IN THE HIGH COURT FOR THE STATE OF TELANGANA
AT: HYDERABAD
CORAM:

***HON'BLE SRI JUSTICE K. LAKSHMAN**

+ WRIT PETITION Nos. 45940 OF 2022 AND 3372 OF 2023

% Delivered on: 05-06-2023

Between in W.P. No.45940 of 2022:

Little Flower High School, Abids, Hyd. Rep.by
Its HM & Correspondent, Bro.Sajan Anthony .. Petitioner

Vs.

$ The State of Telangana, rep.by its Principal Secretary,
Dept. of School Edn., Hyderabad & others .. Respondents

Between in W.P. No.3372 of 2023:

Mr. M. Gowthan Sagar S/o M. Govind Raj .. Petitioner

Vs.

$ The State of Telangana, rep.by its Principal Secretary,
Dept. of School Edn., Hyderabad & others .. Respondents

! For Petitioners in both WPs. : Mr. Ali Faraz Farooqui &
Mr. Ch. Samson Babu

^ For Respondents : 1. Learned Govt. Pleader for School Education
2. Mr. Ch. Samson Babu
3. Mr. Ali Faraz Farooqui

< Gist :

> Head Note :

? Cases Referred :

1. (2014) 8 SCC 1.
2. MANU/TL/0020/2023.

3. (1993) 1 SCC 645.
4. (1974) 1 SCC 717.
5. 2015 SCC OnLine Bom 3929.
6. MANU/TN/0804/2010.
7. 2018 SCC OnLine Chh 551.

THE HON'BLE SRI JUSTICE K.LAKSHMAN

WP NOs. 45940 OF 2022 AND 3372 OF 2023

COMMON ORDER:

The present writ petitions arise out of common set of facts. Therefore, they are decided *vide* the following common order.

2. Heard Mr.Ch.Samson Babu, learned counsel for the petitioner in W.P.No.45940 of 2022 and respondent No.5 in W.P.No.3372 of 2023; Mr.Ali Faraz Farooqui, learned counsel for the petitioner in W.P.No.3372 of 2023 and respondent No.5 in W.P.No.45940 of 2022; and learned Government Pleader for School Education appearing on behalf of the official respondents in both writ petitions.

3. W.P. No. 45940 of 2022 is filed challenging the proceedings issued by the District Educational Officer, Hyderabad *vide* RC. No. 321/HRC/B3/2022 dated 30.11.2022 as illegal, and violative of Articles 14 and 30 of the Constitution of India. Likewise, W.P. No. 3372 of 2023 is filed seeking a direction against Respondent No. 5 therein to implement the orders in RC No. 321/HRC/B3/2022 dated 01.12.2022 issued by the District Educational Officer, Hyderabad.

(For the sake of convenience, the parties are referred to as they are arrayed in W.P. No. 3372 of 2023)

Facts of the case:-

4. The Petitioner (represented by his father) in W.P. No. 3372 of 2023 is a minor student who was studying in Class III of Respondent No. 5 (hereinafter referred to as 'Respondent school'). According to the Petitioner, due to the on-set of Covid-19 pandemic, he could not pay the school fee. As such, he was denied to attend online classes of Class III by the Respondent School. Thereafter, the Petitioner paid the school fee. However, the Respondent School did not permit him to appear for the final exams of Class III on the ground that he did not have requisite attendance. The Respondent School did not promote him to Class IV and detained him in Class III.

5. Aggrieved by the action of the Respondent School in not promoting the Petitioner, his father lodged a complaint with the Telangana State Human Rights Commission (hereinafter referred to as 'TSHRC') and a case bearing H.R. Case No. 3242 of 2022 dated 05.08.2022 was registered against the Respondent School. The TSHRC communicated the matter to the District Educational Officer to take action and submit a report.

6. The District Educational Officer in-turn requested the Deputy Educational Officer to submit a report after conducting an enquiry in relation to H.R. Case No. 3242 of 2022 dated 05.08.2022. The Deputy Educational Officer issued a show cause notice dated 26.09.2022 to the Respondent School seeking a reply as to why contrary to the Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as 'the Act, 2009') the Petitioner student was being detained in Class III and not being promoted to Class IV.

7. Since no reply was received from the Respondent School, another reminder show cause notice dated 25.10.2022 was issued by the Deputy Educational Officer. The Respondent School replied to the said show cause notice stating that the Petitioner student had not attended any classes and did not appear for any of the internal tests and examinations. Further, the Respondent School stated that the Act, 2009 is not applicable to minority institutions like itself.

8. Recording the stand taken by the Respondent School, the Deputy Educational Officer submitted an enquiry report dated 27.10.2022 to the District Educational Officer concluding that the management of the

Respondent School ‘ is giving irrelevant answers not justiciable as per the rules in vogue’.

9. Based on the enquiry report, the District Educational Officer issued proceedings dated 30.11.2022 stating that the Act, 2009 is applicable to all schools including unaided minority institutions like the Respondent School and directed the Deputy Educational Officer to issue notice to the Respondent School to promote the Petitioner Student to Class IV as per Section 16 of the Act, 2009.

10. The Respondent School has challenged the said proceedings dated 30.11.2022 in W.P. No. 45940 of 2022.

11. Thereafter, proceedings dated 01.12.2022 were issued by the District Educational Officer instructing the Deputy Educational Officer to issue notice to the Respondent School to promote the Petitioner student as per proceedings dated 30.11.2022. The Petitioner student in W.P. No. 3372 of 2023 seeks a direction against the Respondent School in not implementing the orders passed in proceedings dated 01.12.2022.

12. <u>Contentions of the Petitioner Student and the District Educational Officer</u>:-

i. The Act, 1999 is applicable to all aided/un-aided minority institutions and schools including the Respondent School.

ii. Right to Education is a fundamental right and cannot be denied to the Petitioner.

iii. As per Section 16 of the Act, 2009, no student pursuing elementary education i.e., from Class I to Class VIII can be detained. Therefore, the Petitioner cannot be detained and shall be promoted to Class IV.

iv. Further, the Petitioner was not permitted to attend the classes because of failure to pay the fee. However, now the Petitioner has paid the fee and cannot be denied promotion to Class IV.

v. Further, the Government of Telangana *vide* G.O. Ms. No. 54 dated 05.05.2020 and G.O. Ms. No. 56 dated 26.04.2021 had decided that for the academic years 2019-20 and 2020-2021, all the students from Class I to Class IX shall be promoted to the next academic year. Therefore, the Petitioner cannot be detained in Class III.

13. <u>Contentions of the Respondent School</u>:-

i. The Act, 2009 which provides that no child from Class I to Class VIII can be detained is inapplicable to minority schools like itself. Reliance is placed on **Pramati Educational and Cultural Trust v. Union of India**[1].

ii. The Petitioner cannot be promoted to Class IV because he has not attended any classes of Class III. Further, it was denied that he was not permitted to attend classes.

iii. G.O. Ms. No. 54 dated 05.05.2020 and G.O. Ms. No. 56 dated 26.04.2021 are not applicable to the Petitioner/student as he has not attended any online or physical classes.

iv. Therefore, the Respondent School cannot be forced to promote the Petitioner student to Class IV without him attending the requisite classes.

<u>Findings of the Court</u>:-

14. From the facts of the case and the contentions raised by the parties, the following questions have to be decided by the Court:

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[1] (2014) 8 SCC 1.

I. *Whether the Act, 2009 including Section 16 thereof is applicable to minority educational institutions?*

II. *Whether the Petitioner student can be promoted to Class IV under Section 16 of the Act, 2009, despite having low attendance?*

15. Before answering the aforesaid questions, this Court would like to highlight that the writ petition against the Respondent School is maintainable. This Court in **Sampath Karthikeya Busa v. University Grants Commission**[2]held that a writ petition against an educational institution is maintainable, if the right to education of a student is in question. The relevant paragraphs are extracted below:

> 23. As stated above, the public function/duty performed by Respondent No. 2 is imparting education to students. If any action of an educational institution effects the right to education of a student, it partakes a public law element as imparting education is a public law function. Students who are suspended by a private educational institution from attending classes and who challenge such suspension under Article 226 stand on a different footing than that of private individuals involved in private disputes like breaches of contract or commission of offences. Students and their right to education is central to any educational institution. Any action effecting their right to education involves a public law element. Such action should be the one which directly effects the students and their education. The students can challenge such action and its validity thereof. The courts can decide whether such action was valid, justified

[2]MANU/TL/0020/2023.

> and reasonable in light of the facts of the case and the applicable rules of the university.
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> **24. In the present case, Respondent No. 2 performs a public function. It suspended the Petitioners herein indefinitely with immediate effect on the ground of registration of FIR. The action of suspension directly effects the Petitioners' education and such suspension involves a public law element. Therefore, the present writ petition is maintainable.**

Therefore, the writ petition filed by the Petitioner student i.e., 3372 of 2023 is maintainable.

16. Before answering the questions framed above, it is also apt to note that right to education is a fundamental right. The Supreme Court in **Unni Krishnan v. State of A.P.**[3] held that children upto the age of 14 years have a right to free education. Recognizing the said right, Article 21A of the Constitution of India was added to the existing fundamental rights *vide* Constitution (86th Amendment) Act, 2002. The said provision provides the right of mandatory and compulsory elementary education of children from the age of 6 to 14 years.

17. It is pertinent to note that unlike other fundamental rights, Article 21A imposes a positive obligation on the State to provide education to all the children aged 06 to 14 years. In other words, the State is required to act

[3] (1993) 1 SCC 645.

positively and take all measures to ensure that the right to education is realized. Therefore, the State has the power to enact laws providing education to all the children and making such education accessible.

In furtherance of the object of Article 21A, the parliament enacted the Act, 2009, the relevant provisions of which are extracted below:

> **Section 2 (c)** "child" means a male or female child of the age of six to fourteen years;
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> **Section 2 (f)** "elementary education" means the education from first class to eighth class;"
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> **Section 2 (n)** “school” means any recognised school imparting elementary education and includes—
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> (i) a school established, owned or controlled by the appropriate Government or a local authority;
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> (ii) an aided school receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority;
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> (iii) a school belonging to specified category; and
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> (iv) an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority;
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> **Section 3 Right of child to free and compulsory education.—** (1) Every child of the age of six to fourteen years, including a child referred to in clause (d) or clause (e) of Section 2, shall have the right to free and

compulsory education in a neighbourhood school till the completion of his or her elementary education.

(2) For the purpose of sub-section (1), no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing the elementary education:

(3) A child with disability referred to in sub-clause (A) of clause (ee) of Section 2 shall, without prejudice to the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996), and a child referred to in sub-clauses (B) and (C) of clause (ee) of Section 2, have the same rights to pursue free and compulsory elementary education which children with disabilities have under the provisions of Chapter V of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995:

Provided that a child with "multiple disabilities" referred to in clause (h) and a child with "severe disability" referred to in clause (o) of Section 2 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (44 of 1999) may also have the right to opt for home-based education.

18. As can be seen from the above provisions, right to elementary education i.e., from Class I to Class VIII of a child between 06 to 14 years is recognized. Therefore, the Petitioner student falls within the purview of the Act,2009 as a child entitled for elementary education.

19. Further, the definition of school in Section 2(n)(iii) includes schools belonging to a specified category and Section 2(n)(iv) provides that school also includes an unaided school. A conjoint reading of both the provisions indicates that the definition of school includes a minority unaided private school like the Respondent School.

20. With this background, the Court shall now discuss the applicability of the Act, 2009 to the Respondent School.

Issue No.I:-

21. Constitution of India being a secular document recognises the rights of minorities which can be classified as religious and linguistic minorities. In recognition of their rights, Part III of the Constitution of India in Article 30 provides a fundamental right to such minorities to establish, administer and manage educational institutions. The object behind such a right is to preserve the culture and traditions in the form of providing education to the children belonging to the minority community.

22. It is pertinent to note that a nine-judge constitution bench of the Supreme Court in **Ahmedabad St. Xavier's College Society v. State of**

Gujarat[4]held that the right under Article 30 permits minorities to run educational institutions providing secular education and also permits them to admit students not belonging to such minority community.

23. For the sake of convenience, Article 30 of the Constitution of India is extracted below:

> 30. Right of minorities to establish and administer educational institutions
> (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice
> (1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause
> (2) The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

24. The scope of Article 30 of the Constitution of India with respect to regulation by the State has been discussed by the Supreme Court on various occasions. The Courts have consistently held that minority institutions have a

[4](1974) 1 SCC 717.

fundamental right to establish and administer educational institutions. However, such right is subject to regulation by the State, which can make laws to maintain the standards of education and promote education. Further, regulation of minority educational institutions is permissible to prevent maladministration.

25. It is relevant to note that the power of regulation of minority educational institutions is limited. The State cannot bring in laws to regulate minority educational institutions which have an effect of destroying the minority character of the institution. In this context, it is relevant to take note of the following paragraphs in **Ahmedabad St. Xavier's College Society (supra)**:

> 19. The entire controversy centres round the extent of the right of the religious and linguistic minorities to administer their educational institutions. The right to administer is said to consist of four principal matters. First is the right to choose its managing or governing body. It is said that the founders of the minority institution have faith and confidence in their own committee or body consisting of persons elected by them. Second is the right to choose its teachers. It is said that minority institutions want teachers to have compatibility with the ideals, aims and aspirations of the institution. Third is the right not to be compelled to refuse admission to students. In other words, the minority

institutions want to have the right to admit students of their choice subject to reasonable regulations about academic qualifications. Fourth is the right to use its properties and assets for the benefit of its own institution.

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90. We may now deal with the scope and ambit of the right guaranteed by clause (1) of Article 30. The clause confers a right on all minorities, whether they are based on religion or language, to establish and administer educational instructions of their choice. The right conferred by the clause is in absolute terms and is not subject to restrictions, as in the case of rights conferred by Article 19 of the Constitution. **The right of the minorities to administer educational institutions does not, however, prevent the making of reasonable regulations in respect of those institutions. The regulations have necessarily to be made in the interest of the institution as a minority educational institution. They have to be so designed as to make it an effective vehicle for imparting education. The right to administer educational institutions can plainly not include the right to maladminister.** Regulations can be made to prevent the housing of an educational institution in unhealthy surroundings as also to prevent the setting up or continuation of an educational institution without qualified teachers. **The State can prescribe regulations to ensure the excellence of the institution. Prescription of standards for educational institutions does not militate against the right of the minority to administer the institutions. Regulations made in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and**

the like may undoubtedly be imposed. Such regulations are not restrictions on the substance of the right which is guaranteed: they secure the proper functioning of the institution, in matters educational [see observations of Shah, J. in *Rev. SidhajbhaiSabhai* p. 850]. Further as observed by Hidyatullah, C.J. in the case of *Very Rev. Mother Provincial* the standards concern the body politic and are dictated by considerations of the advancement of the country and its people. **Therefore, if universities establish syllabi for examinations they must be followed, subject, however, to special subjects which the institutions may seek to teach, and to a certain extent the State may also regulate the conditions of employment of teachers and the health and hygiene of students. Such regulations do not bear directly upon management as such although they may indirectly affect it. Yet the right of the State to regulate education, educational standards and allied matters cannot be denied.** The minority institutions cannot be allowed to fall below the standards of excellence expected of educational institutions, or under the guise of exclusive right of management, to decline to follow the general pattern. While the management must be left to them, they may be compelled to keep in step with others.

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176. Recognition or affiliation is granted on the basis of the excellence of an educational institution, namely, that it has reached the educational standard set up by the university. Recognition or affiliation is sought for the purpose of enabling the students in an educational institution to sit for an examination to be conducted by the university and to obtain a

degree conferred by the university. For that purpose, the students should have to be coached in such a manner so as to attain the standard of education prescribed by the university. Recognition or affiliation creates an interest in the university to ensure that the educational institution is maintained for the purpose intended and any regulation which will subserve or advance that purpose will be reasonable and no educational institution established and administered by a religious or linguistic minority can claim recognition or affiliation without submitting to those regulations. That is the price of recognition or affiliation: but this does not mean that it should submit to a regulation stipulating for surrender of a right or freedom guaranteed by the Constitution, which is unrelated to the purpose of recognition or affiliation. In other words, recognition or affiliation is a facility which the university grants to an educational institution, for the purpose of enabling the students there to sit for an examination to be conducted by the university in the prescribed subjects and to obtain the degree conferred by the university, and therefore, it stands to reason to hold that no regulation which is unrelated to the purpose can be imposed. If, besides recognition or affiliation, an educational institution conducted by a religious minority is granted aid, further regulations for ensuring that the aid is utilized for the purpose for which it is granted will be permissible. **The heart of the matter is that no educational institution established by a religious or linguistic minority can claim total immunity from regulations by the legislature or the university if it wants affiliation or recognition; but the character of the permissible regulations must depend upon their purpose. As we said, such regulations will be permissible if**

they are relevant to the purpose of securing or promoting the object of recognition or affiliation. There will be border line cases where it is difficult to decide whether a regulation really subserves the purpose of recognition or affiliation. But that does not affect the question of principle. **In every case, when the reasonableness of a regulation comes up for consideration before the Court, the question to be asked and answered is whether the regulation is calculated to subserve or will in effect subserve the purpose of recognition or affiliation, namely, the excellence of the institution as a vehicle for general secular education to the minority community and to other persons who resort to it. The question whether a regulation is in the general interest of the public has no relevance, if it does not advance the excellence of the institution as a vehicle for general secular education as, *exhypothesi*, the only permissible regulations are those which secure the effectiveness of the purpose of the facility, namely, the excellence of the educational institutions in respect of their educational standards.** This is the reason why this Court has time and again said that the question whether a particular regulation is calculated to advance the general public interest is of no consequence if it is not conducive to the interests of the minority community and those persons who resort to it.

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209. The essence of the right guaranteed by Article 30(1) of the Constitution is a free exercise of their choice by minority institutions of the pattern of education as well as of the administration of their educational institutions. Both these, taken together, determine the kind

or character of an educational institution which a minority has the right to choose. Where these patterns are accepted voluntarily by a minority institution itself, even though the object may be to secure certain advantages for itself from their acceptance, the requirement to observe these patterns would not be a real violation of rights protected by Article 30(1). Indeed, the acceptance could be more properly viewed as an assertion of the right to choose which may be described as the "core" of the right protected by Article 30(1). In a case in which the pattern is accepted voluntarily by a minority institution, with a view to taking advantage of the benefits conferred by a statute, it seems to me that it cannot insist upon an absolutely free exercise of the right of administration. Here, the incidental fetters on the right to manage the institution, which is only a part of the fundamental right, would be consequences of an exercise of the substance or essence of the right which, as I see it, is freedom of choice. No doubt, the rights protected by Article 30(1) are laid down in "absolute" terms without the kind of express restrictions found in Articles 19, 25 and 26 of the Constitution. But, if a minority institution has the option open to it of avoiding the statutory restrictions altogether, if it abandons, with it, the benefits of a statutory right, I fail to see how the absoluteness of the right under Article 30(1) of the Constitution is taken away or abridged. All that happens is that the statute exacts a price in general interest for conferring its benefits. It is open to the minority institution concerned to free itself from any statutory control or fetters if freedom from them is considered by it to be essential for the full exercise of its fundamental rights under Article 30(1) of the Constitution. This article, meant to

serve as a shield of minority educational institutions against the invasion of certain rights protected by it and declared fundamental so that they are not discriminated against, cannot be converted by them into a weapon to exact unjustifiable preferential or discriminatory treatment for minority institutions so as to obtain the benefits but to reject the obligations of statutory rights. **It is only when the terms of the statute necessarily compel a minority institution to abandon the core of its fundamental rights under Article 30(1) that it could amount to taking away or abridgement of a fundamental right within the meaning of Article 13(2) of the Constitution. It is only then that the principle could apply that what cannot be done directly cannot be achieved by indirect means.** Having stated my approach to the interpretation of Article 30(1) of the Constitution, I proceed now to consider the effect of this article on the impugned provisions.

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261. Absolute rights are possible only in the moon. It is impossible for a member of a civilized community to have absolute rights. **Some regulation of rights is necessary for due enjoyment by every member of the society of his own rights.**

262. It cannot be disputed that the right under Article 30(1) is also subject to regulation for the protection of various social interests such as health, morality, security of State, public order and the like, for the good of the people is the supreme law. Today, education, specially Science and Technology, is a pre-emptive social interest for our developing Nation. “It is now evident that the real source of wealth lies no longer in raw material, the labour force or machines, but in

having scientific, educated, technological manpower base. The education has become the real wealth of the new age." [J.D. Bernal, Science in History, Pelican Book, Vol. I, p. 117] The attack on complex and urgent problems of the country has to be made "through two main programmes: (1) The development of physical resources through the modernisation of agriculture and rapid industrialisation. This requires a science-based technology ... (2) The development of human resources through a properly organisedprogramme of education".

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269. Subject to these preliminary remarks, it is now necessary to consider how far a regulation may touch upon the right conferred by Article 30(1) without inquiring the wrath of Article 13(2). In other words, what is the test for deciding whether a regulation imposed on a minority educational institution takes away or abridges the right conferred by Article 30(1)? **It has already been discussed earlier that the test of a valid regulation is its necessity. Any regulation which does not go beyond what is necessary for protecting the interests of the society (which includes the minorities also) of the rights of the individual members of the society should be constitutional.** It cannot be said that such a regulation takes away or abridges the rights conferred by Article 30(1).

26. It can be seen from the above extracted paragraphs that State can make reasonable laws to regulate education even when such education is provided by minority educational institutions. Regulation of education and its

standards in cases of secular education is different from regulation of administrative activity. Article 30 of the Constitution of India does prescribe regulation of education. It only protects the right of minorities in establishing the educational institutions and maintaining them. As long as the law does not impinge upon the minority character of the institution, such law is valid and is applicable to minority educational institutions.

27. Now coming to the present case, the Respondent School contends that the Act, 2009 is inapplicable to unaided minority institutions. It relied on the decision in **Pramati Educational and Cultural Trust (supra)** wherein the Supreme Court held as follows:

> 49. Article 21-A of the Constitution, as we have noticed, states that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. The word "State" in Article 21-A can only mean the "State" which can make the law. Hence, Mr Rohatgi and Mr Nariman are right in their submission that the constitutional obligation under Article 21-A of the Constitution is on the State to provide free and compulsory education to all children of the age of 6 to 14 years and not on private unaided educational institutions. Article 21-A, however, states that the State shall by law determine the "manner" in which it will discharge its constitutional obligation under Article 21-A. Thus, a new power was vested in the State to enable the State to discharge this constitutional

obligation by making a law. **However, Article 21-A has to be harmoniously construed with Article 19(1)(*g*) and Article 30(1) of the Constitution. As has been held by this Court in *VenkataramanaDevaru* v. *State of Mysore* [AIR 1958 SC 255] : (AIR p. 268, para 29)**

"*29.* … The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect could be given to both. This is what is known as the rule of harmonious construction."

We do not find anything in Article 21-A which conflicts with either the right of private unaided schools under Article 19(1)(*g*) or the right of minority schools under Article 30(1) of the Constitution, but the law made under Article 21-A may affect these rights under Articles 19(1)(*g*) and 30(1). The law made by the State to provide free and compulsory education to the children of the age of 6 to 14 years should not, therefore, be such as to abrogate the right of unaided private educational schools under Article 19(1)(*g*) of the Constitution or the right of the minority schools, aided or unaided, under Article 30(1) of the Constitution.

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55. When we look at the 2009 Act, we find that Section 12(1)(*b*) read with Section 2(*n*)(*ii*) provides that an aided school receiving aid and grants, whole or part, of its expenses from the appropriate Government or the local authority has to provide free and compulsory education to such proportion of children admitted therein as its annual recurring aid

or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent. Thus, a minority aided school is put under a legal obligation to provide free and compulsory elementary education to children who need not be children of members of the minority community which has established the school. We also find that under Section 12(1)(*c*) read with Section 2(*n*)(*iv*), an unaided school has to admit into twenty-five per cent of the strength of Class I children belonging to weaker sections and disadvantaged groups in the neighbourhood. Hence, unaided minority schools will have a legal obligation to admit children belonging to weaker sections and disadvantaged groups in the neighbourhood who need not be children of the members of the minority community which has established the school. **While discussing the validity of clause (5) of Article 15 of the Constitution, we have held that members of communities other than the minority community which has established the school cannot be forced upon a minority institution because that may destroy the minority character of the school. In our view, if the 2009 Act is made applicable to minority schools, aided or unaided, the right of the minorities under Article 30(1) of the Constitution will be abrogated. Therefore, the 2009 Act insofar it is made applicable to minority schools referred in clause (1) of Article 30 of the Constitution is ultra vires the Constitution. We are thus of the view that the majority judgment of this Court in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[(2012) 6 SCC 1] insofar as it holds that the 2009 Act is applicable to aided minority schools is not correct.**

> 56. In the result, we hold that the Constitution (Ninety-third Amendment) Act, 2005 inserting clause (5) of Article 15 of the Constitution and the Constitution (Eighty-sixth Amendment) Act, 2002 inserting Article 21-A of the Constitution do not alter the basic structure or framework of the Constitution and are constitutionally valid. We also hold that the 2009 Act is not ultra vires Article 19(1)(*g*) of the Constitution. **We, however, hold that the 2009 Act insofar as it applies to minority schools, aided or unaided, covered under clause (1) of Article 30 of the Constitution is ultra vires the Constitution.** Accordingly, Writ Petition (C) No. 1081 of 2013 filed on behalf of Muslim Minority Schools Managers' Association is allowed and Writ Petitions (C) Nos. 416 of 2012, 152 of 2013, 60, 95, 106, 128, 144-45, 160 and 136 of 2014 filed on behalf of non-minority private unaided educational institutions are dismissed. All IAs stand disposed of. The parties, however, shall bear their own costs.

28. The Supreme Court in **Pramati Educational and Cultural Trust (supra)** dealt with the applicability of Article 15(5) of the Constitution of India and Section 12 of the Act, 2009 which provides for reserving certain number of seats in the school for children belonging to disadvantaged groups. The Court held that though Article 15(5) and Section 12 of the Act, 2009 were enacted in furtherance of Article 21A. However, under Article 21A, minority educational institutions established cannot be forced to admit students. The Court held that if minority educational institutions are forced to

reserve seats and admit students it will destroy the minority character of such institutions. Therefore, the Court held that the Act, 2009 is inapplicable to minority educational institutions.

29. The decision in **Pramati Educational and Cultural Trust (supra)** cannot be interpreted to mean that the Act, 2009 in its entirety is inapplicable to minority educational institutions. The Act, 2009 is inapplicable only in so far as the minority character of educational institutions is affected. The Court in **Pramati Educational and Cultural Trust (supra)** held that admissions based on reservations in a minority educational institution has a tendency to destroy the minority character.

30. As can be seen from para 49 of the decision, Article 21A has to be harmoniously construed with Article 30. This means that any law made in furtherance of Article 21A, in so far as it does not take away the rights of the minorities under Article 30, is valid. The said interpretation is in tune with Section 1(4) of the Act, 2009 which is extracted below:

> **Section 1 Short title, extent, application and commencement**.—(1) This Act may be called the Right of Children to Free and Compulsory Education Act, 2009.
> (2) It shall extend to the whole of India

> (3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.
> (4) Subject to the provisions of Articles 29 and 30 of the Constitution, the provisions of this Act shall apply to conferment of rights on children to free and compulsory education.

31. Section 1(4) of the Act, 2009 clearly states that the Act, 2009 is applicable subject to Articles 29 and 30 of the Constitution of India. Therefore, as long as Article 30 is not violated, the Act, 2009 is applicable to minority educational institutions.

32. At this stage, it is relevant to note that a division bench of the Bombay High Court in **Jayshree Vijay Mundaware v. Principal/Head Mistress of Ashoka Universal School**[5]referring to a communication dated 27.08.2014 addressed by the Ministry of Human Resource Development, Department of School Education and Literacy, New Delhi held that the Act, 2009 is applicable to minority educational institutions. Further, the said communication stated that provisions of the Act, 2009 pertaining to holding back (Section 16) are applicable to minority educational institutions. The relevant paragraph including the communication dated 27.08.2014 is extracted below:

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[5]2015 SCC OnLine Bom 3929.

29. The RTE Act, defines the "elementary education" in section 2(f) which is from 1st Standard to 8th Standard. The RTE Act, covers all such schools for various other purposes, though specifically excluded unaided minority schools, for the reasons so recorded in *Society For Unaided Private Schools of Ra-jasthan* (Supra). But the basic rules and regulations and the purposes and object of right of education of such admitted children, which is not only flowing from RTE Act, but also from the Constitution of India, cannot be overlooked by all the concerned. To achieve the constitution and specifically, Article 21(A) and 45 of the Constitution of India, we have therefore, also required to consider the Constitutional right of such children referring to a free and compulsory education in school and/or even otherwise.

30. It is relevant to note the following communication addressed by the Ministry of Human Resource Development, Department of School Education and Literacy, New Delhi dated 27th August 2014 to Shri Arnab Roy, Secretary, Department of School Education, Govt, of West Bengal, Bikash Bhavan, Salt Lake, Kolkata - 700 091:

"*Subject : Applicability of the provisions of the RTE Act, 2009 to the minority educational institutions detention of students between Classes I to VIII.*

The undersigned is directed to refer to your letter No. 236-SSE/14 dated 22nd April 2014 on the subject and to say that the issue relating to the applicability of the child rights conferred on children by the RTE Act, 2009 including no detention clause in elementary schools run by Minority Institutions has been considered in consultation with the Department of Legal Affairs, Ministry of Law & Justice.

2. *The Department of Legal Affairs has opined that" The RTE Act was amended in 2012 and provisions of the Act were made applicable Subject to provisions of articles 29 and 30 of the Constitution, which means that the provisions of RTE Act so far as these do not infringe rights conferred on minorities to the extent of 'establish and administer' shall apply to*

these institutions. The regulatory provisions like 'prohibition of holding back' and 'corporal punishment' which do not affect the substance of the guaranteed rights to administer educational institutions as provided under Article 30(1) appear to be applicable to the minority institutions also. In view of the above, the regulatory provisions as provided in the RTE Act appear to be applicable to minority institutions in terms of Articles 29 and 30 of the Constitution of India".

3. *You are accordingly requested to take appropriate action for the protection of the child rights conferred on children by the RTE Act, 2009 in elementary schools.*"

Therefore, this Court holds that provisions of the Act, 2009 which do not offend Article 30 of the Constitution of India are applicable to minority educational institutions.

33. Now coming to the facts of the case, the present case concerns detention of the Petitioner student in Class III. Section 16 of the Act, 2009 deals with holding back of students. The said provision was enacted with the object of reducing drop-out rates among children between the age groups of 06 to 14 years. The said provision deals with children who are already admitted in accordance with the admission policy of the school and does not in any way offend the minority character of educational institutions. Therefore, this Court holds that Section 16 of the Act, 2009 is applicable to

minority educational institutions like the Respondent School. Accordingly, this issue is answered.

Issue No.2:-

34. The Respondent School contended that the Petitioner student cannot be promoted from Class III to Class IV on the ground that he did not have requisite attendance and he did not appear for any examination including the annual examination. This raises a question whether a student who fails to have requisite attendance and who fails to appear in an examination can be promoted under Section 16 of the Act, 2009.

35. To decide the said question, it is apposite to discuss the scope of Section 16 of the Act, 2009 which is extracted below:

> **Section 16. Examination and holding back in certain cases.—(**1) There shall be a regular examination in the fifth class and in the eighth class at the end of every academic year.
>
> (2) If a child fails in the examination referred to in sub-section (1), he shall be given additional instruction and granted opportunity for re-examination within a period of two months from the date of declaration of the result.
>
> (3) The appropriate Government may allow schools to hold back a child in the fifth class or in the eighth class or in both classes, in such manner

and subject to such conditions as may be prescribed, if he fails in the re-examination referred to in sub-section (2):

Provided that the appropriate Government may decide not to hold back a child in any class till the completion of elementary education.

(4) No child shall be expelled from a school till the completion of elementary education.

36. Section 16(1) provides that a regular examination shall be conducted in Class V and Class VIII. If the child fails in such regular examination, he/she shall be given the opportunity of a re-examination in accordance with Section 16(2). It is only when the child fails in the re-examination conducted in Class V or Class VIII that the concerned school can hold back or detain the student in the same class with the permission of the appropriate Government. The appropriate Government can decide not to hold back a child despite him failing in the re-examination as per the proviso to Section 16(3). Therefore, Section 16 of the Act, 2009 provides that only if a child fails in a re-examination in Class V or Class VIII, he/she can be held back in the same class with the permission of the appropriate Government.

37. It is relevant to note that the Madras High Court in **Ka. Kalaikottuthayam v. The State of Tamil Nadu**[6] interpreting the unamended Section 16 of the Act, 2009 held that there is a statutory prohibition against detaining a child pursuing elementary education. The Court held that the object behind Section 16 is to prevent children aged 06 to 14 years from leaving the school. The relevant paragraph is extracted below:

> 23. Thus, there is a statutory prohibition for failing a student and retaining in the same standard for any reason, including the reason that the student has scored very low marks in the examinations conducted, either in the class examinations or in Term examinations including final examinations. **When the Central Act prohibits holding back of any child in any class in the age group of 6 to 14, who will normally be undergoing classes in standards 1 to 8 as per the definition mentioned above, I am of the view that the first respondent Department or any other officer is not competent to issue any norms for giving promotion to students of standards 1 to 8, as the promotion to higher class is automatic. Even though the conduct of examination is not prohibited under Section 16, getting pass marks in number of subjects is not required for giving promotion to higher class. The object behind the said provisions is that no student should leave the school within the age group of 6 to 14 for any reason, i.e., due to non-payment of fee, not passing the**

[6]MANU/TN/0804/2010.

> **examination, etc.** When right to education upto the age of 14 is guaranteed as a fundamental right under Article 21A of the Constitution of India, and right to free and compulsory education also has now been declared as a statutory right apart from fundamental right as per Act 35 of 2009 with effect from 1.4.2010, as rightly contended by the learned Counsel for the petitioner the department cannot issue any circular giving direction to the third respondent or any other school authority to give promotion by fixing any norms to students of standards 1 to 8.

38. In **Vatsal Khakhariya v. State of Chhattisgarh**[7], the Chhattisgarh High Court dealing with the question whether a child can be held back under the unamended Section 16 of the Act, 2009 for lack of attendance held that such child cannot be held back. The relevant paragraphs are extracted below:

> 14. After noticing the constitutional provisions enumerated in Article 21A of the Constitution of India read with Sections 16 and 8(f) of the Act of 2009, it is quite vivid that the petitioner was admitted to Class-VIII by respondent No. 3 School for the academic year 2017-18 and he was allowed to appear in the 8th Class examination with the intervention of the District Education Officer, though he has appeared only in four papers and could not appear in two papers, but by virtue of legislative injunction contained in Section 16 of the Act of 2009, the petitioner

[7]2018 SCC OnLineChh 551.

cannot be held back for promotion to the next class. Even the order of the District Education Officer dated 9-4-2018 was not subjected to challenge by the respondent School. However, after allowing the petitioner to appear in the examination, he was issued mark-sheet leaving the column of promoted to next class "NIL". Now, a stand has been taken by the respondent School that the petitioner only appeared in class for 11 days out of 209 days, therefore, he was not entitled to be promoted to next class.

15. In the considered opinion of this Court, it was the duty of the respondent School to ensure the attendance of the student(s)/petitioner if any, as provided in Section 8(f) of the Act of 2009 and after permitting him to appear in the examination and allowing the order of the District Education Officer to go unchallenged, no such ground can be allowed to be permitted not to promote the petitioner to Class-IX, as he has completed elementary education now. **It is true that if the petitioner has not attended the classes, it is likely to have the adverse effect on the learning of the petitioner/child who has not attended the school, but Section 16 of the Act of 2009 does not allow holding back of children in any class till the completion of elementary education for any reason whatsoever it may.** In this regard, the Right of Children to Free and Compulsory Education (Second Amendment) Bill, 2017 has already been proposed and it has been tabled to the Rajya Sabha on 9th February, 2018, which is under consideration. This Bill has been proposed to substitute Section 16 of the Act of 2009 so as to empower the appropriate Government to take a decision as to whether to hold

back a child in the fifth class or in the eighth class or in both classes, or not to hold back a child in any class, till the completion of elementary education.

16. Be that as it may, since Section 16 of the Act of 2009, as it stands today, statutorily prohibits the school to hold back a child in any class till the completion of elementary education, the act of respondent No. 3 DPS in holding back the petitioner and not promoting him to the next class i.e. promotion to Class-IX is held to be arbitrary and not in accordance with Section 16 of the Act of 2009. Accordingly, respondent No. 3 DPS is directed to award a certificate as provided in Section 30 of the Act of 2009 to the petitioner in such a manner as prescribed certifying that he has completed his elementary education and necessary report card be issued to him within a week from the date of receipt of a certified copy of this order.

39. According to this Court, though the above decisions deal with unamended the Section 16 of the Act, 2009, nonetheless, the object of the said provision remains the same. As per the present Section 16 of the Act, 2009, only a student studying in Class V or Class VIII can be held back with the permission of the appropriate Government. Under the said provision, a child studying in any other class other than Class V or Class VIII cannot be detained or held back. Further, the said provision does not permit the concerned school to detain a child based on lack of attendance.

40. It is true that a child who did not attend requisite classes may lag behind his/her peers in terms of education. However, considering the object of Section 16, such child cannot be held back. In any case, the concerned child shall have to appear in the regular examination in Class V or Class VIII, as the case maybe. If the child fails the said regular examination, the concerned school can hold him back in accordance with Section 16 of the Act, 2009 with the permission of the appropriate Government. Therefore, this Court holds that a child pursuing elementary education cannot be detained in the same class, unless the requirements of Section 16 of the Act, 2009 are satisfied. A child cannot be detained on the ground of him/her having less attendance and non-appearance of examination, provided the child is studying in any class other than Class V or Class VIII.

41. In the present case, the Petitioner student is detained in Class III which is impermissible as per Section 16 of the Act, 2009. The Respondent School could not have detained the Petitioner student and is bound to promote him to Class IV. Accordingly, this issue is answered.

Conclusion:-

42. In light of the aforesaid discussion, this Court holds as follows:

i. W.P. No. 45940 of 2022 is dismissed.

ii. W.P. No. 3372 of 2023 is allowed and Respondent No. 5 therein (Little Flower High School) is directed to promote the Petitioner therein to Class IV forthwith.

iii. No order as to costs.

Consequently, miscellaneous applications, if any shall stand closed.

K. LAKSHMAN, J

Date:05.06.2023
Note: L.R. Copy to be marked.
b/o. vvr