

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Pronounced on: February 16, 2016

+ **LPA 89/2016**

DIRECTORATE OF EDUCATION

..... Appellant

Through Mr. Guru Krishnakumar, Sr. Adv. with
Mr. Rahul Mehra, Sr. Standing Counsel (Civil),
Mr. Gautam Narayan & Mr. Anuj Aggarwal, ASCs
with Ms. Sneha and Mr. R.A. Iyer, Advocates

Versus

ACTION COMMITTEE UNAIDED

RECOGNIZED PRIVATE SCHOOLS

..... Respondent

Through: Mr. Sunil Gupta, Sr. Adv. with Mr. S.D.
Salwan, Mr. Kamal Gupta, Mr. Vedanta Varma,
Mr. Akhil Kumar Gola, Advocates

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE JAYANT NATH

J U D G M E N T

: **Ms. G.ROHINI, CHIEF JUSTICE**

1. This appeal by the Directorate of Education (DoE) is directed against the order of the learned Single Judge dated 06.01.2016 in C.M. No.1778/2016 in W.P.(C) No.448/2016.
2. By the said order, the learned Single Judge stayed the order of the appellant/DoE dated 06.01.2016, which is impugned in the writ petition, till the disposal of the writ petition.
3. We have heard the learned counsel for both the parties.

4. W.P.(C) No.448/2016 has been filed by the Action Committee Unaided Recognized Private Schools/the respondent herein with a prayer to quash the orders of the appellant herein dated 31.12.2015 and dated 06.01.2016.

5. The order dated 31.12.2015 was issued by DoE, Government of NCT of Delhi (GNCTD) advising all the Unaided Private Recognized Schools in Delhi to correct and modify their admission criteria in terms of the earlier Circular dated 08.12.2015 regarding admission for Entry Level Classes against the open seats in Private Unaided Recognized Schools of Delhi for the Academic Session 2016-17.

6. The order dated 06.01.2016 was also issued by DoE, GNCTD stating that on a scrutiny of the criteria adopted by the Private Unaided Schools as uploaded on the websites, it was found that the admission criteria adopted by some of the schools is unfair, unreasonable and non-transparent and accordingly directing the schools to remove the admission criteria specified therein (62 in number) and to replace them with the criteria which shall be fair, reasonable and transparent.

7. As mentioned above, the learned Single Judge stayed the order dated 06.01.2016 till the disposal of W.P.(C) No.448/2016 and it was recorded in the order under appeal itself that the writ petitioners had confined the challenge only to 11 out of the 62 criteria i.e. Item Nos.1, 3, 5, 10, 16, 31, 32, 45, 47, 48 and 61 of the order dated 06.01.2016 besides the management quota.

8. The learned Single Judge opined that *prima facie* the impugned order has been issued without any authority and it is in direct conflict with the Recognized Schools (Admission Procedure for Pre-Primary Class) Order, 2007 (for short hereinafter referred to as ‘the 2007 Order’) issued by the Lieutenant Governor of NCTD in exercise of the powers conferred by Section 3(1) of DSE Act read with Rule 43 of DSE Rules. Placing reliance upon the decision in ***Forum for Promotion of Quality Education v. LG; 216 (2015) DLT 80***, the learned Single Judge also held that the private unaided school managements are entitled to full autonomy in administration including the right to admit students. The learned Single Judge was also of the view that the impugned order dated 06.01.2016 being only an administrative order without the advice of the Advisory Board under Section 22 of DSE Act, is without any authority of law. So far as the criteria specified in the impugned order are concerned, the learned Single Judge observed that *prima facie* there is nothing to hold that the 11 criteria to which the challenge was confined in the writ petition are unreasonable or based on whims and fancies of the management or they can lead to mal-administration. Regarding the management quota, the learned Single Judge held that the same has been recognized by the Supreme Court in ***P.A. Inamdar*** and also ***Christian Medical College*** and that apart in LPA No.781/2014 the Division Bench declined to stay the judgment in ***Forum for Promotion of Quality Education***.

9. Thus, interim stay has been granted with respect to the 11 criteria and the management quota making it clear that the allegations of malpractice should be investigated and taken to their logical conclusion.

10. Assailing the said order, it is vehemently contended by Shri Guru Krishnakumar, the learned Senior Counsel appearing for the appellant that the *prima facie* finding recorded by the learned Single Judge that the impugned order has been issued without any authority of law is erroneous. While submitting that the order dated 06.01.2016 was issued in exercise of the power conferred under Section 3(1) and Section 23 of the Delhi School Education Act, 1973 and Rule 43 of the Delhi School Education Rules, 1973 read with the powers delegated to the DoE under the Circular dated 04.09.2001, it is also contended by the learned Senior Counsel for the appellant that the orders dated 31.12.2015 and 06.01.2016 have rightly been issued by DoE and that the learned Single Judge has erred in concluding that the same are in the nature of an executive instruction/executive action. The further contention is that the objective behind issuing the said orders being to ensure that admissions to Entry Level Classes are made in a fair, reasonable, rational, transparent and non-exploitative manner but not to deprive the private unaided educational schools of their autonomy, the learned Single Judge ought not to have stayed the same. It is also contended that the learned Single Judge failed to appreciate that DoE is statutorily bound to ensure that all schools are managed and run in the best interest of education of children and for better organization and development of school education.

11. We have also heard Shri Sunil Gupta, the learned Senior Counsel appearing for the respondent who has supported the order under appeal.

12. Having regard to the fact that the main writ petition is yet to be heard on merits and by the order under appeal the learned Single Judge has only

recorded a *prima facie* finding that order dated 06.01.2016 is without authority of law, the limited issue that requires consideration in the present appeal is whether the *prima facie* satisfaction recorded by the learned Single Judge suffered from any infirmity.

13. A perusal of the order under appeal shows that the learned Single Judge arrived at the *prima facie* finding that the order of DoE dated 06.01.2016 is without authority of law for the following reasons:

- (i) it is in direct conflict with the Recognized Schools (Admission Procedure for Pre-Primary Class) Order, 2007 issued by the Lieutenant Governor; and
- (ii) even if the submission of DoE that the Delhi School Education Act, 1973 must be interpreted in the light of the Constitution 69th Amendment Act dated 01.02.1992 inserting Article 239AA and the Government of National Capital Territory Act, 1991 is accepted, Article 239AA(3)(c) of the Constitution of India would be attracted to the present case.

14. The Recognized Schools (Admission Procedure for Pre-Primary Class) Order, 2007 (for short 2007 Order) was issued by the Lieutenant Governor of NCT of Delhi in exercise of the powers conferred by Section 3(1) of Delhi School Education Act, 1973 (for short DSE Act) read with Rule 43 of the Rules made thereunder. DSE Act, 1973 is a Parliamentary enactment and Section 3 empowers the Administrator i.e. the Lieutenant Governor to regulate education in all the schools in Delhi in accordance with the provisions of the DSE Act and the Rules made thereunder. Rule 43 of the Rules further provides that the Administrator, if he is of opinion that in

the interest of school education in Delhi it is necessary to do so, issue such instructions in relation to any matter not covered by the Rules as he may deem fit. In exercise of the powers so conferred by Section 3(1) of the Act and Rule 43 of the Rules the 2007 Order was made by the Lieutenant Governor. Clause 14 of the said Order prescribes the parameters to be adopted by the recognised schools in the best interest of the children. As per Sub clause (vi) of Clause 14 the schools may have a management quota upto 20% of the total seats available for admission in the class. Sub clauses (i) to (v) specified the criteria that have to be adopted by the schools in the admission process.

15. On 18.12.2013, the Recognized Schools (Admission Procedure for Pre-Primary Classes) (Amendment) Order, 2013 was issued by the Lieutenant Governor of the National Capital Territory of Delhi thereby substituting Clause 14 of the 2007 Order. By virtue of the said Amendment, the management quota in admission in any private unaided recognised school of Delhi was deleted. The Amendment Order also provided that the total number of seats to a class at entry level shall be divided into four parts specified therein. The said Amendment Order dated 18.12.2013 was challenged by Action Committee Unaided Recognised Private School by filing W.P.(C) No.177/2014. By order dated 28.11.2014, the writ petition was allowed and the Amendment Order dated 18.12.2013 was quashed with regard to 75% general nursery seats in the private unaided schools of Delhi holding *inter alia* that the Amendment Order dated 18.12.2013 is *ultra vires* the DSE Act and the DSE Rules. It was also held by the learned Single Judge that the concept of autonomy of private unaided schools has been

recognised by Section 16(3) of the DSE Act and Rule 145 of the DSE Rules and by virtue of the said provisions the head of the every unaided school is empowered to regulate admissions in the schools or any class thereof.

16. LPA No.781/2014 preferred by DoE against the said order of the learned Single Judge is pending and the Division Bench by order dated 10.12.2014 dismissed the application for interim stay.

17. While so, the admissions to the entry level classes in the private unaided recognised schools for the Academic Session 2016-17 are sought to be regulated by the impugned order dated 06.01.2016 issued by DoE by directing that only 25% of the seats are reserved in private unaided recognised schools for EWS/DG admissions and rest of the 75% seats should be open seats where points based fair, reasonable and transparent criteria can be adopted for the admissions and that in 75% of the open seats there should not be any quota. By virtue of the said order dated 06.1.2016, the 20% Management Quota provided under Clause 14 of the 2007 Order has been done away and that apart, the parameters specified in Clause 14 have also been extensively modified.

18. At the cost of repetition, it may be mentioned that the 2007 Order was made by the Lieutenant Governor/Administrator in exercise of the powers conferred under Section 3(1) of the DSE Act read with Rule 43 of the DSE Rules. Though the order of DoE dated 06.01.2016 does not refer to 2007 Order, virtually it substitutes the parameters for admission for pre-primary classes prescribed under Clause 14 of 2007 Order. As rightly held by the learned Single Judge, the modification/substitution of the admission procedure for pre-primary classes since has been an occupied field, can be

effected only by way of an amendment to 2007 Order. The learned Single Judge was also right in holding that the Lieutenant Governor of Delhi alone is competent to make any such amendment to 2007 Order in view of Sections 2(a) and 3 of the DSE Act and Rule 43 of the DSE Rules. We entirely agree with the view of the learned Single Judge that the order dated 06.01.2016 which is a mere executive/administrative order cannot take the place of a law made by the Legislature. Therefore, the action of DoE in seeking to modify/substitute the admission procedure by issuing the order dated 06.01.2016 undoubtedly amounts to exercising the power conferred on the Lieutenant Governor under Section 3(1) read with Section 2(a) of the DSE Act and the Rules made thereunder. The same being impermissible under law, the learned Single Judge was right in holding that the said order is without authority. So far as the Circular dated 04.09.2001 relied upon by the learned Senior Counsel for the appellant to substantiate the plea that the powers regarding regulation of education in all the schools vested in the Administrator under Section 3(1) have been delegated to DoE is concerned, we found that the material produced by the appellants to substantiate the said plea is vague and not sufficient to uphold the DoE's order dated 06.01.2016. At any rate, whether the provisions of 2007 Order which was made by the Administrator in exercise of the statutory powers can be modified by a delegatee by issuing an executive order is a larger issue which needs consideration in the main petition. We are also in agreement with the learned Single Judge that the order dated 06.01.2016, at any rate, cannot be saved in view of Article 239AA(3)(c) of the Constitution of India.

19. Therefore, the learned Single Judge is justified in arriving at a *prima facie* conclusion that the order dated 06.01.2016 issued by DoE is without authority of law. Consequently, the order dated 06.01.2016 has been rightly stayed by the learned Single Judge.

20. Hence, the present appeal is devoid of any merit and the same is accordingly dismissed.

21. We make it clear that the findings/observations made in this judgment as well as the order under appeal shall not be treated as conclusive and shall not come in the way while deciding the main petition.

CHIEF JUSTICE

JAYANT NATH, J.

FEBRUARY 16, 2016

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