaster;
- (v) prompt response to any threatening disaster situation or disaster;
- (vi) assessing the severity or magnitude of effects of any disaster;
- (vii) evacuation, rescue and relief;
- (viii) rehabilitation and reconstruction;

2(i) "mitigation" means measures aimed at reducing the risk, impact or effects of a disaster or threatening disaster situation."

Taking note of these enactments as well as various orders passed, directions issued, action taken and advisories issued from time to time by Government of India as well as by the State, closure of all the schools was ordered by the State government on 14.3.2020. Issuance of impugned directions by State to private schools in such circumstances to meet emergent and unprecedented situation cannot be said to be without authority.

4(iii)(b) Contagion COVID-19 compelled the respondent-State to frame 'the Himachal Pradesh Epidemic Disease (COVID-19) Regulations, 2020' vide notification dated 11.3.2020 under the Epidemic Disease Act. These were further amended on 14.3.2020 empowering the State and certain officers to issue orders for surveillance, prevention, control and treatment of the Epidemic Disease. Section 23 of the Disaster Management Act, 2005 makes it mandatory for the State to have State Disaster Management Plans. It enjoins upon State government to adopt measures for prevention and mitigation of disasters as well as to lay down manner in which the mitigation measures are to be integrated with plans and objects. Section 38 makes it mandatory for the State government to take measures for the purpose of Disaster Management, while specifying some of such measures. Section 39 specifies the responsibilities of every government department in regard to prevention, mitigation, preparedness and response to disasters. To contain the spread of disease, all educational institutions in the State were ordered to be closed on 14.3.2020. By this time winter closing schools in the State had already started functioning though many of these institutions probably had not realized the school fees, last date for deposit of which was 30.3.2020. The education department thereafter came out with impugned notifications/communications. The closure of the

schools was ordered by the State under the provisions of Epidemic Disease Act, Disaster Management Act, 2005 and Regulations framed under the Acts. State's temporarily regulating the payment/deposit of fee/charges already fixed by the schools under such scenario cannot be stricto-sensu termed as infringement with the rights of such institutions to determine and fix their fees. Its only the realization of the fees/charges already fixed by such institutions, which has been deferred under the impugned notification. The same has not even been waived of. State has the authority to regulate payment of fees/charges due from parents of wards studying in the private schools, which were closed by the State to combat an emergent situation. Desperate times demands desperate measures. One also cannot loose right of the object of Act of 1997, which is to 'regulate' private educational institutions. For regulating the institutions, such measures were the need of the hour when scores of people suddenly lost their means of livelihood.

In the above context, it will be apposite to take note of **(2018) 8 Supreme Court Cases 321**, titled **Union of India versus Mool Chand Kharaiti Ram Trust**, wherein following was observed regarding power of State to issue executive directions under Article 162 of the Constitution of India:

"90. We are of the considered opinion that there was no necessity of enacting a law, as the policy/rules under which the land has been obtained, the hospitals were obligated to render free treatment as the land was allotted to them for earning no profit and

held in trust for public good. Similar is the provision in the 1981 rules and apart from that the regulations framed by the Medical Council of India also enjoins upon the medical profession to extend such help and in view of the object of the hospitals, trust, and missionaries it is apparent that there was no necessity of any legislation and the Government was competent to enforce in the circumstances, the contractual and statutory liability and on common law basis.

91. The right to carry on the medical profession has not been restricted, however, what was enjoined upon the respondent-hospitals to perform otherwise had been given a concrete shape. Thus, it was permissible to issue circular in the exercise of power under Article 162 of the Constitution. It was urged on behalf of the hospitals that they were doing a charitable work at their own, thus, it could not be said to be a restriction within the meaning contemplated under Article 19(6) for which a law was required. No new restriction has been imposed for the first time under Article 19(6) of the Constitution of India, as such in our opinion, there was no necessity for enacting a law, such guidelines could be issued under the executive powers.

92. In *Ram Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549, this Court observed that it is open to the State to issue executive orders even if there is no legislation in support thereof provided the State could legislate on the subject in respect of which action is taken. There can be executive orders in the absence of legislation in the field. This Court has observed:

"7. Article 73 of the Constitution relates to the executive powers of the Union, while the corresponding provision in regard to the executive powers of a State is contained in article 162. The provisions of these articles are analogous to those of section 8 and 49(2) respectively of the Government of India Act, 1935 and lay down the rule of distribution of executive powers between the Union and the States, following the same analogy as it provided in regard to the distribution of legislative powers between them. Article 162, with which we are directly concerned in this case, lays down:

"162. Extend of executive power of State.-Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has the power to make laws:

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive

power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

Thus, under this article, the executive authority of the State is executive in respect to matters enumerated in List II of Seventh Schedule. The authority also extends to the Concurrent List except as provided in the Constitution itself or in any law passed by the Parliament. Similarly, article 73 provides that the executive powers of the Union shall extend to matters with respect to which the Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or any agreement. The proviso engrafted on clause (1) further lays down that although with regard to the matters in the Concurrent List the executive authority shall be ordinarily left to the State it would be open to the Parliament to provide that in exceptional cases the executive power of the Union shall extend to these matters also.

Neither of these articles contain any definition as to what the executive function is and what activities would legitimately come within its scope. They are primarily concerned with the distribution of the executive power between the Union on the one hand and the States on the other. They do not mean, as Mr. Pathak seems to suggest, that it is only when the Parliament or the State Legislature has legislated on certain items appertaining to their respective lists, that the Union or the State executive, as the case may be, can proceed to function in respect to them.

On the other hand, the language of article 162 clearly indicates that the powers of the State executive do extend to matters upon which the state Legislature is competent to legislate and are not confined to matters over which legislation has been passed already. The same principle underlies article 73 of the Constitution. These provisions of the Constitution, therefore, do not lend any support to Mr. Pathak's contention.

xxx xxx xxx

12. It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily, the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away.

The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the

different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature.

It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of article 154 of the Constitution but, as we have already stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of executive are limited merely to the carrying out of these laws.

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

xxx

xxx

xxx

17. Specific legislation may indeed be necessary if the Government require certain powers in addition to what they possess under ordinary law in order to carry on the particular trade or business. Thus when it is necessary to encroach upon private rights in order to enable the Government to carry on their business, a specific legislation sanctioning such course would have to be passed.

18. In the present case it is not disputed that the entire expenses necessary for carrying on the business of printing and publishing the textbooks for recognised schools in Punjab were estimated and shown in the annual financial statement and that the demands for grants, which were made under different heads, were sanctioned by the State Legislature and due Appropriation Acts were passed.

For the purpose of carrying on the business the Government do not require any additional powers and whatever is necessary for their purpose, they can have by entering into contracts with authors and other people. This power of contract is expressly vested in the Government under article 298 of the Constitution. In these circumstances, we are unable to agree with Mr. Pathak that the carrying on of the business of printing and publishing textbooks was beyond the competence of the executive Government without a specific legislation sanctioning such course."

Apex Court held that executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. The executive cannot go against the provisions of the Constitution or of any law. It is not necessary that in order to enable the executive to function, there must be a law already in existence and that powers of executive are limited merely to the carrying out of this law. Therefore, what cumulatively emerges from the above discussion is that the State had the authority to issue impugned directions to the private schools in the given facts and circumstances.

5. Reasonableness of Restrictions:

5(i) Necessity of State to temporarily regulate/restrict the realization of the fee and charges normally levied by private schools, in view of exigencies of situations arising because of lockdown and curfew imposed in the State due to spread of

COVID-19, is understandable And in view of discussion made hereto before, such temporarily measures so taken by the State in the impugned notification cannot be said to be without any authority. However, the restrictions, even though imposed temporarily, cannot be unreasonable or arbitrary.

5(ii) The sum and substance of the restrictions imposed by the State with the right of private schools to collect fee and other charges under the impugned notification dated 27.5.2020 can be summed up as under:-

Tuition Fee

a) Private schools can charge and collect only the Tuition Fee. Such charges and collection can only be on monthly basis and only from those classes going online. Tuition fee cannot be increased. No other fee or any hidden charges are to be added towards tuition fee.

b) No fine can be charged in case of non-payment of tuition fee during lockdown period.

c) Name of student cannot be struck off from the school on account of non-payment of tuition fee. Such a student cannot be deprived of the facility of online classes/reading material.

Transport charges

Private schools cannot charge any transportation fee during lockdown period.

Other Funds

Collection of building funds, maintenance fund, sports fund, computer fee, co-curricular fee etc. will stand deferred during lockdown period. ◇

Salary/Emoluments to Staff & Working of Staff

Monthly salary being paid to its teaching/non-teaching staff shall not be stopped by the private schools. The existing emoluments shall also not be reduced in the name of non-availability of funds. If required, deficiency in the funds can be made good from the Society/Trust running the school.

5(iii) While directing the private schools to neither stop payment of monthly salary nor reduce the existing total emoluments being paid to their teaching and non-teaching staff but at the same time permitting the schools to collect only the tuition fee, that too on monthly basis without authorizing them to compulsorily realize even this tuition fee is an unreasonable restriction. As in such situation incoming of funds have been made more or less voluntary, dependant on the goodwill of the parents whereas outgoing payments to be made by the schools are mandatory. Learned Additional Advocate General could not justify as to why even the tuition fee has not been permitted to be collected compulsorily by the private schools. This is rather an illogical and arbitrary condition. In case, the privately managed schools can not authoritatively charge even the 'tuition fee' then it is beyond comprehension as to how they will

pay the monthly salary/emoluments to not only their teaching but non-teaching staff as well. It cannot be assumed that private schools have unending supply of reserve funds with them. Thus conditions No. 6,7 and 8 in the impugned communication dated 27.5.2020 run in contradiction to each others' professed object. The object sought to be achieved in condition No. 8 will eventually be defeated by condition Nos. 6 and 7. ◇

We cannot loose sight of the fact that by and large wards of affluent/reasonably well off families study in the private schools. Private schools are sought after because of the status and reputation they enjoy. These schools may have been closed temporarily but are required to maintain their already created infrastructure and instructional facilities. Their recognition and affiliation also depends upon compliance of these aspects. These schools are not financially aided by the State government. Whether all this can be met from tuition fees alone is another question. Neither we have the facts nor the figures to deal with the income and expenditure of the schools nor we intend to go into the related factual muddle. But these aspects do need consideration by the State while imposing temporary restrictions upon the private schools.

5(iv) It has also been argued on behalf of the private schools that apart from tuition fees, they are also entitled to

collect the transport charges. The transport charges cover not only the maintenance and fuel of vehicles but also cover the insurance payments, loan installments, taxes, salaries of transport staff. Further it has been submitted that annual charges levied by the schools amongst others cover repayment of loans taken for building infrastructure of the school and would also be required for carrying out further improvements in the new world viz setting up online educational facilities, payment to software hosts, proposed sanitization of premises on re-opening etc. An important fact highlighted by the petitioner association is the necessity of presence of the staff in the school premises for effective and continuous online dissemination of education in accordance with prescribed syllabus under supervision and after following physical distancing norms and protocols.

5(v) The impugned notifications were issued by the State practically in a state of emergency therefore perhaps principles of natural justice were not complied before their issuance. Further lockdown is gradually being lifted by the State government. The commercial scenario at present is also not the one, which was prevailing few months ago. Therefore, in the interest of all concerned, **we issue following directions:**

i) Respondent-State is directed to revisit and re-examine all the conditions imposed by it upon private schools in

its communication dated 27.5.2020 in the light of observations made above. Whereafter a fresh decision in accordance with law and subject to succeeding directions shall be taken on the subject within a period of four weeks from today.

ii) While revisiting the conditions, the judicial pronouncements on the subject shall be kept in view.

iii) It shall be open to the representatives of petitioner and other stakeholders to submit their representations on the issues involved to the respondent No. 2 within a period of one week from today. All these representations shall be considered by the Competent Authority of respondent-state while revisiting the communication dated 27.5.2020.

iv) Conditions No. 6 and 7 of the notification dated 27.05.2020 are quashed and set aside while condition No. 1 is partially modified. Private schools henceforth are allowed to charge monthly tuition fees and are authorized to enforce collection of the same. The past tuition fees due towards the private schools are also permitted to be realized by them without charging any fine/late fees after giving two months notice.

v) A genuine representation of a parent regarding his/her inability to pay the tuition fee due to financial issues arising out of the lockdown, preferred to the competent authority of the concerned school shall be examined by the competent authority of the school within one week from the date of

representation and sympathetic decision in accordance with law shall be taken thereupon.

vi) While revisiting the notification dated 27.5.2020, State shall also examine feasibility of allowing the schools to enforce attendance of their staff in the school premises, for the purpose of imparting proper, good quality education in accordance with prescribed syllabus through continuous and good quality online streaming, after following the protocols regarding maintenance of physical distancing norms within the period granted. A specific decision in this regard shall be taken and indicated in terms of direction No. 5(v)i) above.

6. CWP No. 2322 of 2020

6(i) This writ petition has been preferred by a parent against Lawrence School Sanawar, seeking implementation of the notification dated 27.5.2020. The prayer clause of the writ petition reads as under:

“That in view of the submissions as made in detailed above, the necessary directions may kindly be issued to the respondents by issuing the writ of mandamus or any other appropriate writ or orders for waiving off the fees of the students studying in the school for the sessions 2020-21 and refund the amount already received by the respondent No. 2 excluding the tuition fees as per the notification dated 27.05.2020 issued by the Director of Higher Education, H.P. vide Annexure P-1 and further the demand notice calling upon the parents of the children to make the payment of Rs. 1,70,800/- Annexure P5, may kindly be ordered to be declared illegal, null, void and against the mandate of directions issued by the respondent No. 1 by quashing the same.”

6(ii) Notification dated 27.05.2020 does not make any distinction between private schools whether residential or non-residential vis-a-vis its applicability. Respondent school on its own has not challenged the notification or its applicability to it. However, in response to the prayer made in the petition for directing the school only to charge tuition fee without any component of boarding/lodging charges, it has been submitted by learned Senior Counsels on behalf of the school that:-

6(ii)(a) Respondent is a complete residential school. 'Tuition fee' in respect of respondent residential school will apply to the entire fee that is relatable to the education of a child. In a complete residential school there is no concept of separate 'tuition fee' as child's education and overall development would not remain confined to class rooms but would travel beyond. The fee of a residential school is thus all encompassing and cannot be compartmentalized.

6(ii)(b) Respondent residential school is a small township having 139 acres of land with large number of old buildings, large number of roads, pathways which all require all forms of maintenance. The facilities so created are permanent.

6(ii)(c) It is further the case of the respondent that the fee charged is all inclusive. Salary, wages and benefits for complete education of a student is one component of the whole, which works out at about 80% of annual fee. Out of ₹5,86,200/- fee for

civilian category, the component spent on child's education alone comes out to ₹4,68,960/-. Maintenance of whole campus takes up the balance small percentage of fee leaving variable costs for boarding/lodging expenses, which are a small percentage of the fee that is dependent upon students being on campus. This has already been offered as rebate. The savings, which the school would make due to absence of students have been estimated at ₹270 per day and the benefit has been passed on to the parents.

6(ii)(d) Various other factors have been pointed out in the reply viz charges of concessional fee from about 91 defence service students etc.

6(iii) Reference has also been made to **(2016) 7 SCC 353**, titled **Modern Dental College & Research Centre v. State of M.P.** in support of the submission that fee has been fixed by the respondent keeping in mind the infrastructural facilities available with it, their required upkeep and maintenance, the investments made and future plans for betterment of institution. The relevant paras are reproduced hereinunder:

"72. Thus, in T.M.A. Pai Foundation, P.A. Inamdar and Unni Krishnan, 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.

75. To put it in nutshell, though the fee can be fixed by the educational institutions and it may vary from institution to institution depending upon the quality of education provided by each of such institution, commercialisation is not permissible. In order to see 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 these educational institutions keep playing vital and pivotal role to spread education and not to make money. So much so, the Court was categorical in holding that when it comes to the notice of the Government that a particular institution was charging fee or other charges which are excessive, it has a right to issue directions to such an institution to reduce the same.

77. This Court also held that for fixing the fee structure, following considerations are to be kept in mind:

(a) the infrastructure and facilities available;

(b) investment made, salaries paid to teachers and staff;

(c) future plans for expansion and/or betterment of institution subject to two restrictions, viz. non-profiteering and non-charging of capitation fees."

We may hasten to add here itself that Section 9 of the Act, 2007 takes care of the aforesaid parameter in abundance.

81.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 2007 Act](#). 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."

Regarding inapplicability of the notification in question, reliance has also been placed on following para of **(2012) 6 SCC 1**, titled ***Society for Unaided Private Schools of Rajasthan versus Union of India and Another:-***

"54. However, we want the Government to clarify the position on one aspect. There are boarding schools and orphanages in several parts of India. In those institutions, there are day scholars and boarders. The 2009 Act could only apply to day scholars. It cannot be extended to boarders. To put the matter beyond doubt, we recommend that appropriate guidelines be issued under Section 35 of the 2009 Act clarifying the above position."

Whether concept of 'Tuition Fee' can be held to be applicable to a complete residential school which does not compartmentalize the fees/charges under different heads, is a question which needs consideration by the State. The notification dated 27.05.2020 as it stands, cannot be applied in its abstract form to the respondent school. However, we direct the respondent-State to examine the issue of difference between residential/non-residential/partially residential school vis-a-vis applicability of any direction which will be issued by the State in terms of para-5(v)(i) above and take appropriate decision in terms of same directions.

7. With these observations and directions, these writ petitions are disposed of, so also the pending application(s), if any.

For compliance of directions, to come up on

5.10.2020.

**(Tarlok Singh Chauhan),
Judge.**

**(Jyotsna Rewal Dua),
Judge.**

**August 24, 2020,
(vs)**