IN THE HIGH COURT AT CALCUTTA

CONSTITUTIONAL WRIT JURISDICTION

APPELLATE SIDE

The Hon'ble **JUSTICE SANJIB BANERJEE**

And

The Hon'ble **JUSTICE MOUSHUMI BHATTACHARYA**

WPA 5890 of 2020
with
IA No. CAN 1 of 2020 (CAN 4006 of 2020)
with
IA No. CAN 2 of 2020 (CAN 4867 of 2020)
with
IA No. CAN 3 of 2020 (CAN 4869 of 2020)
with
IA No. CAN 4 of 2020 (CAN 5108 of 2020)
with
IA No. CAN 5 of 2020 (CAN 5111 of 2020)
with
IA No. CAN 6 of 2020 (CAN 5149 of 2020)
with
IA No. CAN 7 of 2020 (CAN 5150 of 2020)
with
IA No. CAN 8 of 2020 (CAN 5157 of 2020)
with
IA No. CAN 9 of 2020 (CAN 5188 of 2020)
with
IA No. CAN 10 of 2020 (CAN 5189 of 2020)
with
IA No. CAN 11 of 2020 (CAN 5216 of 2020)
with
IA No. CAN 12 of 2020 (CAN 5217 of 2020)
with
IA No. CAN 13 of 2020 (CAN 5294 of 2020)
with
IA No. CAN 14 of 2020 (CAN 5295 of 2020)
with
IA No. CAN 15 of 2020 (CAN 5528 of 2020)

with
IA No. CAN 16 of 2020 (CAN 5529 of 2020)
with
IA No. CAN 17 of 2020
with
IA No. CAN 18 of 2020
with
IA No. CAN 19 of 2020
with
IA No. CAN 20 of 2020
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IA No. CAN 21 of 2020
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IA No. CAN 22 of 2020
with
IA No. CAN 23 of 2020
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IA No. CAN 24 of 2020
with
CAN 25 of 2020

with
CAN 26 of 2020
with
CAN 27 of 2020
with
CAN 28 of 2020
with
CAN 29 of 2020
with
CAN 30 of 2020
with
CAN 31 of 2020

Vineet Ruia
v.
Principal Secretary, Department of School
Education, Government of West Bengal and Others

With

WPA 5378 of 2020
IA No. CAN 2 of 2020
(CAN 3697 of 2020)
with
IA No. CAN 3 of 2020

(CAN 3698 of 2020)

Pratyush Patwari
v.
State of West Bengal and Others

With

WPA 5872 of 2020
With
IA No. CAN 1 of 2020
(CAN 3956 of 2020)
Santosh Kumar Yadav
v.
Union of India and Others

With

WPA 5400 of 2020
Raja Satyajit Banerjee
v.
State of West Bengal and Others

With

WPA 5530 of 2020
IA No. CAN 1 of 2020
(CAN 3252 of 2020)
Biplab Kumar Chowdhury
v.
Union of India and Others

(Via Video Conference)

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For Calcutta Boys School :	Ms Chama Mookerjee, Adv., Ms Shruti Agarwal, Adv.
For Julien Day School :	Mr Anujit Mookherji, Adv.
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For New Town School :	Ms Lapita Banerjee, Adv., Ms Arijita Ghosh, Adv., Mr Souma Sil, Adv.
For D.P.S. Ruby Park :	Mr S.N. Mookherjee, Sr Adv., Mr Somopriya Chowdhury, Adv., Mr Dinabandhu Dan, Adv., Mr Dipayan Dan, Adv.

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Mr Manas Dasgupta, Adv.

Hearing concluded on: October 6, 2020.

Date: October 13, 2020.

SANJIB BANERJEE, J. : –

An invisible virus, that has threatened the dominant species on the planet and has spawned an array of bewildering reactions across diverse spheres of life, has also made sure that it leaves its impact in the judicial arena. From bringing to life the act-of-God clause that was mostly regarded as a redundant appendage in contracts to redefining the rules of human engagement, the pandemic has almost been all pervasive. The present lis is born in its wake: upon a unique situation arising where students have been kept away from academic institutions for months together, prompting their parents or guardians to question why regular fees ought to be paid in such a scenario. These five petitions canvass a point of public interest that private unaided schools across the State should allow substantial concession in fees as the physical conduct of classes has not been possible for more than six months and normal functioning may not resume in a full-fledged manner for several months more.

2. The lead petition is WPA 5890 of 2020. In due course the other petitions, though filed earlier, have been heard together. In the principal matter, parents or guardians of students of about 145 schools, mostly in an around the city, have joined together to suggest that these private

institutions cannot be allowed to make merry and charge the usual fees despite no classes being conducted for a considerable period and, thereafter, classes being resumed on the online mode in some cases with very limited resources being used by the schools. The parents or guardians complain of profiteering by the schools by unjustly enriching themselves even as several of the schools have terminated the services of several of the usual employees or have not paid the teachers in full and not incurred the normal expenses needed to physically operate such schools.

3. Most of the schools say that they have retained all the teachers and have paid their salaries. Some of the schools go even as far as to suggest that they have enhanced the salaries of the teaching staff pursuant to the Central or State recommendations as adopted by such schools. Almost all the schools represented contend that they have not removed any regular employee from the payrolls; and some even claim that the contractual staff have also been retained and paid during the lockdown.

4. Some six or seven of the schools, particularly the institutions controlled by the Church of North India and another which claims to be a linguistic minority educational institution, have objected to the court seeking to interfere into their affairs. They suggest that not only do they enjoy a special status accorded by Article 30(1) of the Constitution but they are also protected under Article 19 of the *suprema lex*. Several Anglo-Indian schools and a handful of other so-called minority institutions have

jumped on the bandwagon to not only assert their right to independent management of their educational bodies but also to question the propriety on the part of the court in entertaining any grievance against them in the jurisdiction available under Article 226 of the Constitution.

5. In the same breath, it must be acknowledged that several other prominent schools submit that they are entitled to question the maintainability of the proceedings, but refrain from doing so in the larger interest of the students and their parents or guardians so that a workable solution can be forged. Even the objecting schools, without any exception, have offered to consider individual cases of financial hardship in a humane manner and allow the maximum concession – but on a case-to-case basis – as the relevant school's finances and resources would warrant. By and large, the schools indicate that they have not taken the ultimate drastic measure of excluding students from the limited online classes now conducted, though no fees may have been tendered on behalf of several students for the period beginning April, 2020. Some of the high-end schools, however, inform the court that almost all students have paid the fees and they have received no request for any concession or waiver or deferment or the like. The general refrain is that schools do not look at making any profit and, to the extent their financial positions may allow, they are ready to accord concessions to parents or guardians of students in financial distress; but a general reduction of fees across the board should not be permitted.

6. The first order of substance pertaining to school fees was made in the lead petition on July 21, 2020. At that stage, it was noticed that parents or guardians of nearly 15,000 students enrolled in 112 schools had come together to file the lead matter. The order of July 21, 2020 provided that none of the 112 schools involved should discontinue making online courses available to any of the students, unconditionally till August 15, 2020. The 112 schools were also restrained from prohibiting any of the students from participating in the online examinations, if any, till August 15, 2020. Such directions were made applicable for all classes and all courses. The order proceeded to direct that outstanding dues of each student as at July 21, 2020 ought to be cleared to the extent of 80 per cent by August 15, 2020. Those students already debarred from online courses or online examinations were directed to be restored to the previous status. The schools were also requested to ensure that the online programmes were not stopped in the event there was any meagre shortfall in payment in any case.

7. By the time the principal matter was heard next on August 10, 2020, three other writ petitions were assigned to be taken up together. The order noticed the modern malaise of virulent and vituperative reactions in the social media, parents demonstrating at the school gates in some cases and a militant appeal on the virtual platform to not pay any school fees altogether. It was also noticed that several of the schools likely to be affected by any order may not have been served or afforded an

opportunity to be represented. The State's affidavit was received, wherein the several advisories issued by it to all schools in the State were disclosed.

8. The petitions were next taken up on August 17, 2020 when it was indicated that a two-member committee would be appointed by the court for the purpose of looking into the financial statements to be submitted by the schools which had been indicated in the lead matter. All schools involved were required to submit their accounts, justifying the heads indicated therein. The accounts were to be certified by the regular auditors of the schools or by any chartered accountant. The accounts were directed to cover the heads of income and expenditure for the months of January to July, 2020. The order specified that the object of the exercise was to enable the committee to look into the variable costs that may not have been incurred during the lockdown or other expenses which could be found to be unjustified. The matter was directed to appear the following day for the committee to be formally constituted and specific directions to be issued.

9. On August 18, 2020, the committee headed by Prof. Suranjan Das, the Vice-Chancellor of Jadavpur University, and Prof. Gopa Datta, a former head of the Secondary Council in the State, was formally constituted. All the schools indicated in the lead matter were directed to submit their financial statements for the months of January to July, 2020 together with the figures for the months of January to July, 2019 in a tabular

form. The format of the table and the heads of disclosure were indicated in an appendix to the order. The order clarified that the relevant appendix was only indicative and not exhaustive. The court exhorted the schools to make complete and accurate disclosures by August 29, 2020, certified by the regular auditors of the relevant school or by a chartered accountant. The form of the declaration to accompany the statement was indicated in a further appendix. To ensure that the privacy of the financial statements of the schools was not gravely compromised, the statements were required to be filed directly to the committee at a dedicated e-mail account created for such purpose. The password to open the e-mail account was communicated in confidence to the members of the committee. The financial statements were required to be filed in sealed covers in court with strict directions for such covers not to be opened except with the previous leave of the court.

10. Some of the CNI schools carried a petition for special leave to appeal against the orders passed in the present proceedings on July 21, 2020, August 17, 2020 and August 18, 2020. Such petitions were disposed of on the following lines by an order of September 3, 2020 passed by the Supreme Court:

> "…
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> These special leave petitions have been filed challenging three interlocutory orders dated 21.07.2020, 17.08.2020 and 18.08.2020. With regard to orders dated 21.07.2020 and 17.08.2020, we are of the view that no interference is called for by this Court in these special leave petitions. In so far as order dated 18.08.2020 is concerned, we grant liberty

> to the petitioners to make an application before the High Court for recall/modification of the order dated 18.08.2020. Until orders are passed on such application of petitioner, the order dated 18.08.2020 shall not be given effect to; and the same is ordered to be kept in abeyance. We, however, are of the view that looking to the issues, which are involved in the writ petition, the High Court may decide all issues at an early date.
>
> Subject to above, the special leave petitions are disposed of.
>
> …"

11. When the matters were next taken up by this court on September 8, 2020, it was discovered that none of the CNI schools that had approached the Supreme Court had filed any application for recalling or modifying the order dated August 18, 2020. This court noticed the Supreme Court order of September 3, 2020 and interpreted the same, insofar as it kept the order of August 18, 2020 in abeyance, to apply only to the schools which had filed the special leave petitions. The order went on to record that a preliminary report had been filed by the two-member committee, which expressed reservations regarding several heads of expenses indicated to have been incurred by the schools which had submitted the financial statements before the committee. This court also observed that since 145 schools were involved in the main matter, it was not feasible to go into the accounts of the individual schools and a general mechanism had to be devised to ascertain a quantum of concession since all schools had obviously incurred less expenditure than normal because the schools were physically closed, although online classes and examinations may have been conducted. Though the order of September 8, 2020 mooted the constitution of individual parent-

teacher committees for all of the schools, such idea was not carried forward by any subsequent order in view of the submission made on behalf of the parties and, particularly, the conciliatory and constructive stand taken by most of the schools involved, including the CNI schools and the other prominent schools in an around the city. The time to pay 80 per cent of the fees, in terms of the previous order, was extended. What remained unsaid in the order of September 8, 2020 was that in the absence of any application for recalling or modifying the order dated August 18, 2020 being received, the matter could not be taken up for further consideration in view of the Supreme Court order of September 3, 2020.

12. The petitions were next heard on September 14, 2020 when the CNI schools and a linguistic minority school urged, by making applications, that no order pertaining to the fees charged by such schools should be made. Several other schools were heard at length and it was observed that affording concessions to only those who sought the same could make the process arbitrary. It was, however, clarified in the order that since the lis was born in the wake of the pandemic and "the present scenario … is unprecedented, extraordinary measures need to be taken which may not be treated as a precedent in future."

13. The matter has been heard on the virtual mode several days thereafter, affording all parties to make their submission. All schools involved which sought to be heard have been heard. It is evident that the concerned

schools ranged from those charging more than Rs.10,000/- a month to those charging a few thousand rupees or so a month to those receiving even less than Rs.1,000/- per month. Most of the schools at the lower-end of the spectrum say they face almost subsistence existence and implore the court not to foist any concession on them or they may be altogether wiped out.

14. It is at this stage that the legal objections urged by the CNI schools and the linguistic minority school, in particular, together with the schools run by the Roman Catholics need to be seen. On behalf of the CNI and the linguistic minority schools, it is submitted that private unaided educational institutions such as these schools are not amenable to the writ jurisdiction under Article 226 of the Constitution as such schools cannot be regarded as authorities within the meaning of Article 12 of the Constitution. It is further submitted on their behalf that in view of Article 30(1) of the Constitution which mandates that all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice, the court cannot delve into the affairs of any institution run by any such minority and any attempt to regulate the fees in such schools, even temporarily, would amount to an infringement of their unfettered right of administration guaranteed by the provision. Such objectors complain that the principal petition is singularly lacking in particulars and point out that there is no allegation levelled therein against such schools. They suggest that what

the parents or guardians seek falls within the domain of the executive or the legislature; and, in the absence of any executive action or any law being put in place, the court cannot issue any directions of the kind sought. These schools maintain that the directions contained in the orders dated July 21, 2020 and August 18, 2020 are excessive and in derogation of the status enjoyed by linguistic or religious minority educational institutions under the Constitution. It must be noticed, however, at this stage that the Supreme Court refused to interfere with the order dated July 21, 2020 and only gave leave to apply for recalling or modifying the order dated August 18, 2020.

15. The objecting CNI and linguistic minority schools refer to Article 19 of the Constitution and assert that their right to carry on any occupation under Article 19(1)(g) can only be fettered by an appropriate law enacted by the legislature. They contend that court orders cannot be a substitute for the "law" that is referred to and recognised in clause (6) of Article 19 of the Constitution. Such schools refer to the State's affidavit and the appeals made by the State to the schools and say that since no further action has been taken by the State, it will be evident that the schools have been functioning to the satisfaction of the State. These schools are particularly averse to any roving inquiry into their accounts or affairs to be conducted by the court or by the executive or any committee appointed by either. Their accounts, they say, are their private matters and no degree of invasion to peer into the same would be permissible.

The schools refer to their accounts and matters pertaining to their affairs being protected by the right of privacy which, according to them, has been accorded the status of a fundamental right by the Supreme Court.

16. The CNI and the linguistic minority schools first rely on a judgment reported at (2019) 16 SCC 303 (*Ramakrishna Mission v. Kago Kunya*) for the proposition that a petition under Article 226 of the Constitution may, ordinarily, not be maintained against a private unaided school. Paragraphs 20 and 26 of the judgment have been stressed on. However, it cannot be lost sight of that the grievance carried to the court under Article 226 of the Constitution in the reported case was by an employee. It was a service matter and, it is in such context, that the Supreme Court held that there was no public law involved in the enforcement of a private contract of service.

17. The said objectors next rely on a nine-member Constitution Bench decision reported at (2017) 10 SCC 1 (*Justice K. S. Puttaswamy (Retd) v. Union of India*) where the nature and facets of the right of privacy fell for the Supreme Court's consideration. Paragraphs 412 to 415 of the judgment are placed wherein privacy is seen as a travelling right that is as inalienable as the right to perform any constitutionally permissible act. Though such objectors lay considerable emphasis on the Supreme Court accepting that the right of privacy is also integral to the cultural and educational rights that permit groups with distinct languages, scripts and cultures to conserve the same, it cannot be said that the

right of privacy in the context of the accounts of the educational institution that the objectors canvass, is absolute. For instance, if benefits are obtained by way of tax exemptions, the books of accounts have to be opened up, on demand, to the taxman. Again, since educational institutions cannot be profit-making bodies; and, if there is a credible allegation of profiteering made, the accounts may be scrutinised to ascertain the veracity of the allegation. Thus, even though every person's accounts may be private and such person seen to be entitled to a degree of protection that the accounts not be made public, the right of privacy in such milieu is not absolute.

18. The objecting CNI and linguistic minority schools next refer to a judgment dealing with the obligation of minority schools qua the Right of Children to Free and Compulsory Education Act, 2009 which was enacted in the light of Article 21-A being introduced by the Eighty-sixth Constitutional Amendment. There is no doubt that in the judgment reported at (2014) 8 SCC 1 (*Pramati Educational and Cultural Trust v. Union of India*), the Constitution Bench held at paragraph 56 of the report that the 2009 Act insofar as it was made applicable to minority schools, aided or unaided, covered under clause (1) Article 30 of the Constitution was ultra vires of the Constitution, but that may not be germane to the issue that has arisen in this case. There is no prayer here for children between the ages of six and 14 to be provided free education

by any school. The reference to the judgment is utterly inapposite in the context of the present lis and the issues that fall for consideration.

19. The said objectors have next brought another Constitution Bench judgment reported at (2002) 8 SCC 481 (*T M A Pai Foundation v. State of Karnataka*). Paragraph 61 of the report is placed for the observation therein that in case of private unaided schools, maximum autonomy has to be allowed to the management with regard to administration, including the right of appointment, disciplinary powers, the mode of admission of students and the structuring of the fees to be charged. The said objectors herein submit that the Supreme Court recognised that the State did not have adequate resources to establish educational institutions of excellence and any attempt to curtail the income of private schools "disables those schools from affording the best facilities because of a lack of funds". A further passage from page 590 of the report is highlighted by the said objectors herein where the Supreme Court held that "Fees to be charged by unaided institutions cannot be regulated but no institution should charge capitation fee."

20. A further judgment reported at (2003) 6 SCC 697 (*Islamic Academy of Education v. State of Karnataka*) is placed by the said objectors for the Supreme Court's answer to the question framed by it as to "whether the educational institutions are entitled to fix their own fee structure …". The answer to such question, in the context of the *T M A Pai* case, may be seen from the following passage at paragraph 7 of the report:

> "**7.** So far as the first question is concerned, in our view the majority judgment is very clear. There can be no fixing of a rigid fee structure by the Government. Each institute must have the freedom to fix its own fee structure taking into consideration the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. *They must also be able to generate surplus which must be used for the betterment and growth of that educational institution*. In paragraph 56 of the judgment it has been categorically laid down that the decision on the fees to be charged must necessarily be left to the private educational institutions that do not seek and which are not dependent upon any funds from the Government. Each institute will be entitled to have its own fee structure. The fee structure for each institute must be fixed keeping in mind the infrastructure and facilities available, the investments made, salaries paid to the teachers and staff, future plans for expansion and/or betterment of the institution etc. Of course there can be no profiteering and capitation fees cannot be charged. It thus needs to be emphasized that as per the majority judgment imparting of education is essentially charitable in nature. Thus the surplus/profit that can be generated must be only for the benefit/use of that educational institution. Profits/surplus cannot be diverted for any other use or purpose and cannot be used for personal gain or for any other business or enterprise.
> …"

21. The final judicial precedent relied upon by the said objectors is the judgment reported at (2005) 6 SCC 537 (*P.A. Inamdar v. State of Maharashtra*). Paragraphs 139 to 141 have been placed from the report where the same sentiment as expressed in *Islamic Academy* has been repeated and there is also a distinction made between profession and business. However, even as the Supreme Court recognised the right of every institution to devise its own fee structure, it added the following qualification as a limitation to the right: "there can be no profiteering and no capitation fee can be charged directly or indirectly, or in any form

…". To boot, the court went on to emphasise that the fee structure "can be regulated in the interest of preventing profiteering."

22. On behalf of some of the Roman Catholic schools, it is submitted that such schools fall within the ambit of what is known as Anglo-Indian schools in this State and there is a Code of Regulations in place under which the State, to a limited aspect, regulates and monitors the activities of such schools. According to these Roman Catholic schools, the latest circular issued by the State on July 20, 2020 is clear and categorical and the Anglo-Indian schools have complied therewith and there is no complaint in such regard. The substance of the submission on behalf of the Roman Catholic schools is that since the Code of Regulations for Anglo-Indian and other Listed Schools, 1993 was notified on December 24, 1993, the relevant schools covered by the regulations have submitted to the limited authority of the State executive and have adhered to the directions or advisories issued. These Anglo-Indian schools contend that if there is a mechanism already envisaged under the 1993 Regulations, there is no scope for interference under Article 226 of the Constitution without a case being made out that the State has been indifferent to the acts of mal-administration on the part of these schools. The relevant schools assert that no case of mal-administration has been made out and the principal petition hardly refers to anything pertaining to the Roman Catholic or the Anglo-Indian schools. On behalf of one of such schools, Loreto Day School, Elliot Road, it is submitted that such school

caters to the children of labourers, daily wage-earners and bustee-dwellers and such a school cannot be compared to schools which charge fees in excess of Rs.10,000/- per month or provide air-conditioning facilities in the classrooms.

23. Before referring to the various decisions of this court recognising the Code of Regulations of 1993, the Anglo-Indian schools commend the five aspects covered by the State's letter addressed to "all concerned schools" on July 20, 2020 to the court and say that if all five aspects are covered and complied with by any school, this court should not interfere in the affairs of the relevant school. The relevant letter of the State government is addressed by the Principal Secretary in the Department of School Education to the heads of all schools in the State. In view of the pandemic and the difficulties faced by citizens, schools in the State were advised as follows:

> "1) All schools functioning in the State of West Bengal, should not increase any fee including tuition fee for the academic session 2020-2021.
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> 2) School should consider the matter of delayed payment, if any, sympathetically.
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> 3) Schools should not charge any fee for the services e.g. transport, library, computer lab, sports, extra/co-curricular activities etc not rendered during the lockdown period. Only proportionate charges, against the services rendered to the students, be levied, during the period.
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> 4) No new fee, should be introduced, during the current academic session.
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> 5) Students should not be denied the services including the online classes, for want of payment of the required fee as

stated above, due to financial crisis in the ongoing lockdown period."

24. According to the Roman Catholic schools, the commands contained in the State's letter of July 20, 2020 are binding on all schools and the same will be evident from the last paragraph of the letter which requires a compliance report to be sent by every school to the Commissioner of School Education within seven days of the receipt of the letter. Indeed, the submission on behalf of the Roman Catholic schools is that the advisories issued by the government are under the Code of Regulations of 1993 and fall within the limited extent of the executive authority exercised by the State under Article 162 of the Constitution.

25. The Roman Catholic schools have referred to several judgments, particularly of this court, where the said Code of Regulations of 1993 fell for consideration. They first rely on a Division Bench judgment reported at AIR 1995 Cal 194 (*The Association of Teachers in Anglo Indian School v. The Association of Aids of Anglo Indian School in India*) which was rendered in an appeal from an order of a Single Bench declaring certain clauses of the Code of Regulations of 1993 to be unconstitutional. The writ petition was instituted by the heads of various Anglo-Indian schools in the State. The three specific clauses of the Code which were challenged pertained to religious instructions being imparted to pupils, the management of the schools run by managing committees and disciplinary proceedings against employees. The Division Bench ultimately allowed the appeal in part by holding that the provision

pertaining to the disciplinary proceedings was ultra vires Article 30(1) of the Constitution. It must not be lost sight of that the court observed that the imparting of education was in the nature of performing a public duty. It is, however, not clear as to how the dictum in the reported case has any relevance in the present context.

26. In the next judgment cited by the Roman Catholic schools, reported at (2000) 1 CHN 635 (*Ballygunge Siksha Samity v. Susmita Basu*), the matter pertained to the fixation of salaries of the teaching and non-teaching staff in schools which were partially aided, in the sense that the dearness allowance for some teaching and non-teaching staff was provided by the State government. Again, the relevance of such precedent in the present context cannot be appreciated. Though the Division Bench judgment in *Ballygunge Siksha Samity* was upheld by the Supreme Court in the judgment reported at (2006) 7 SCC 680 (*Sushmita Basu v. Ballygunge Siksha Samity*), nothing turns on such judgment as far as the present issues are concerned except that, ordinarily, a petition under Article 226 of the Constitution may not be maintained against a private unaided school when the subject-matter of the petition involves the service conditions of the employees. For the same reason, another decision cited by the Roman Catholic schools, reported at (2017) 3 Cal LT 35 (HC) (*Mrs Hasi Sen v. State of West Bengal*), is found to be inapposite as that also pertained to the fixation of

salaries. The unreported judgment rendered in the appeal in the same matter on August 19, 2018 has also been placed.

27. Apropos the submission made on behalf of the Roman Catholic schools that all State schools remain bound by the executive advisories issued by the State, it is clarified by the State that the advisories were only requests which were not binding on the private unaided schools as the State does not exercise any control over the private unaided schools. The State says that even the circular of July 20, 2020 has to be seen as a mere request. The majority of the schools represented also submit that they have read and understood the State advisories on fees as mere requests.

28. The State says that every school now functioning in the State has to obtain a no-objection certificate from the State. Such no-objection certificate requires the fees charged by any school to be commensurate with the facilities afforded to its students. The State submits that in the event of a gross violation or an oppressive fee structure being imposed by any school, the State may withdraw the NOC which will, in effect, result in the relevant school having to shut shop. The State says that it was sensitive to the difficulties faced by parents and guardians of school students in this State and did its bit to the extent permissible; but the State did not perceive the withdrawal of the NOC of any non-conforming school to be a solution since that would leave all the students of the relevant school without a school and stranded midstream. The State

refers to the rules of the Central Boards like the CBSE and ICSE which stipulate that fees should be commensurate with the services and facilities made available and there should be no increase therein without the approval of the State government. However, both the State and the majority of the schools represented hasten to add that the State scarcely looks into the fee structures in private unaided schools and it is only because of the peculiar situation that has now arisen as a consequence of the pandemic that the State felt it necessary to issue the advisories. THE State submits that as far as the schools affiliated to the State Board are concerned, the fees are kept at a maximum of Rs.245/- per month, but for other schools the State has traditionally not evinced any interest in their fee structure. On the CBSE and ICSE regulations, most of the schools represented submit that they do not have any statutory force, though they are contained in private contracts between the private unaided schools and the respective Central Boards.

29. The State joins issue with both the CNI and the linguistic minority schools and the Roman Catholic schools to say that there is no doubt that writ petitions, instituted against private unaided schools imparting education, which is a public duty, are maintainable when the conditions for imparting education form the subject-matter of such petitions. In the same vein, the State says that when a charge of exorbitant fees has been brought in a scenario where there is no physical conduct of classes but the fees are not reduced, Article 30(1) of the Constitution is not a defence

to stop the writ court from assessing the reasonableness of the fees charged. The State asserts that the right to impart education can be a profession and as such protected, but only as long as there is no attempt at making any profit in any manner or form. The State suggests that since the underlying theme of the case run by the petitioners is that fees charged during the lockdown period at the same rate as in the pre-Covid-19 times may be unreasonable, unfair and amount to profiteering, there is no impediment to the court ascertaining the veracity of such charge.

30. The State has also referred to the West Bengal Right of Children to Free and Compulsory Educational Rules, 2012 which have been promulgated under Section 38(1) of the Act of 2009. The said Rules of 2012 require all unaffiliated, unrecognised, unaided schools established before the commencement of the Rules and proposed to be established after the coming into force of the Rules to obtain a certificate of recognition in terms of Section 18(2) of the Act of 2009. Clause 10(15) of the Rules of 2012 prohibits any school to run for profit to any individual, group of individuals or any other persons. There is also a clause to the effect that the fee structure for the students cannot be enhanced without the prior permission of the State Government.

31. As to the width and the ambit of the authority available to a High Court under Article 226 of the Constitution, the State has referred to the famous judgment reported at (1989) 2 SCC 691 (*Andi Mukta SMVSSJMS*

Trust v. V. R. Rudani) and another reported at (1969) 1 SCC 585 (*The Praga Tools Corporation v. Shri C. A. Imanual*)). Paragraph 20 of the report in *Andi Mukta* is instructive:

> "**20.** The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists mandamus cannot be denied."

32. Further judgments on the amplitude of the authority conferred by Article 226 of the Constitution have been brought by the State. In the judgment reported at (1999) 1 SCC 741 (*UP State Cooperative Land Development Bank Limited v. Chandra Bhan Dubey*) the all-pervasive control of the State government over a cooperative bank was noticed and such bank was found to be an instrumentality of the State amenable to the writ jurisdiction of the High Court. At paragraph 27 of the report, the Supreme Court noticed the use of the word "person" in Article 226 of the Constitution and observed that in terms of Section 2(42) of the General Clauses Act, 1897 "person" is defined to include any company or association or body of individuals, whether incorporated or not. The court observed that when the Constitution as the fountainhead of all

statutes was clear in the use of the language "we cannot put shackles on the High Courts to limit their jurisdiction by putting an interpretation on the words which would limit their jurisdiction". The following passage from paragraph 27 may be seen:

> "**27.**
> …
> When any citizen or person is wronged, the High Court will step in to protect him, be that wrong be done by the State, an instrumentality of the State, a company or a cooperative society or association or body of individuals, whether incorporated or not, or even an individual. Right that is infringed may be under Part III of the Constitution or any other right which the law validly made might confer upon him. But then the power conferred upon the High Courts under Article 226 of the Constitution is so vast, this Court has laid down certain guidelines and self-imposed limitations have been put there subject to which the High Courts would exercise jurisdiction, but those guidelines cannot be mandatory in all circumstances. The High Court does not interfere when an equally efficacious alternative remedy is available or when there is an established procedure to remedy a wrong or enforce a right. A party may not be allowed to bypass the normal channel of civil and criminal litigation. The High Court does not act like a proverbial "bull in a china shop" in the exercise of its jurisdiction under Article 226."

33. As to the jurisprudential expanse covered by the expression "any other purpose" in Article 226 of the Constitution, the State has relied on a judgment reported at AIR 1952 Cal 315 (*Carlsbad Mineral Water Mfg. Co. Ltd. v. H. M. Jagtiani*) which has been quoted with approval at paragraph 27 of a more recent judgment reported at (2003) 4 SCC 225 (*G. Bassi Reddy v. International Crops Research Institute*). The relevant passage may be seen:

> "**27.** It is true that a writ under Article 226 also lies against a "person" for "any other purpose". The power of the High Court to issue such a writ to "any person" can only mean the power to issue such a writ to any person to whom, according to the well-established principles, a writ lay. That a writ may issue to an appropriate person for the enforcement of any of the rights conferred by Part III is clear enough from the language used. But the words "and for any other purpose" must mean "for any other purpose for which any of the writs mentioned would, according to well-established principles issue. *(Quoted from Carlsbad Mineral Water)*"

34. On the same lines, an oft-quoted judgment of the last Sixties, reported at AIR 1966 SC 81 (*Dwarka Nath v. Income Tax Officer, Special Circle, D-Ward, Kanpur*), has been placed for the recognition therein of the wide authority available under Article 226 of the Constitution in the following sentence at paragraph 4 of the report:

> "**4**. … This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. …"

35. The State next relies on a judgment reported at (2005) 6 SCC 657 (*Binny Limited v. V. Sadasivan*) where it was observed that though the authority under Article 226 of the Constitution was wide, "it is an accepted principle that this is a public law remedy and it is available against a body or person performing a public law function." *(Paragraph 9)*

36. At paragraph 29 of the report, the court went on to add that under Article 226 of the Constitution a writ of mandamus could also be issued against any private body or person but "The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought." A further judgment

reported at (2012) 12 SCC 331 (*Ramesh Ahluwalia v. State of Punjab*) has been brought by the State to emphasise that the act of imparting education is a public duty.

37. In response to the objecting schools' submission that their right to carry on any occupation under Article 19(1)(g) of the Constitution would be breached if the court sought to interfere with the management of such schools, the State has relied on a Constitution Bench judgment reported at (1993) 1 SCC 645 (*Unni Krishnan, J. P. v. State of Andhra Pradesh*). On the aspect of the right to establish an educational institution, the Supreme Court observed that though Article 19(1)(g) of the Constitution used four similar expressions – profession, occupation, trade and business – and their fields may overlap, "imparting of education is not and cannot be allowed to become commerce." The court proceeded to declare that any law ensuring that education was not allowed to become commerce would be a valid measure under Article 19(6) of the Constitution. It may do well to notice the following passage from paragraph 197 of the report:

> "**197**.
> …
> While we do not wish to express any opinion on the question whether the right to establish an educational institution can be said to be carrying on any "occupation" within the meaning of Article 19(1)(g), - perhaps, it is – we are certainly of the opinion that such activity can neither be a trade or business nor can it be a profession within the meaning of Article 19(1)(g). Trade or business normally connotes an activity carried on with a profit motive. Education has never been commerce in this country. Making it one is opposed to the ethos, tradition and sensibilities of this nation. The

> argument to the contrary has an unholy ring to it. Imparting of education has never been treated as a trade or business in this country since time immemorial. It has been treated as a religious duty. It has been treated as a charitable activity. But never as trade or business. We agree with Gajendragadkar, J. that "education in its true aspect is more a mission and a vocation rather than a profession or trade or business, however wide may be the denotation of the two latter words …"

38. On behalf of the Union, the *P.A. Inamdar* case has been referred to for the dictum therein that monitoring admission procedure and determining fee structure in educational institutions are "permissible as regulatory measures aimed at protecting the interest of the student community as a whole as also the minorities themselves, in maintaining required standards of professional education on non-exploitative terms in their institutions." Though the matter that fell for consideration in that case was advanced education or professional courses, the principle will apply to all educational institutions. Reasonable restrictions may be imposed in the interest of minority institutions and that would not violate Articles 19 and 30(1) of the Constitution.

39. It must be recorded that none of the schools represented spoke against concession in some form being afforded to students who required the same; but almost all the schools maintain that concession should not be passed on as a matter of right, but may only be need-based. Indeed, the schools represented, without exception, attempted to be constructive rather than treat the matter as adversarial and the court must acknowledge the efforts of counsel representing a wide spectrum of the

schools to try and forge a common template, with room for individual need-based consideration.

40. Two of the appearing schools refer to a seven-judge decision reported at (2002) 5 SCC 111 (*Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*) which attempted to find a solution to the divergent views expressed in previous Supreme Court judgments as to the nature of the bodies that would be covered by the expression "other authorities" in Article 12 of the Constitution. Paragraph 40 of the report is placed for the formulation of the test to determine whether a person or a body could be regarded as an authority within the meaning of Article 12 of the Constitution. The submission of the relevant schools in such regard is that since no private unaided school may be seen to be an extension of "the State", the court should be slow in encroaching into the private domain of such entities or disturbing their right to fashion their management and administration, including the fee structure.

41. Another judgment, reported at (2013) 15 SCC 677 (*Maharishi Mahesh Yogi Vedic Vishwavidyalaya v. State of Madhya Pradesh*), has been cited on behalf of some of the schools. At paragraph 84 of the report, the Supreme Court concluded that "imparting of education is a fundamental right … *(a)*ny attempt on the part of the State to interfere with the … imparting of education, would amount to an infringement of the fundamental right guaranteed under the Constitution."

42. On behalf of the CNI and the linguistic minority schools, affidavits have been filed to assert that there has been no increase in the fees during the current financial year, that no student has been barred from attending the online classes and the court has been assured that no student would be kept away from the online classes or prevented from taking the board examinations despite non-payment of fees. As to any concession, it is suggested by such schools that the same should be left to the management of the schools to decide on a case-to-case basis. These schools go even as far as to suggest that they may agree to receive installments over a long period of time and even beyond the period of the relevant student's tenure in the school.

43. Several other schools have claimed that they have not increased their fees or prohibited any student from participating in the online classes. Such schools suggest that applications may be made by the parents by a specified date for such applications to be considered on merits and the maximum concession to be afforded keeping the financial position of the individual school in mind. Such schools have assured the court that no student would be debarred from participating in the online classes or from being sent up for the board examinations as long as the relevant board's fees are paid. These schools have also agreed to issue transfer certificates to those students who wish to leave, upon 80 per cent of the dues being cleared. A majority of the schools represented are inclined to

follow this course of action, but are averse to any course correction by the court.

44. The third template suggests suitable reduction in the fees under various heads to be indicated by the individual schools to the court in due course; but the schools subscribing thereto also say that for further concessions, the managements of the schools must be allowed complete freedom to decide with a right to the dissatisfied parents or guardians to carry the matter before any court-appointed committee. Such schools have suggested that a quarterly review of the measures be undertaken by keeping the proceedings pending.

45. The matter must be seen in the appropriate perspective. The present situation, in many ways, is unique and unprecedented. Several ordinary mechanisms have broken down and it is truly an extraordinary scenario that the virus has fashioned for humanity at large. Normal life has been thrown out of gear with no certainty as to whether the normalcy of old would ever return. But life has to go on and time does not stand still. The human is a thinking species and this lends to its adaptability.

46. Though the petitioners have attempted, at times, to enlarge the scope of the lis in an endeavour to bring about a moderation of the fees in general charged by private unaided schools in the State, such misadventure is best avoided. Private unaided schools must be left free to determine their fee structures, as long as there is no element of profit-making.

Profiteering can assume various forms. A body of private individuals or even a society run by private persons may be creative in attributing expenses where none exists or devising imaginary heads of expenditure. But such acts should draw the attention of the executive or the legislature for appropriate checks to be imposed and a complaint brought to court may only be seen in the broader context without the court going through the accounts with a toothcomb. After all, it must be appreciated that normal market forces must be allowed to play out: parents and guardians have a choice to not opt for a particular school or opt for one of the several, though it must be noticed that the number of quality schools may not have increased keeping pace with the enhanced demand.

47. There can be no doubt that as a consequence of physical classes not being conducted over the last six months and more, the ordinary running expenses incurred by schools would be considerably less. Schools will still have to incur the fixed costs, but the variable costs must have come down. Again, there are schools and there are other schools. Though most of the schools represented here claim that they have not discontinued the services of any teacher or other member of the staff, it must be remembered that several schools engage contractual floating staff at times and it is inconceivable that even such contractual floating staff have been retained without obtaining any services from them. The first item of the basket of variable costs that comes to mind is

electricity charges. The expenses incurred on account of electricity charges must have been considerably lower in all schools since most classrooms have not been opened and other physical facilities not availed of. But there is no data as to the percentage of electricity charges out of the total monthly expenditure incurred by a school or any definitive ratio in such regard that the court can go by. It is also possible that tiffin or transport services routinely provided by some schools not being required over the past several months, the expenses on such counts may have gone down. The regular cleaning and scavenging expenses and the usual maintenance costs may also not have been incurred. Equally, it is possible that cleaning, scavenging and maintenance works are undertaken by regular staff, who have all been retained and their salaries paid. In such a scenario, there may not be any less expense incurred, except in the use of the mechanical and other non-human resources necessary in such regard. It is just as possible that the fuel cost out of the transportation charges may have been saved, but salary to the transportation staff and capital expenses for maintaining or acquiring buses and the like may still have been incurred. There can, thus, not be any generalisation except with an element of guesswork, without going into the nitty-gritties of the revenue and expenditure of each of the schools involved.

48. Several of the schools involved in the present proceedings, particularly those not at the higher end of the fee-band, have taken a severe beating

during the pendency of the present proceedings as an unreasonable section of the parents or guardians may have assumed the pendency of the proceedings to be a charter to not pay the fees. Despite previous directions setting deadlines for payment, there are credible complaints made by the schools that even the reduced scale of fees has not been met. On the other hand, there has hardly been a complaint of any student being denied participation in the online classes despite even the scaled-down fees not being tendered.

49. At the lower end of the spectrum, there appear to be several schools which have not provided online classes as they do not have the facilities to do so or the parents of their students may not have the requisite hardware or software to enable their wards to participate in any online class. Only some of the difficulties in the daunting and unenviable task of making an appropriate assessment in the circumstances have been indicated and there is no doubt that however assiduously the line of best fit is chosen, most schools may not find themselves placed on such line if they were mapped on a graph. The quality of education imparted, the facilities available and the strata of the society to which the 145 schools herein cater are so disparate that it is tempting to abandon the exercise altogether by proffering one of the several credible excuses imaginable.

50. But the exercise to discover a line of best fit or to explore a common ground would only arise if the court's authority to do is seen to be available, notwithstanding the conciliatory stand adopted by most of the

schools represented in the present proceedings. The objections raised by the CNI and the linguistic minority schools and the protest by the Roman Catholic or Anglo-India schools need to be addressed first along with the murmurs raised by some of the other schools as to the jurisdiction available under Article 226 of the Constitution and the amenability of private unaided schools to such jurisdiction.

51. A facile answer to the issue as to the maintainability of the present proceedings would be that whether or not the person or persons against whom an order is sought in this jurisdiction is an authority within the meaning of Article 12 of the Constitution, if the order sought bears a direct nexus with the character of the function discharged by the relevant person and such function is regarded as a public duty, the proceedings would be maintainable. But when an issue presents a broader canvass as in this case, it affords a rare opportunity to cover the expansive contours of the myriad possible hues. The Constitutional status of a High Court, the expansive words used in Article 226 of the Constitution, the discussion and the debates in the Constituent Assembly before carefully choosing the words and expressions therein allow, as has been said, a High Court to reach injustice wherever it may be discovered and deal with the same in accordance with law. But just as the widest authority, subject to territorial considerations, may be available to High Courts under Article 226 of the Constitution, such courts must exercise extreme self-restraint and not use the extensive

amplitude as a springboard for judicial anarchy. In the ordinary, everyday situation, the remedy under Article 226 of the Constitution is confined to the public law domain and the words used in the provision must be read in the context of the company that they keep. In a breakdown scenario, however, the words in the provision give ample authority to travel beyond the public law domain, though extreme caution and circumspection must be exercised in treading into hitherto uncharted territories.

52. The expression, "every High Court shall have power" is an enabling command of the fountainhead of all laws in the country and can never be read down. Again, the next operative limb of the provision, "to issue to any person, or authority, including in appropriate cases, any Government, within those territories", is of limitless import, except that a high constitutional body as the High Court must be reasonable and rational in wielding such unlimited power, particularly in the usual circumstances. The expression in the second limb contains an inclusive definition of the person or authority referred to therein and it is even possible to suggest that the inclusive definition governs only the word "authority" and the word "person" is left to be freely interpreted and understood. At any rate, the grammatical clause is not exhaustive but only indicative of a class which is included as being amenable to the authority to receive writs under such provision. The third aspect of the provision is found in the expression "directions, orders or writs,

including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them". While the words "directions", "orders" and "writs" may otherwise seem similar or, at times, be used interchangeably, they are distinct in the manner they have been used in the provision. Also, the inclusive words in the last limb of the subject expression describe the nature of the writs that may be issued and may be seen to only to govern the word "writs"; though, no doubt, when the words "directions", "orders" and "writs" have been used in the same breath, they must take a certain degree of colour from each other. Thus, in the usual course, directions and orders may issue in proceedings under Article 226 of the Constitution when the person so directed or ordered is amenable to the issuance of any of the writs indicated therein. But the everyday service may not be an excuse to constrain the broad freedom that the words "directions" and "orders" connote. The last feature of the provision is the purpose for which the directions or orders or writs may issue thereunder and the guidance in such regard is found in the expression "for the enforcement of any of the rights conferred by Part III and for any other purpose." It is true that, in a sense, the second part of the final expression, "and for any other purpose", has traditionally been read somewhat *ejusdem generis* with the preceding words, "for the enforcement of any of the rights conferred by Part III". Such reading, in the ordinary course, is the exercise of self-restraint that is expected of a superior court as a High Court. But the reading down of the several limbs of the provision in everyday use does

not imply that in an unprecedented situation, or in a breakdown scenario, the full meaning of the width of the authority conferred by the provision may not be realised and injustice allowed to prosper with a superior court as a High Court folding its arms in impotent obeisance to the doctrine of self-restraint. If the constitutional command in the provision is to reach injustice, it necessarily follows that such injustice must be addressed in accordance with law. It will not do for the sentinel on the qui vive to fiddle away in search of high notes of propriety while citizens are seared in the flames of withering injustice or the legal dykes of rights are breached. Indeed, the expansive authority is to uphold constitutional values and protect rights in accordance with law.

53. Without for once suggesting that some words used in a provision may be selectively plucked out and other words of such provision disregarded to give an altogether different twist to the mandate contained in the provision, the complete authority that a superior court as a High Court in this country has been conferred by the Constitution may be seen from how Article 226 may also be read:

> "… every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person … directions, orders or writs … for any … purpose."

54. It cannot be over-emphasised that though the authority is available, it may not be exercised willy-nilly and it is reasonably expected of a high authority as a High Court to have due regard to the constitutional scheme, the hierarchy of courts, the rule of law and the usual

circumspection before extending the authority available outside the public law domain. The greater the authority, the more the need to exercise restraint. But in a breakdown scenario as a result of any natural calamity or an act of God or when the subordinate judiciary is not available or a litigant has no access to any other court in an extreme case, the High Court must not forget the width of the authority available to it and its constitutional obligation to discharge its duties governed by the overarching established principles designed by what may be loosely said to be the rule of law.

55. Two other broad heads of objection have been taken by some of the schools as noticed above: under Article 30(1) of the Constitution and under Article 19 thereof read with the right of privacy as espoused.

56. Without detracting from the extent of the right of religious and linguistic minorities reserved in respect of educational institutions under Article 30(1) of the Constitution, it goes without saying that even minority educational institutions need to adhere to certain fundamental norms, the most basic of them being that they cannot be run for the purpose of making profit. The essence of such basic requirement is that the fees charged must have some reasonable correlation with the facilities provided. Such nexus need not be assessed or ascertained with arithmetical accuracy. If the facilities provided over a long stretch of time, as for the best part of a year and probably more, cost less because physical classes have not been held, a substantial part of the money

saved has to be returned without, for the moment, going to the question as to whether it should be returned *pro rata* or on a need-based basis. If it is judicially accepted that the revenue may not exceed expenditure in a school by more than about 15 per cent in any given year for such excess to be ploughed back for the betterment of the institution at a future date, there is obviously a cap on the extent by which the revenue can exceed expenditure in any given year. When it is obvious that the schools have incurred less expenditure over such a prolonged period of time and may continue to do so for some time longer, allowing the schools to charge at the usual rate would be to give a licence to unjust enrichment beyond the judicially demarcated limits. In such sense, an assessment of the fees demanded or obtained during the lockdown period and in the absence of physical classes in the schools, may not amount to the breach of any right conferred by Article 30(1) of the Constitution in respect of a school run by a religious or a linguistic minority. But the exercise has to be limited and it cannot take shape to invade the freedom of such educational institutions to determine their fee structures. Indeed, the same rule should apply to all private unaided schools since they are governed by private contracts between private individuals.

57. For similar reasons and since schools cannot be run for business or commerce, the right under Article 19(1) of the Constitution may not be regarded as absolute and subject to reasonable restrictions. It is not necessary for any legislative enactment in terms of clause (6) of Article

19 of the Constitution in view of the Supreme Court pronouncements and the operation of Article 141 of the Constitution in such regard. As for privacy, every person is entitled to his accounts not being opened up to all and sundry unless mandated by law as in the case of public companies or some categories of trusts or societies. But the ordinary right of privacy is not so absolute as to deny a constitutional court the authority to assess whether a wholesome charge of unjust enrichment or profiteering is substantiated by calling for such accounts or by having the accounts evaluated by an expert. The rights as asserted under Articles 19 and 30(1) of the Constitution and even the right of privacy may be used as a shield against invasive instruments and blatantly intrusive acts of the State; they cannot be used as swords to parry a credible charge of profit-making in an educational institution, minority or otherwise, whether aided or unaided.

58. In the present case, however, the widest authority available under Article 226 of the Constitution does not have to be invoked. As long as the lis carried to the writ jurisdiction and the reliefs claimed therein have substantial nexus with some public duty, the authority of the court to receive the action is justified, though the extent of the orders that may ensue will depend on the merits of the matter. Article 21-A of the Constitution requires the State to provide free and compulsory education to all children of the age of six to 14 years. The principal part of the provision is to provide compulsory education, the attendant or ancillary

part thereof is to provide such education free. When a private body or person or any form of juristic entity takes upon itself the burden of imparting education it takes up a public duty and such public duty aspect of its functioning is open to judicial review in the usual course without even considering the much broader authority available under Article 226 of the Constitution.

59. But a balance has to be struck in the assessment, especially in a landscape involving the interplay between apparently conflicting rights. When a school exists and it is open to be approached for admission, there is a private contract between the school on the one hand and the relevant student and the students' parents or guardians on the other. When a parent or guardian seeks admission of his child or ward to a private unaided school, such parent or guardian waives the right of the student, if such student is between six and 14 years of age, to receive free education from the State. The practical aspect of the matter, however, is all too obvious to be stated. If the parents approach a particular school with their eyes wide open and upon being completely aware of the fees required to be paid and other conditions necessary to be complied with for their children to remain in the school, there is, ordinarily, little scope for any subsequent grievance. On the supply side, the school is free to impose such conditions as may be deemed fit for providing education to the student, including the fees that must be paid. The only caveat in such regard is that the fees must be commensurate

with the facilities provided, in the sense that profit cannot be taken away out of the excess of the revenue over expenditure in running a school. At the same time, there can be a reasonable excess of the revenue over expenditure which may be held to be ploughed back in future as long as it conforms to the judicially accepted norm at the higher end of about 15 per cent or so. There is no doubt that parents are ambitious in their quest for the quality of education their children ought to receive and oftentimes travel beyond their means to ensure better education and better facilities for their children. But the reality is that a daily wage-earner, despite his ambitious dreams, may scarcely approach one of the high-end schools without availing of a bursary that several of the schools extend. Ordinarily, the usual market forces would determine the class of school that a student would get enrolled in, subject to the uncertainties that admission procedures present. It is precisely for this reason that a court may not be excited to get into the fee structure of a private unaided school unless unimpeachable evidence of profiteering by such school is carried to it; and even then, the court should be circumspect in the absence of any executive or legislative regulation unless a case of virtual daylight robbery is made out.

60. Having accepted the autonomy and freedom that private unaided schools generally enjoy, it is completely unacceptable that schools have not incurred less expenditure than usual since the lockdown came to be in force from or about the end of March this year. Indeed, implicit in the

submission of almost all the schools represented herein is that the usual expenses may not have been incurred by them during such period and may still not be incurred till physical classes resume, notwithstanding some additional expenses incurred by the majority of the schools since introducing online classes.

61. In the light of the foregoing discussion and purely as a one-time measure necessitated by the present unprecedented situation, the following directions are issued:

i. There will no increase in fees during financial year 2020-21.

ii. From the month beginning April, 2020 till the month following the one in which the schools reopen in the physical mode, all 145 schools will offer a minimum of 20 per cent reduction of fees across the board. Non-essential charges for use of facilities not availed of will not be permissible. For instance, additional charges for laboratory, craft, sporting facilities or extracurricular activities or the like will not be permissible during the months that the schools have not functioned in the physical mode. Session fees traditionally charged periodically will be permissible, but again, subject to a maximum of 80 per cent of the quantum charged for the corresponding period in the financial year 2019-20.

iii. The minimum figure of 20 per cent reduction in the monthly tuition fees will be on the basis of the tuition fees charged for the corresponding month in the previous financial year.

iv. For the financial year 2020-21, a maximum of five per cent excess of revenue over expenditure will be permissible; the balance excess (without any mathematical precision) should be passed on by way of general concession or special concession in individual cases of extreme distress. If any school makes a loss as a consequence of following these directions, such loss can be made up in course of the next two financial years, 2021-22 and 2022-23, if normal physical functioning resumes by March 31, 2021.

v. No amount towards the arrears on account of revision of pay to teachers or other employees can be passed on in the fees for financial year 2020-21. The amount on account of arrears may be recovered in 2021-22 and 2022-23, if normal physical functioning resumes by March 31, 2021.

vi. There will be no increase in salaries of teachers or of other employees during financial year 2020-21. If any individual school has given effect to a higher pay-scale, the difference must not be realised out of the school fees during the financial year 2020-21.

vii. Parents and guardians of students are requested not to avail of the reduction in schools fees, if their financial situation

does not merit the reduction. However, if any set of guardians or parents obtains the benefit, no questions in such regard can be asked.

viii. In addition to the across-the-board reduction, every school will entertain applications from parents or guardians for further reduction or waiver or exemption or delayed or installment payments, as the case may be. Every application in such regard must be supported by the financial statements of the parents or guardians so as to justify the request. The financial statements should be certified by any qualified auditor and accompanied by a declaration by the applicant parent or guardian verifying the particulars to be true and correct.

ix. Each application will be considered on merit. Such applications have to be filed before the respective schools by November 15, 2020 and every application should be dealt with on an individual basis and a decision communicated to the applicant by December 31, 2020. Till the decision on the individual application is communicated and for a further period of two months thereafter, no coercive action should be taken against the relevant student. In other words, the student must be allowed every facility that a similarly placed other student would enjoy, including the name of such student being put forward for the board examinations,

subject, however, to the fees payable to the board being tendered within time on behalf of the relevant student.

x. When an application for further reduction or waiver or exemption or delayed payment of fees has been disposed of by the relevant school but the parents or guardians are aggrieved by the decision, an application may be filed, upon deposit of Rs.1000/-, to a committee for further adjudication of the request and to assess the decision communicated by the relevant school. Such application has to be filed within 10 days of the rejection, in full or part, of the request being communicated to the relevant parents or guardians.

xi. The committee referred to in the immediate preceding clause will be headed by Mr Tilok Bose, Senior Advocate as its chairperson and will be assisted by the Headmistress or Principal (the occupant of the higher of the two offices, if they are two) of Heritage School and Ms Priyanka Agarwal, Advocate for the parents in WPA 5890 of 2020. The committee will be empowered to engage an auditor or a firm of chartered accountants to assist the committee. The committee and the auditor appointed by the committee will look into the extent of reduction or exemption or the like sought and the feasibility thereof on the basis of the accounts of the relevant school for the financial year 2019-20 and the financial figures for the first six months of the

financial year 2020-21 as certified by the auditors of the relevant school. The two other members of the committee will assist the chairperson of the committee to arrive at an appropriate decision, but the chairperson will have the final say therein.

xii. The deposit obtained by the committee will be retained by the committee and Rs.800/- therefrom disbursed to the auditor or firm of chartered accountants for the first time the accounts of a particular school need to be assessed by the auditor or firm of chartered accountants. For every repeat exercise, meaning studying the accounts of the same school from the second time onwards, Rs.500/- per case will be paid to the auditors. The balance amount in the hands of the committee will be used for the purpose of secretarial and managerial services the committee may be required to obtain. Any ultimate surplus has to be made over to court for the same to be dealt with in accordance with law. No remuneration is provided for any of the members of the committee and the court hopes that the members nominated graciously accept this onerous task in the larger public interest.

xiii. By November 30, 2020, the committee should indicate a dedicated e-mail account whereat the appeals against the decisions of the schools may be filed. The e-mail ID should

be communicated to Advocate-on-record for the petitioner in the lead matter for it to be disseminated to all parents and guardians. The money required to be deposited will be tendered in cash to a secretary or manager as may be indicated by the committee. The application will be deemed complete only upon the grievance in writing being forwarded to the relevant e-mail account and the deposit being made. No application will be entertained without the deposit being tendered. Full accounts of the monies received and expenses incurred must be maintained and presented in court, when sought.

xiv. All schools should have the accounts for the financial year 2019-20 ready and also the accounts for the period of April to September, 2020 ready to be furnished within two days of the demand therefor by the committee.

xv. Every application made before the committee must clearly indicate the name and other particulars of the student involved and furnish the e-mail ID of the school and its Principal or the like for the committee to communicate with the school.

xvi. The committee must endeavour to dispose of every application within 45 days of the receipt thereof and the decision of the committee will be binding, subject to the relevant schools having a right to apply to this court in the

present proceedings for the reconsideration thereof on cogent grounds. Till a dispute between the parents or guardians of a particular student and the relevant school is finally decided, no coercive action against the student may be taken by the school, whether to disallow the student from attending class in any form or taking any examination or for the candidature of such student being forwarded for any board examination (subject to the board's fees being tendered).

xvii. The quantum of fees to be charged for every month will be indicated by the individual schools on any website and the notice-boards of the schools and informed to Advocate for the petitioner in WPA 5890 of 2020 for the same to be put up on a website that such petitioner must set up for this purpose. The fees payable for every month and the other periodic charges, like session fees, for the entire financial year 2020-21 should be indicated by the individual schools and put up on the website to be set up by the petitioner in WPA 5890 of 2020 by October 31, 2020.

xviii. By November 30, 2020, the fees payable in terms of this order for the period up to November 30, 2020 should be tendered on behalf of all students of the 145 schools. To the extent the parents or guardians of the students apply for further reduction or waiver or exemption, they can pay the

amount as possible by November 30, 2020 and copies of the applications for further reduction or the like should be deposited by such date.

xix. With effect from December 8, 2020 all schools will be entitled to disallow students whose fees have not been paid in full in terms of this order and those who have not applied for reduction or waiver or the like. However, schools should ensure that this extreme step is taken only after exercising due care and caution.

xx. No student will be entitled to apply for a transfer certificate without the full quantum of fees in terms of this order being first discharged.

xxi. For the purpose of clarity, it is reiterated that fees payable by students to boards for examinations or otherwise shall have to be paid in addition to the monthly fees and other charges in terms of this order and no waiver or reduction of the fees or charges payable to the boards may be sought or granted.

xxii. There will be no refund of the fees already paid. However, to the extent fees have already been paid which are in excess of the directions contained herein, suitable adjustments will be made over the remaining months of the financial year, unless the parents agree in writing otherwise.

xxiii. The expenses incurred for developing the infrastructure of the schools should not be passed on to the students during the current financial year, though it will be open to recover the same from the students from financial year 2021-22 onwards, if the physical functioning resumes by March 31, 2021.

xxiv. The cap of five per cent of the revenue over expenditure for the year 2020-21 will be subject to the exception that it may exceed the five per cent only if the general reduction afforded to the parents is not availed of by any of the parents and no student in financial distress has been denied additional concession despite being worthy.

xxv. No unusual expense should be incurred during financial year 2020-21 and no development or infrastructure expense should be incurred unless absolutely unavoidable.

xxvi. These directions will continue till such time that physical functioning of the schools resumes in the normal course.

xxvii. The above directions for any form of concession will not apply to any of the 145 schools where the average monthly fee (calculated on an annual basis over the year from April, 2020 to March, 2021) is less than Rs 800/-. However, such schools may voluntarily take such measures as deemed fit. The exception carved out is perceived to be reasonable since the quantum of concession in such cases will be nominal

and the elaborate exercise may be unnecessary as the extent of possible profit is unlikely to be significant. But the monthly fees payable in such cases must be put up on the notice-boards and websites as in the other cases and without exception.

xxviii. The other private unaided schools in the State should also abide by the directions *mutatis mutandis*, particularly since the matter has been heard extensively and as public interest litigation. However, only the disputes pertaining to the 145 schools included in WPA 5890 of 2020 may be referred to the committee constituted herein; and not the disputes pertaining to other private unaided schools in the State.

62. It is made clear that this order may not be used as a precedent for the regulation of fees in the schools in future. The present measure may be seen as an extraordinary step in an unforeseen situation to somewhat relieve the parents and guardians of students of their financial burden in the economic distress brought about by the pandemic.

63. The writ petitions will remain pending till the physical classes are resumed in the schools and the directions contained herein are worked out completely. The petitions will appear next on December 7, 2020 to monitor the progress in the implementation of the directions contained herein.

64. The accounts submitted by the schools in sealed covers should be retained in their present condition by the Registrar-General. The accounts will not be looked into by any person or the sealed covers opened without the express previous leave obtained from the court.

65. Out of the deposit made by the petitioners pursuant to the previous directions, a sum of Rs.20,000/- will be paid on account of secretarial services obtained by the two-member committee appointed earlier. The Registrar-General should ascertain from Prof. Suranjan Das the mode and manner of disbursement of such amount and act accordingly. The court expresses its appreciation for the work done by such committee and its report. The accounts submitted before the committee should be retained in strict confidence by the office of Prof. Suranjan Das and destroyed after three months unless contrary directions are issued by this court.

66. All interim applications in the several writ petitions, including IA No. CAN 1 of 2020 to IA No. CAN 31 of 2020 in WPA 5890 of 2020; together with IA No. CAN 2 of 2020 and IA No. CAN 3 of 2020 in WPA 5378 of 2020; IA No. CAN 1 of 2020 in WPA 5872 of 2020; and IA No. CAN 1 of 2020 in WPA 5530 of 2020 stand disposed of without any order as to costs.

67. The parities will have liberty to apply for the removal of any difficulty.

68. Certified website copies of this judgment, if applied for, be urgently made available to the parties upon compliance with the requisite formalities.

(Sanjib Banerjee, J.)

Moushumi Bhattacharya, J.

1. I have read my senior colleague Justice Sanjib Banerjee's judgment and have been enriched, as always, by the exhaustive analysis of the points involved in the adjudication. I entirely support his reasons leading to the conclusions. The matter required several brainstorming sessions which we happily engaged in and which threw up interesting factual angles with the laws relevant to them. I could not resist penning a few of the insights which form the underpinnings of the factual questions raised before us within the overarching constitutional framework.

2. I propose to supplement three issues; Articles 226, 30(1) and 14 of the Constitution of India together with the right to privacy in the foreground of the arguments made.

3. The cause of the dispute is the economic downturn brought about by the pandemic. The effect is physical attendance being substituted by online classes. The consequence is that guardians are being made to pay for facilities which their wards are unable to avail of. The endeavour of the Court is that students must not be caught in the crossfire between their parents and the school authorities. The *dramatis personae* present on the stage before us are:

a) The petitioners backed by the aggrieved guardians who want a reduction of fees to alleviate their financial stress brought about by the pandemic

b) The schools who cite continuing infrastructural costs

c) Minority institutions who seek the cover of Article 30 (1) of the Constitution

d) The Councils/Boards to which the schools are affiliated

e) The contractual workers engaged in the schools who want their incomes protected.

f) The West Bengal Board of Secondary Education ; supports the guardians

g) The HRD Ministry, Government of India; believes that sufficient wrongs must be committed before the Court can intervene.

4. The sweep of the Court's powers under Article 226 of the Constitution of India aided by the specific expressions used in the said Article has been discussed in the preceding paragraphs of this Judgment. Under Article 226, the power of the High Courts is

> *".....to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of....."*

The operative words are "*in the nature of..*" thus dissociating the writs under the Article from the prerogative writs issued by the English courts and widening the canvas in which such orders or writs may be issued at the same time. The order in which the words have been positioned indicate that the writ

courts not only have the power to issue the five writs but also to issue orders and directions having the force and effect of the five writs, separately or together, for enforcing the rights guaranteed under Part III of the Constitution. The wide berth contemplated was recognised in *Dwarka Nath vs Income Tax Officer AIR 1966 SC 81* as an enabler for tailoring the reliefs to fit the shape and peculiarities of the case and stretching the parameters of the power "*to reach injustice wherever it is found*". These striking words have resonated in recent decisions of the Supreme Court which held that the powers of the High Courts in exercise of its writ jurisdiction cannot be constricted by strict legal principles so as to immobilise the Court in upholding the rule of law (refer *Maharashtra Chess Association vs Union of India 2019 SCC OnLine SC 932).*

5. But does that mean that a court's authority to issue writs under Article 226 is unfettered? The answer, reiterated in numerous precedents, is an emphatic No. The court must set its own limits to the exercise of the power on an assessment of whether the violation complained of, warrants discretion to be exercised in favour of granting the relief prayed for. In other words, the court draws its own boundaries within which it decides the lis on a number of factors; including but not limited to whether there is an efficacious remedy or alternative forum which the petitioner should have first exhausted, whether the right can be reasonably restricted, where there is stark absence of a public law element in the discharge of duties of the concerned entity or even where the conduct of the petitioner does not call for the court's intervention on the facts of the case. The rule of law which springs from the fountainhead of

constitutional rights and freedoms must also be interpreted against the relevant statutes and case-law which change their beat and bearing to the times.

6. In this case, the roadblocks have been put by the CNI (Church of North India) schools who urge that being minority institutions, they are amenable to the protection of Article 30(1) of the Constitution and any direction passed in the matter of regulation of fees would amount to curtailing the right guaranteed under the said Article, which is

> "***30 (1)*** *All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice."*

The operative word in the present context is '*administer*'. In ordinary parlance, to administer is; to manage or run the affairs of, and entails control in matters of everyday governance and being essentially of a non-transitory nature. Matters of admission of students, selection procedures for such, appointment of teachers and staff, choice of courses to be taught, orientation or character given to the educational methods adopted, all form part of the right to administer (refer *Pramati Educational and Cultural Trust vs Union of India (2014) 8 SCC 1*). Regulation of fees in institutions covered by Article 30(1) has been a contentious matter since the *T.M.A. Pai Foundation case (2002) 8 SCC 481* to *Modern Dental College and Research Centre vs State of Madhya Pradesh (2016) 7 SCC 353, Islamic Academy of Education vs State of Karnataka (2003) 6 SCC 697, Modern School v Union of India (2004) 5 SCC 583;* which recognised the right of the minority institution to administer its affairs but reprimanded

against profiteering and commercialising of education. In the case at hand, our aim is not to intermeddle in the internal affairs of these institutions or supplant the present governing bodies of these institutions with a court-appointed agency; but to figure out a best-fit in a disparate set of schools and guardians and that also for a limited period of time, with the paramount interest of the students in mind.

7. The privacy argument of the CNI and the linguistic minority schools is the second aspect which should be briefly dwelt on. *K.S. Puttaswamy vs. Union of India (2017) 10 SCC 1* has been placed to elevate the right to privacy as a 'travelling right' (per Justice S.A. Bobde at paragraph 412 of the report) and a consequent bar on any direction on the schools for furnishing their accounts. The right to privacy, taken at its most obvious connotation, is the right of a person to draw his or her boundaries in terms of sharing of information. It is a pro-individual right where the person can choose the company he keeps and the time and the agency to disclose what he wishes to. It is a right aimed at preserving the spatial and intellectual integrity of an individual in matters of choice and acts as a springboard for the connected freedoms which are guaranteed under the Constitution. The argument against disclosing of accounts by the schools is not acceptable for two reasons. First, there is an unfounded apprehension that the court is trying to ferret information out to the detriment of the concerned schools. This is far from the court's intention. Even if it is assumed that the schools are being called upon to disclose their revenue surpluses, there should be a semblance of parity in the standards of

assessment of relative financial strength. For assessing the financial position of a guardian, the concerned parent may be called upon to furnish income statements. The schools should also be required to do the same in order to fairly ascertain whether a refusal to provide further concessions to a parent is justifiable on the basis of facts. Second, a comparative assessment of financial solvency is to facilitate the process of reaching a solution. The schools cannot be permitted to take an unreasonable position to put speed breakers in that path. As noticed in several decisions impacting minority institutions, Article 30(1) was contemplated by the framers to serve as a shield and not as a sword. After all, can these schools bypass the statutory requirement of filing their periodic audited financial numbers to the concerned authorities?

8. We were urged at various stages of the hearing to place the schools in categories dictated by their linguistic and religious minority status, the concessions already offered, the fee-instalment schemes proposed and the socio-economic profile of students. It was also submitted that in proposing a waiver of fees, the court was unfairly equating those guardians who can pay with those who cannot. In response to the grievance raised, the facts placed before us must be set under the lens of Article 14 of the Constitution. The mandate of equality before the law militates against treating equals as unequals and vice versa. Persuading the court to only look at the relative financial strength of the guardians and form clusters/baskets on that basis alone would result in missing entirely the reality of the times that we live in. In the success-oriented and celebrity-driven world of moving images, education

too, like many other choices, has become fundamentally aspirational. It is perceived as a gateway not only to a privileged peer-group but also to an empowered future full of possibilities. Schools cannot be simplistically categorised according to the financial profile of the guardians and whether as such they need a fee-reduction for their wards. There are many parents who are diverting a substantial part of their disposable resources, at great personal sacrifice, to get their children admitted to high-end schools with superior educational infrastructure and amenities. Such guardians would greatly benefit from a relaxation in the quantum of fees under the current financially-stressed times. The writ petitioners are supported by guardians of students of 145 schools -representing the entire spectrum of school segments- from the schools serving the economically challenged, to the traditionally well-known 'English medium' schools, to the middle–level vernacular schools, to the new-fangled high-end schools catering to the affluent sections of the society (there are no insinuations in these descriptions). In fact, seeing the diversity of the demographic, we were tempted to customise individual/special - fits instead of an omnibus best-fit solution to the dispute. However, we arrived at a considered decision that taking such a course would result in creating several classes and classifications of unintelligible differentiation based on arbitrary presumptions which would cause more injustice to those before us. The bottom line is simply this; a benefit, like a right, cannot be denied to a greater number merely on the ground that it may be misused by a few.

9. In arriving at a reasonable solution, there were other complexities which

had to be addressed. We could not overlook the possibility of diffusing lines and roles-reversal. The teachers who need the schools to remain financially solvent for their job-security may also be parents mired in debts/loss of service who would benefit from a fee-reduction. The mechanism proposed had to as inclusive as possible representing the concerns of guardians across the board, irrespective of privilege and financial bracket.

10. We are emboldened by the evolution of Public Interest Litigations where the courts have been encouraged to devise new strategies and a goal-oriented approach to give redress to a determinate class of people (*refer S.P. Gupta v. Union of India, 1981 Supp SCC 87, Bandhua Mukti Morcha Vs. Union of India, (1984)3 SCC 161)*. The objective in such litigations is to design a relief which is appropriate to the matter at hand and not be hemmed-in by procedural roadblocks. The case before us has invited us to look beyond traditional adversarial concepts in favour of the greatest good for the greatest number.

11. To put the directions in context, paragraph 61 is a measure limited to the unprecedented times that we are collectively witnessing and to achieve a result which is fair to all within the constitutional mandate. Indeed, the concerns would have been considerably different if the petitioners had complained of schools charging exorbitant fees in the pre- “New Normal” times! The issues urged are a direct and proximate result of an unprecedented challenge to the economy due to the pandemic leading to loss of jobs and opportunities with an uncertain future with no definitive end-point of the present conditions in sight. We have designed a 2-tier mechanism not only to

provide guardians with a window for further concessions but also to make the process as free of coercion/ compulsion and as much transparent as is practicably possible under the circumstances.

12. We repose faith in the fairness and competence of the Committee to take the process forward. We also wish to record our appreciation for counsel who have been extremely helpful with their suggestions for finding the best solution to the problem keeping the interest of the students foremost in their minds. Since the writ petitions are being made returnable on 7th December, 2020, the implementation of the directions will continue to be monitored by the court.

(Moushumi Bhattacharya, J.)

Later:

Some of the appearing schools seek a stay of the operation of the order. Such prayer is considered and declined.

(Sanjib Banerjee, J.)

I agree.

(Moushumi Bhattacharya, J.)