

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment reserved on: 13.02.2013
Judgment pronounced on: 19.02.2013

+

W.P.(C) NO.8533/2010

SOCIAL JURIST, A CIVIT RIGHTS GROUP ...Petitioner

Through : Mr. Ashok Aggarwal, Mr.Vikas K. Chadha, Mr. Khagesh B. Jha, Ms.Nisha Tomar, Ms. Kusum Sharma, Advocates

VERSUS

GOVT. OF NCT OF DELHI & ANR. ...Respondents

Through: Mr. Anjum Javed, Mohd. Noorullah, Mr. Mirza Amir Baig, Advs. for GNCTD
Mr. Sunil Gupta, Sr. Adv. with Mr.Aditya Garg, Mr. Rohit S., Advs. for intervener Forum for Promotion of Quality Education for All
Mr. Rajeeve Mehra, ASG with Ms.Maneesha Dhir, Mr. Abhishek Kumar, Ms. Vanessa Singh, Advs. for R2/UOI
Mr. Neeraj K. Kaul, Sr. Adv. with Mr.P.D. Gupta, Mr.Kamal Gupta, Adv. for schools
Ms. Shobha, Mr. Ashok Kumar Singh, Advs. for the Action Committee

+

W.P.(C) NO.263/2011

DELHI COMMISSION FOR PROTECTION
OF CHILD RIGHTS

...Petitioner

Through : Mr. R. Venkataramani Sr. Adv. with Mr.A.K. Singh, Ms.Neelam Singh, Ms.Supriya Garg, Advocates

VERSUS

UNION OF INDIA & ORS. ...Respondents

Through: Mr. Rajeeve Mehra, ASG with Ms.Maneesha Dhir, Mr. Abhishek Kumar, Ms. Vanessa Singh, Advs. for R1/UOI

Mr. Neeraj K. Kaul, Sr. Adv. with Mr.P.D. Gupta,
Mr.Kamal Gupta, Adv. for schools
Ms. Shobha, Mr. Ashok Kumar Singh, Advs. for the
Action Committee
Mr. C.S. Vaidyanathan, Sr. Adv. with Mr. Senthil
Jagadeeswar, Ms.Haripriya Padmanabhan, Advs. for
schools

CORAM :-
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V.K. JAIN

D. MURUGESAN, Chief Justice

Brief facts in WP(C) 8533/2010

1. This *pro bono publico* petition is filed by Social Jurist, a civil rights group, through its President. The petitioner questions the guidelines dated 23.11.2010 framed by the Government of India through Ministry of Human Resources Development, Department of School Education and Literacy and the order dated 15.12.2010 passed by the Director, Department of Education, Government of National Capital Territory of Delhi.

Facts from WP(C) No.263/2011

2. This is also a *pro bono publico* petition filed by Delhi Commission for Protection of Child Rights challenging the guidelines passed by the Government of India dated 10.12.2010 and order passed by the Director, Department of Education dated 15.12.2010. The petitioner has also sought for a direction under Section 15(ii) of the Commission for Protection of Child Rights Act, 2005 for violation under Section 12(1) and 13(1) of the Act and further to adopt the neighbourhood and proximity of child to the

school coupled with the system of random selection or draw of lots as the sole criteria for admission in nursery classes in all schools in Delhi.

3. Both the writ petitions concern about the admission of children in nursery classes. The challenge to the impugned guidelines and the order limited to 75% seats, is basically made on the ground that in exercise of the power under Sections 35(1) and (2) of the Act, the respective appropriate Governments have let unguided and arbitrary powers on the schools falling under clause (iv) of sub-section (n) of Section 2 of the Act, namely, unaided schools not receiving any kind of aid or grants to meet their expenses from the appropriate Government or the local authority, to formulate their own criteria for admission of children for 75% of seats. By the impugned guidelines and order, the screening procedure defined under Section 2(o) of the Act is almost diluted. Though the appropriate Government would be entitled to issue directions, it could be exercised only for the purpose of implementation of the provisions of the Act and not to dilute the same.

4. Before we proceed to discuss the issue involved in this petition, we would like to mention that the validity of Section 12(1)(c) of the Act came up for consideration before the Supreme Court in the *Society of Unaided Private Schools of Rajasthan Vs. Union of India* **(2012) 6 SCC 1**, insofar as it contemplates the schools defined in Section 2(d) and 2(e) of the Act to admit in Class I at least 25% of strength of that class and the said provision was upheld and made applicable to the private un-aided non-minority schools covered under clause (iv) of sub-Section (n) of Section 2. In both the above writ petitions, the challenge relates to the remaining 75% of the seats. In view of the limited challenge and that too in respect of the

admissions to nursery classes, the following basic issues are hence for our consideration:-

- i. Whether Right to Education Act applies to pre-school including nursery schools and for education of children below six years of age? and;
 - ii. Whether Right to Education Act applies to admission of children in respect of 75% of the seats apart from 25% of the seats for children covered under the definition given in Section 2(d) and 2(e) of the Act?
5. Both the guidelines of the Government of India and the order of the Government of NCT of Delhi issued under Section 35 of the Act read as under:

“F.No.1-15/2010-EE-4
Government of India
Ministry of Human Resource Development
Department of School Education & Literacy

Room No.429-A, ‘C’ Wing, Shastri Bhavan,
New Delhi, dated 23rd November, 2010

Subject: Guidelines under section 35(1) of the Right of Children to Free and Compulsory Education Act, 2009 regarding procedure for admission in schools under section 13(1) and section 12(1)(c) of the RTE Act - regarding.

Section 13(1) of the Right of Children to Free and Compulsory Education (RTE) Act, 2009 provides, inter-alia, that while admitting a child, no school or person shall subject the child or his/her parents to any 'screening procedure'. Section 2(o) of the RTE Act defines the term 'screening procedure' to mean the 'method of selection for admission of a child, in preference over another, other than a random method'. Further, section 12(1)(c) of the Act provides that unaided schools and specified category schools shall admit at least 25% of the strength of class I, children belonging to

weaker section and children belonging to disadvantaged group from the neighbourhood and provide them free and compulsory education till completion of elementary education. Further, where the school admits children at pre-primary level, such admissions shall be made at that level.

2. The Ministry has received representations from several unaided and aided schools seeking clarification on the procedure to be followed for admission. The Ministry held a meeting with various stakeholders on the 14th August, 2010 to elicit their views for formulating a guideline for admissions, which would be consistent with the spirit of the RTE Act, specifically with section 13(1) read with section 2(o) of the Act.

3. The objective of the provisions of section 13(1) read with section 2(o) is to ensure that schools adopt an admission procedure which is non-discriminatory, rational and transparent, and that schools do not subject children and their parents to admission tests and interviews in order to decide whether they will admit a child or not. Admission tests and interviews are generally a tool for profiling and eliminating children, and therefore screening to assess a child's 'intelligence' should be prohibited. The RTE Act is anchored in the belief that availability of equal educational opportunities to children belonging to different social and economic background will reinforce the idea of equality enshrined in our Constitution, and ensure that children are not discriminated on the basis of social or economic background or any such criteria. There is need for moving towards composite classrooms with children from diverse backgrounds, rather than homogenous and exclusivist schools. It is an academically established point that heterogeneity in the classroom leads to greater creativity.

4. Keeping these objectives in view, the following guidelines are issued under section 35(1) of the RTE Act, 2009:

- (i) With regard to admissions in class I (or pre-primary class as the case may be) under section 12(1)(c) of the RTE Act in unaided and 'specified category' schools, schools shall follow a system of random selection out of the applications received from children belonging to

disadvantaged groups and weaker sections for filling the pre-determined number of seats in that class, which should be not less than 25% of the strength of the class.

- (ii) For admission to the remaining 75% of the seats (or a lesser percentage depending upon the number of seats fixed by the school for admission under section 12(1)(c), in respect of unaided schools and specified category schools, and for all the seats in the aided schools, each school should formulate a policy under which admissions are to take place. This policy should include criteria for categorization of applicants in terms of the objectives of the school on a rational, reasonable and just basis. There shall be no profiling of the child based on parental educational qualifications. The policy should be placed by the school in the public domain, given wide publicity and explicitly stated in the school prospectus. There shall be no testing and interviews for any child/parent falling within or outside the categories, and selection would be on a random basis. Admission should be made strictly on this basis.

5. The aforementioned guideline should be brought to the knowledge of all concerned for necessary compliance.

This issues with the approval of the competent authority.

xxx xxx xxx xxx xxx xxx xxx xxx xxx

No.F.DE/ACT/2010/.7211-7222 Dated: 15/12/10

ORDER

Invoking the provisions u/s 35(1) of The Right of Children to Free and Compulsory Education (RTE) Act, 2009, the Ministry of Human Resource Development has issued guidelines regarding procedure for admission in schools u/s 13(1) and 12(1)(c) of RTE Act under letter No. F. No. 1-15/2010-EE-4 dated 23.11.2010. The guidelines state:

- 1) With regard to admissions in class 1 (or pre-primary class as the case may be) under section 12(1) (c) of the RTE

Act In aided and unaided schools, schools shall follow a system of random selection out of the applications received from children belonging to disadvantaged groups and weaker sections for filling the pre-determined number of seats in that class, which should be not less than 25% of the strength of the class.

2) For admission to the remaining 75% of the seats [or a lesser percentage depending upon the number of seats fixed by the school for admission under section 12(1) (c)] In respect of unaided schools and specified category schools, and for all the seats in the aided schools, each school should formulate a policy under which admissions are to take place. This policy should include criteria for categorization of applicants in terms of the objectives of the school on a rational, reasonable and just basis. There shall be no profiling of the child based on parental educational qualifications. The policy should be placed by the school in the public domain, given wide publicity and explicitly stated in the school prospectus. There shall be no testing and interviews for any child/parent falling within or outside the categories, and selection would be on a random basis. Admission should be made strictly on this basis.

The Ministry of Human Resource Development has further clarified point (2) above through its letter no. F.No.1-15/2010-EE-4 dated 10-12-2010 as follows:-

"The guideline does not specify any category nor does it lay down any cap on any category Identified by a school. Schools are free to identify any category based on policy/principles that are fair, just and reasonable within the ambit of the RTE Act and the guidelines referred to above and placed in public domain for implementing the admissions in schools".

Keeping in view the unique background, ethos and objectives of the schools In Delhi, covered under point (2), the categorization of the applicants should be on the basis of a criteria, developed in terms of the objectives of the school and can include Sibling, Transfer Case, Single Parent and Alumni.

With regard to applicability of RTE Act to Minority Institutions, the Ministry of Human Resource Development

has Issued guidelines through letter no. F.No.1-15/2010-EE-4 dated 23-11-2010. These are placed at the annexure.

Each school shall submit its admission policy to the Directorate of Education.

The above order on admission guidelines supersedes any other orders on the subject issued by the Directorate of Education.

Sd/-
(Rajesh Somaal)
Director (Education)”

6. The contention of Social Jurist, petitioner in W.P.(C) No.8533/2010 and Delhi Commission for Protection of Children Rights, the petitioner in W.P.(C) No.263/2011 is also that since Section 13(2) of RTE Act prohibits subjecting a child to screening procedure, which Section 2(o) of the said Act defines to mean the method of selection other than a random method, whereby one child is given preference over another child, all the admissions even to pre-elementary (pre-primary and pre-school) classes are required to be made only by a random method and no categorization of the children in terms of the objectives of the school or criteria such as sibling, transfer case, single parent and alumni is permissible, even to the unaided private schools.

7. On 13.02.2013, Government of India, Ministry of Human Resource Development filed an affidavit, *inter alia*, stating as under:-

“5. There are, however, certain provisions of the Act which relate to children below 6 years and beyond 14 years. The said provisions are reproduced herein:

(i) Second proviso to Section 4 of the Act, relating to education of hitherto un-enrolled and drop out children, provides that such children shall have the right to free

education till completion of elementary education even after 14 years of age.

(ii) Section 11 of the Act provides as under:

“11. Appropriate Government to provide for pre-school education – With a view to prepare children above the age of three years for elementary education and to provide early childhood care and education for all children until they complete the age of six years, the appropriate Government may make necessary arrangement for providing free pre-school education for such children.”

(iii) Section 12(1) (c) of the Act provides as under:

12. Extent of school’s responsibility for free and compulsory education (i) For the purposes of this Act, a school –

(a)...

(b)...

(c) specified in sub clause (iii) and (iv) of Clause (n) of Section 2 shall admit in class I, to the extent of at least twenty five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion;

Provided further that where a school specified in Clause (n) of Section 2 imparts pre-school education, the provisions of Clauses (a) to (c) shall apply for admission to such pre-school education.”

6. Section 13(1) of RTE Act states:

“13. No Capitation fee and screening procedure for admission; (1) No school or person shall, while admitting a child, collect any capitation fee and subject the child or his or her parents or guardian to any screening procedure.”

Section 13 of the Act governs the admission for children between the age of 6 to 14 years in elementary education, further the Guidelines dated 23.11.2010 issued by the Respondent No.2 covers children between 6 to 14 years relating to admission in elementary education, except to the extent enumerated in clause 4(1) of the Guidelines (relating to Section 12(1)(c) of the Act).

7. The State Governments may have its own policies governing admissions in pre-primary class.”

It would thus be seen that the stand taken by the Government of India is that the provisions of RTE Act, 2009, including Section 13 thereof, do not apply to the admission made to the pre-elementary (pre-primary and pre-school) classes by private unaided schools, except to the extent stipulated in the proviso to Section 12(1) of the said Act. On being asked as to what the stand of the Government of NCT in this regard is, the learned counsel representing the State Government categorically stated that the same is the stand taken by them.

8. To answer the issues, the legislative history of the Act shall be considered at first. Time and again it has been emphasized that education occupies an important place in the society and the same had received well founded attention. As early as in the year 1882, the Indian Education Commission was appointed and a proposal was made to adopt a law for universal compulsory education. The said proposal could not be put in order due to financial and administrative difficulties. In the year 1893, the ruler of State of Baroda introduced compulsory education in a division of State initially and extended the same to the entire State.

9. Sometime during March, 1910 Gopal Krishna Gokhale made a demand for introduction of primary education by moving a resolution in the Imperial Legislative Council and the same was later on withdrawn.

During 1913 the British Government though was not prepared to accept the principle of compulsion, it wished to expand the primary education on a voluntary basis. In the Government of India Act, 1935, it was provided that, “education should be made free and compulsory for both boys and girls”. At the time our Constitution was framed, the following un-amended Article 45 provided as follows:

“45. Provision for Free and Compulsory Education for Children – The State shall endeavor to provide, within a period of ten years from the commencement of this constitution, for free and compulsory education for all children until they complete the age of 14 years.”

The said Article was repealed and substituted by the Constitution (Eighty Sixth Amendment) Act, 2002 to provide the following:

“45. Provision for early Childhood Care and Education to Children below the age of six years. – The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.”

10. Though the un-amended Article 45 enumerated the policy for the States to endeavour to provide free and compulsory education to all children until they complete the age of fourteen years in a period of 10 years from the commencement of the Constitution, by the amended Article 45, the States are directed to endeavour to provide early childhood care and education to all children until they complete the age of six years. Amended Article takes care only of early childhood care and education of children upto six years.

11. It has been now well settled that Right to Education of every children is a human right with immense power to transform the elementary

education for children as the most important component of basic education. Considering such importance of elementary education and having noticed that access to education is necessary for enjoyment of other fundamental rights contained in Article 19, Article 21A was added to the Constitution by making free and compulsory education a fundamental right of children having age of six to fourteen years. Eighty Sixth amendment and the said Article reads as under:

“21A. Right to Education – The State shall provide free and compulsory education to all children to the age of six to fourteen years in such manner as the State may, by law, determine.”

12. By the above Article, free and compulsory education is made a fundamental right, as against a directive under directive principle of State policy in Article 45 to provide early childhood care and education to all children till they complete the age of six years. The basic principle on which education policy in India should be formulated is to be found in Part IV contained in the Directive Principles of State Policy, Part III of fundamental rights and Part IV-A containing fundamental duties. In Article 39F, the States are directed that their policy should be towards acquiring opportunities and facilities to children to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. In Article 41, it is directed that the State shall within its economic capacity and development make effective provision for securing right, among others, to education. In Article 39F and Article 41, it is directed as follows:

“39(f). That children are given opportunities and facilities to develop in a healthy manner and in

conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

41. Right to work, to education and to public assistance in certain cases. - The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.”

13. Though the above Directive Principles cannot be strictly enforced as in the case of fundamental rights, nevertheless these directive principles obligated the States to enact law to achieve the above directives. The Constitution in Article 51A(k) casts a duty on every parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years. While Article 21A in effect relates to the right of a children between the age of six and fourteen years to have free and compulsory education, Article 45 relates to the objective of the State to endeavour to provide early childhood care and education for all children below the age of six years. In order to achieve the object for which Article 21A was added to the Constitution, The Right of Children to Free and Compulsory Education Act, 2009 was enacted. The Act seeks to provide the following:

“(a) that every child has a right to be provided full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards;

(b) “compulsory education” casts an obligation on the appropriate Government to provide and ensure admission, attendance and completion of elementary education;

(c) “free education” means that no child, other than a child who has been admitted by his or her parents to a school which is not supported by the appropriate Government, shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education;

(d) the duties and responsibilities of the appropriate Governments, local authorities, parents, schools and teachers in providing free and compulsory education; and

(e) a system for protection of the right of children and a decentralized grievance Redressal mechanism.”

14. In terms of Section 2(c), a ‘child’ is defined as a male or female child of the age of six to fourteen years. It is not in dispute that ‘the Act’ has been enacted in terms of Article 21A of the Constitution. That Article makes free and compulsory education a fundamental right to children of six years of age to fourteen years of age. The above Article does not deal with the fundamental rights for free and compulsory education to children of less than six years of age. Rather Article 45 of directive principles of State policy only provides that the State shall endeavour to provide early childhood care and education for all children until they complete the age of six years. Both Article 21A of the Constitution and Section 2(c) of the Act refer the age of the children between six years and fourteen years, be it a fundamental right or statutory right. A right to free and compulsory education though being statutory in nature under the Act, is traceable to fundamental rights under the Constitution.

15. To further appreciate the issue, the object and the scheme of the Act is relevant for consideration. The scheme of the Act is to provide full time elementary education and not Pre-school education. Chapter I of the Act

deals primarily of definitions apart from the extent and the date the Act came into force. In terms of Section 2(c), a child means a male or female of the age of six to fourteen years. Section 2(f) defines elementary education as meaning from first class to eighth class. While defining the school, Section 2(n) refers to only recognized schools imparting elementary education. The various categories of schools enumerated in sub-clauses (i) to (iv) of clause (n) of Section 2 would be the schools imparting elementary education.

16. Chapter II of the Act deals with the right of the child to free and compulsory education. Section 3(1) contemplates - (1) a right on every child to free and compulsory education; and (2) a further right to have free and compulsory education in a neighbourhood school. Again the said provision emphasizes the age of the child between six and fourteen years for entitlement of such rights. For our discussion, we are not concerned with the other provisions of the said Chapter.

17. Chapter III of the Act deals with the duties of the appropriate Government, local authority and the parents. As far as the duties of the appropriate Government or local authorities is concerned, in terms of Section 6(1), they should establish, within such area or limits of neighbourhood, a school within a period of three years. The word 'school' employed in the said section should be read in terms of Section 2(n) of the Act, as the section makes it a duty for the appropriate Government/local authority to establish such school in effect to carry out the provision of the Act. While speaking about the duties of the appropriate Government, Section 8(a) states that the Government has to provide free and compulsory elementary education to every child. Explanation (i) of the said section, while defining the term 'compulsory education' further

explains the said term meaning applicable thereby to provide free elementary education to every child of the age of six years to fourteen years. The Explanation (ii) makes it further clear that the duties of the school shall be to ensure compulsory admission, attendance and completion of elementary education of every child of the age of six years to fourteen years. Section 10 of the Act provides that it shall be the duty of every parent or guardian to admit or cause to be admitted his or her child or ward, as the case may be, to an elementary education in the neighbourhood school. Section 14, while dealing with the determination of the age of the child for admission to elementary education, states that the age shall be determined on the basis of the birth certificate issued in accordance with the provisions of the Births, Deaths and Marriages Registration Act, 1886 or on the basis of such other documents as may be prescribed.

18. A reading of the above provisions show that while a duty is cast upon the appropriate Government and local authority to establish schools within such area or limits of its neighbourhood irrespective of being pre-schools or elementary schools, a further duty is cast upon the appropriate Government to provide free and compulsory education to every child of the age of six to fourteen years only. In *stricto sensu*, the Act is applicable only to elementary education from Class I to VIII to the children of the age of six years to fourteen years.

19. We may also refer to the provisions of Section 11 of the Act which states that:

“With a view to prepare children of the age of 3 years for elementary education and to provide earlier childhood care and education for all children until they complete the age of 6 years, the appropriate Government may make

necessary arrangements for providing free pre-school education for such children.”

20. The term ‘appropriate Government’ is defined under Section 2(a) of the Act in the following manner:

“2(a) “appropriate Government” means-

- i. in relation to a school established, owned or controlled by the Central Government, or the administrator of the Union territory, having no legislature, the Central Government;
- ii. in relation to a school, other than the school referred to in sub-clause (i), established within the territory of--
 - A. a State, the State Government;
 - B. a Union territory having legislature, the Government of that Union territory.”

21. By the provisions of Section 11, a duty is cast upon the appropriate Government as defined under Section 2(a) of the Act to make necessary arrangements for providing free and pre-school education for such children. The section speaks only of necessary arrangement to be made by the appropriate Government and it does not speak of free and compulsory education in elementary schools.

22. Section 2(n) of the Act defines a ‘school’ as under:

“2(n) “school” means any recognised school imparting elementary education and includes--

- i. a school established, owned or controlled by the appropriate Government or a local authority;
- ii. an aided school receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority;
- iii. a school belonging to specified category; and
- iv. an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority.”

23. Section 12 of the Act contemplates the responsibilities of schools and teachers and the relevant portion of the said provision reads as under:

“12. Extent of school’s responsibility for free and compulsory education.-

- (1) For the purposes of this Act, a school,--
- a. specified in sub-clause (i) of clause (n) of section 2 shall provide free and compulsory elementary education to all children admitted therein;
 - b. specified in sub-clause (ii) of clause (n) of section 2 shall provide free and compulsory elementary 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.;
 - c. specified in sub-clauses (iii) and (iv) of clause (n) of section 2 shall admit in class I, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion:

Provided further that where a school specified in clause (n) of section 2 imparts pre-school education, the provisions of clauses (a) to (c) shall apply for admission to such pre-school education.

- (2) xxx
(3) xxx.”

24. Section 12(1)(a) relates to the schools established, owned or controlled by the appropriate Government or a local authority which we

are not concerned in these petitions. Likewise, Section 12(1)(b) relates to the responsibilities of the aided schools receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority. Again, we are not concerned with these categories of schools in these petitions. We are concerned with the unaided schools not receiving any kind of aid or grants to meet their expenses from the appropriate Government or the local authority as defined under sub-clause (iv) of sub-section (n) of Section 2. Section 12(1)(c) of the Act contemplates that the above schools shall admit in class 1, to the extent of at least twenty-five percent of the strength of that class, children belonging to weaker section and disadvantaged group in neighbourhood and provide free and compulsory elementary education till its completion. It is also argued by the respondents that in the wake of Section 12(1)(c), the schools defined under sub-clause (iv) of clause (n) of Section 2 would be liable to make admissions only to twenty-five percent of the total strength of the class in terms of the provisions of the said Act.

25. For the purpose as to the extent the Act is applicable to the pre-school education, we may refer to proviso to Section 12 which reads as under:

“Provided further that where a school specified in clause (n) of Section 2, imparts pre-school education, the provision of clauses (a) to (c) shall apply for admission to such pre-school education.”

In the wake of the above proviso, it could be safely concluded that the extent of the schools’ responsibility for free and compulsory education as contemplated under Section 12 is equally applicable to a school defined under Section 2(n) of the Act. In respect of admission even to pre-school

education, a school specified in sub-clauses (iii) and (iv) shall admit the children to the extent of at least twenty-five percent of the strength of that class belonging to weaker section and disadvantaged group in neighbourhood and provide free and compulsory education till its completion. To this extent, there is no dispute between the parties. Though the Act was enacted to give effect to the object of Article 21A of the Constitution which relates to the children in the age group of 6 to 14 years as a fundamental right, in our opinion, the provisions of Section 11 and the proviso to Section 12 of the Act are traceable to Article 41 and 45 of the Constitution. As already noted, in terms of Article 41, the State shall of course within the limits of its economic capacity and development, make effective provision for securing the right to education irrespective of the age. Proviso to Section 12(1)(c) is an exception to the intent and object of the Act to provide free and compulsory education at the elementary level as in the wake of the above provision, admission to Class-I in respect of children defined under Section 2(d) and 2(e) is made applicable to pre-school education as well. Though, pre-school is not defined under the Act, it is to be presumed that it is the education prior to elementary education. The above discussion leads to the following conclusions that the Act is applicable to elementary education for the children at the age of six years to fourteen years.

26. This takes us to the next question as to whether the private un-aided non-minority schools shall have the duty of admitting children in Class-I and pre-school classes only to the extent of 25% of the strength of that class in terms of proviso to Section 12(1)(c) or such schools also have the duty to admit the children in pre-elementary classes for the remaining 75% of the strength of the class, only in accordance with the provisions of RTE

Act, 2009. It is argued by the respective counsel appearing for the schools that in view of the proviso to Section 12(1) of the Act, the responsibility of the schools to admit the children in pre-elementary classes is only to the extent of 25% of the strength of the class. This limitation of admission of 25% of the strength of the Class relates only to the children belonging to weaker section and disadvantaged group in neighbourhood school and provide free and compulsory elementary education till the completion of the course. Hence, it is contended that the provisions of the Act are not applicable to the remaining 75% of the seats.

27. Section 35 under Chapter VII of the Act relates to the power of the Central Government or of the appropriate Government or the local authority to issue guidelines. The said Section reads as under:

“35. Power to issue directions.- (1) The Central Government may issue such guidelines to the appropriate Government or, as the case may be, the local authority, as it deems fit for the purposes of implementation of the provisions of this Act.

(2) The appropriate Government may issue guidelines and give such directions, as it deems fit, to the local authority or the School Management Committee regarding implementation of the provisions of this Act.

(3) The local authority may issue guidelines and give such directions, as it deems fit, to the School Management Committee regarding implementation of the provisions of this Act.”

28. Sub-Section (1) of Section 35 empowers the Central Government to issue such guidelines to the appropriate Government or as the case may be, to the local authority, as it deems fit for the purposes of implementation of the provisions of the Act. Likewise, sub-Section (2) of Section 35 empowers the appropriate Government to issue guidelines and give such

directions, as it deems fit, to the local authority or the School Management Committee regarding implementation of the provisions of this Act. Similarly, sub-Section (3) of Section 35 empowers the local authority to issue guidelines and give such directions, as it deems fit, to the School Management Committee regarding implementation of the provisions of this Act. Though the powers of the Central Government, the State Government, the Union Territory and the local authority have separate roles to play, it is common that the Central Government or the State Government or the Local Authority are entitled to issue guidelines only for the purpose of implementation of the provisions of the Act.

29. Since sub-section (2) provides for guidelines and directions being given, by the appropriate Government, to local authority or the School Management Committee, whereas sub-section (3) provides for such guidelines and directions being given by the local authority to the School Management Committee, it appears to us that as far as the schools are concerned, guidelines and directions under Section 35 of the Act can be given only to such schools which are required to have School Management Committees. Section 21 of the Act provides that a school other than a school specified in sub-clause (iv) of clause (n) of Section 2 shall constitute a School Management Committee consisting of the elected representatives of the local authority, parent or guardian of children admitted in such school and teachers. Thus, the schools specified in sub-clause (iv) of clause (n) of Section 2 are expressly excluded from the requirement of constitution of School Management Committees. It is only the unaided schools, not receiving any kind of grants to meet their expenses from the appropriate Government or the local authority which are referred in sub-clause (iv) of clause (n) of Section 2. Thus, it is not

obligatory for the private unaided schools to form School Management Committees in terms of Section 21 of the Act. If that be so, the directions and guidelines under Section 35 of the Act cannot be issued to such schools.

30. Considering the provisions contained in Article 21-A of the Constitution and the scheme of the Right of children to Free and Compulsory Education Act, 2009, as discussed earlier by us, there is no escape from the conclusion that as far as the private unaided schools referred in Section 2(n)(iv) of the said Act are concerned, the provisions of the Act, except the admission to the extent of 25% of the strength of the class, to the children belonging to the weaker sections and disadvantaged group, do not apply to the admissions made to the pre-elementary (pre-school and pre-primary) classes of such schools. Consequently, Section 13 of the Act which prohibits collection of capitation fee and adoption of any screening procedure also does not apply to the admissions made to the remaining 75% of the pre-elementary classes of unaided private schools.

31. The next question which then arises for consideration is as to how the admissions to the pre-elementary classes of private unaided schools shall be governed since the provisions contained in RTE Act do not apply to such admissions. As far as Delhi is concerned, it is Delhi School Education Act, 1973, which applies to all schools in the Union Territory of Delhi. "School" has been defined in Section (2)(u) of the said Act to include a pre-primary, primary, middle and higher secondary school, and also includes any other institution which imparts education or training below the degree level, but does not include an institution which imparts technical education. Therefore, the aforesaid Act applies even to private unaided schools in Delhi. Section 3(1) of the said Act provides that

Administrator may regulate education in all the schools in Delhi in accordance with the provisions of the Act and the rules made thereunder. Rule 43 of Delhi School Education Rules, 1973 provides that the Administrator may, if he is of opinion that in the interest of school education in Delhi it is necessary so to do, issue such instructions in relation to any matter, not covered by these Rules, as he may deem fit. In exercise of the powers conferred upon him by Section 3(1) of the Act and Rule 43 of Delhi School Education Rules, 1973, Lieutenant Governor of Delhi has made an order called the Recognized Schools (Admission Procedure for Pre-Primary Class) Order, 2007 which applies to admissions made to pre-primary and pre-school (pre-elementary) classes made by all schools in Delhi, including private unaided schools. The said order, to the extent it is relevant, reads as under:-

“7. The school shall not conduct any interview of, or interaction with the child for whom admission is being sought. There shall also be no observation of the child either in formal or informal conditions. Similarly, the school shall not conduct any interview of or interaction with the parent(s)/guardian(s). However, the school can have informal interaction with parent(s)/guardian(s) only with the purpose to ascertain the veracity and correctness of the documents/details which will be communicated to the parents(s)/guardian in writing in advance.

8. There shall be no overall lottery system to select/short list a child for admission. Limited use of lottery may however be adopted in case there is a tie amongst applicants.

14. The school shall develop and adopt criteria for admission which shall be clear, well defined, equitable, non-discriminatory and unambiguous. The school shall adopt those parameters which are in the best interests of children and are in line with its own philosophy, and these shall include the following:-

(i) Neighbourhood - It is in the interest of children that they are provided admission in a school nearest to their residence. The schools shall, therefore, give preference to children living in nearby areas. If the school is satisfied that a good and safe transport is available for a child, then, it may consider giving admission to such a child even if he/she lives at a place quite far off from the school. This is also important as distribution of schools is not uniform in the city.

(ii) Background of the Child - Children from all social and economic backgrounds shall be equally considered for admission. The school shall make a conscious effort to admit children with special needs or from vulnerable backgrounds.

(iii) Sibling - Generally, parent(s) or guardian(s) prefer that their children study in the same school. Therefore, the school may give preference to a child who has a sibling studying in that school.

(iv) Transfer Case: - Many parents or guardian are working in transferable jobs, in the government and other private sectors. The school may give preference to the child of such parent(s) or guardian(s).

(v) Single Parent i.e. divorced/ widow/ widower/ unmarried:- The School may give preference to admit child of such single parent.

(vi) Management Quota – School may have a management quota which shall not exceed twenty percent of the total seats available for admission in the class.

(vii) Minority-All minority schools can keep the minority status of the child seeking admission as a criterion.

Schools can also fix additional parameters but are required to stipulate a point system for each criteria/parameter

15. The admission criterion adopted by the school shall be made by managing committee and be finalized with the prior approval of the Directorate of Education. The final approval/disapproval shall be communicated to the concerned school within four weeks from the date of receipt of request from the school concerned.

16. Every school shall make public the approved admission criteria adopted by it, on its website (where available), prospectus and Notice Board.

17. The school shall not change, alter or modify its approved admission criteria during the admission process in an academic session.

21. There shall be one year of pre-primary class in every school. A class of one year duration preceding this called pre-school may be set-up as a neighboring pre-school and the Education Department shall frame the guidelines in this regard, in consultation with experts. The schools which are already running pre-school class may continue to do so subject to the following conditions:

(a) Every child admitted to pre-school shall be of minimum three years by 31st March of the year in which admission is being sought;

(b) The schools shall frame their own guidelines for admission to pre-school class and the same criteria as for admission to the pre-primary level shall be adopted, until such time as the guidelines for pre-schools are framed;

(c) Any such school which has a pre-school class from the session commencing in April 2008, shall move those students to the pre-primary class for the session commencing in April 2009. After that, the final norms to be notified for the pre-school class shall be followed.

Explanation: - For the purposes of this clause, the ages stipulated for entry into standard one, pre-primary class and pre-school class are the minimum ages and there is no bar to children older than the ages specified in this clause being given admission to these classes.

23. A copy of the adopted criteria as approved by Management Committee shall be submitted in the office of the concerned Deputy Director by 30th November, for approval/disapproval.

24. Every school shall furnish detailed information regarding admissions made in the pre-primary class, on the Reporting Form in Form II and District Deputy Director of Education shall put the same on the website of Education Department for public viewing.

25. A Monitoring Cell shall be constituted in each district under the Chairmanship of the District Deputy Director, who shall look into complaints regarding admission and shall also conduct regular inspections to ensure that the process is hassle free, objective and transparent.

26. Any non-compliance of the above Order shall be viewed seriously and necessary action shall be taken as per the provisions of the Delhi School Education Act & Rules 1973.”

It would thus be seen that the aforesaid order applies not only to the admissions made to pre-primary classes for which the child needs to have completed the age of minimum four years as on 31st March of the year in which the admission is sought, but also to pre-school (nursery admissions) for admission to which a child needs to have completed the age of minimum three years as on 31st March of the year in which the admission is sought.

32. During the course of arguments, we were informed that charging capitation fee is prohibited not only in Right To Education Act, 2009, but also in Delhi School Education Act and the rules framed thereunder. Therefore, it cannot be said that if the RTE Act does not apply to the 75% of the admissions made by private unaided schools to pre-elementary classes, they can charge capitation fee for such admissions.

33. Since the constitutional validity of RTE Act, 2009 was upheld by Supreme Court in **Society for Unaided Private Schools of Rajasthan** (*supra*) and the aforesaid Act, based since it is on Article 21A of the Constitution, does not apply to the admission made by private unaided schools in pre-elementary (pre-primary classes and pre-school) classes except to the extent of 25% admissions to the children, belonging to weaker sections and disadvantage group, and the remaining 75% admissions to such classes are regulated by the Recognized Schools (Admission Procedure for Pre-Primary Class) Order, 2007, we need not go into the contention that the provisions of the Act need to be interpreted in such a manner that even remaining 75% seats in pre-elementary classes are made in accordance with the provisions of the said Act.

34. It was contended by Shri Ashok Aggarwal, the learned counsel for the petitioner that in case the provisions of RTE Act do not apply to pre-primary classes, it may result in an anomalous situation, where children are subjected to screening procedure, firstly at the time of pre-primary or pre-school admission and then at the time of promotion to the primary class. We do not find merit in the submission. Since RTE Act, 2009 does apply to all the admission made to elementary classes, including the admissions made to such classes by private unaided schools, it is not open to these private unaided schools to subject a child seeking admission to an elementary class to such a screening procedure which is prohibited under the RTE Act, 2009. Moreover, since the Recognized Schools (Admission Procedure for Pre-Primary Class) Order, 2007 specifically directs all schools, including private unaided schools to move the children admitted in pre-school classes to the pre-primary class and the children admitted in pre-primary class to primary class, there can be no question of children

being subjected to any screening procedure at the time of admission to the primary (elementary class).

35. We take note of the provisions of the Recognized Schools (Admission Procedure for Pre-Primary Class) Order, 2007 are not in challenge before us though during the course of arguments, we were informed that a challenge to the aforesaid order is pending before Supreme Court. We also take note of the fact that under the Recognized Schools (Admission Procedure for Pre-Primary Class) Order, 2007, all the schools, including private unaided schools are required to get their admission criteria approved from Directorate of Education, Delhi. The Lieutenant Governor of Delhi in exercise of the powers conferred upon him by Section 3(1) of Delhi School Education Act and Rule 43 of Delhi School Education Rules, 1973 is competent to give such further directions or to make such modifications to the existing order as the Government may deem appropriate, to prevent any possible misuse or malpractice in making admission to pre-primary and pre-school classes by these private unaided schools. The petitioner may, if so advised, represent to the Lieutenant Governor, Delhi, to make such amendments to the aforesaid order, which, in their opinion, are required to be made, to rule out any possible misuse of the liberty given to the private unaided school, in the said order, in the matter of laying down the criterion for admission to pre-primary and pre-nursery classes.

36. In his written submissions, the learned counsel for the petitioner has referred to the decision of this Court in **Social Jurist, A Civil Rights Group vs. Govt. of NCT of Delhi and Anr.** 190(2012) DLT 406 (DB). We have examined the decision relied upon by the learned counsel for the petitioner. We, however, find that the said judgment does not deal with the

issue involved in this petition. Therefore, the reliance upon the said judgment, in our opinion, misplaced.

37. During the course of arguments before us, the learned counsel for the private unaided schools contended that the guidelines issued by Government of India on 23.11.2010 were considered before Supreme Court in **Society for Unaided Private Schools of Rajasthan** (*Supra*) and was the basis of Section 13 of RTE Act, 2009 being declared valid. The learned counsel for the petitioner, on the other hand, submitted that since no one challenged the aforesaid guidelines in the case of **Society for Unaided Private Schools of Rajasthan** (*Supra*), the Apex Court had no occasion to go into the legal validity or otherwise of the said guidelines in the context of Section 13(2) read with Section 2(o) of RTE Act, 2009. Considering the view taken by us, we need not go into the question as to whether the aforesaid guidelines had the approval of the Apex Court and if so to what extent.

38. For the reasons stated hereinabove, we hold that the guidelines issued by Government of India and the Order issued by Government of NCT of Delhi under Section 35 of RTE Act, 2009 do not apply to 75% of the admission made to pre-elementary (pre-primary and pre-school) classes by private unaided schools, though they do apply to the remaining 25% admissions made by such schools to such classes in view of the proviso to Section 12(1) of the aforesaid Act.

39. Since the scope of the present petition is confined to the admissions made by private unaided schools to pre-elementary (pre-primary and pre-school) classes, we need not go into the question as to whether the impugned guidelines issued by Government of India under Section 35(1) of RTE Act, 2009 dated 23.11.2010 and 15.12.2010 and the order of

Government of NCT of Delhi dated 15.12.2012 contravene the provisions contained in Section 13(2)(b) read with Section 2(o) of the RTE Act, 2009, in their applicability to the admissions made by the private unaided schools to the elementary classes, by permitting categorization in terms of objectives of the school and applying the criterion, such as sibling, transfer case, single parent and alumni, or not.

40. Before parting with the judgment, we are inclined to observe the following as well. Unlike other fundamental rights, the Right to Education places a burden not only on the State but also on the parent or guardian of every child and on the child itself. Education occupies an important and sacred place in our constitution and culture. It is a tool for betterment of our civil institution, protection of our civil liberties and path to an informed and questioning citizenry. The Supreme Court in Mohini Jain Vs. State of Karnataka (1992) 3 SCC 666 has held that though the Right to Education is not explicitly inserted in Part-III of the Constitution as a fundamental right but Article 21 read with Article 39, 41 and 45 make it clear that the Constitution of India made it obligatory for the policy makers to provide education to its citizens. It has been observed as follows:-

“The objectives flowing from the preamble cannot be achieved and shall remain on paper unless the people in this country are educated. The three pronged justice promised by the preamble is only an illusion to the teeming-million who are illiterate. It is only is the education which equips a citizen to participate in achieving the objectives enshrined in the preamble.(Per Kuldeep Singh J)”

41. The Supreme Court in J.P.Unnikrishanan Vs. State of A.P. (1993) 1 SCC 645 has once again reiterated the Right to Education flowing from Article 21 as follows:-

“If really Article 21, which is the heart of fundamental rights has received expanded meaning from time to time there is no justification as to why it cannot be interpreted in the light of Article 45 wherein the State is obligated to provide education up to 14 years of age, within the prescribed time limit.... The Directive Principles contained in Part IV constitute the stairs to climb the High edifice of a socialistic State and the Fundamental Rights are the means through which one can reach the top of the edifice.”

42. Far back in the year 1954, Chief Justice Earl Warren stressed upon the importance of education in *Brown Vs. School Board of Topeka* 347 *U.S. 483 (1954)*:-

“Education is perhaps the most important function of state and local governments.... It is the very foundation of good citizenship. Today it (education) is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”

43. Though we have held that Right to Education Act is not applicable to nursery schools, in our opinion there cannot be any difference yardstick to be adopted for education to children up to the age of 14 years irrespective of the fact that it applies to only elementary education. It is the right time for the Government to consider the applicability of Right to Education Act to the nursery classes as well, as in many of the States admissions are made right from the nursery classes and the children so admitted are automatically allowed to continue from Class-I. In that sense, the provisions of Section 13 would be rendered meaningless insofar as it prohibits screening procedure at the time of selection. Importance of

education is *per se* applicable to every child right from admission to nursery classes till it completes the eighth standard. It is common knowledge that though there is obligation on the State to provide free and compulsory education to children and the corresponding responsibility of the institution to afford the same, educational institution cannot be allowed to run as 'Teaching Shops' as the same would be detrimental to equal opportunity to children. This reality must not be ignored by the State while considering the observations made in this judgment. Hence, we only observe that to avail the benefit of the Right to Education Act to a child seeking for nursery school as well, necessary amendment should be considered by the State. We hope and trust that the Government may take the above observation in the right spirit and act accordingly.

The writ petitions stand disposed of accordingly.

CHIEF JUSTICE

**(V.K. JAIN)
JUDGE**

FEBRUARY 19, 2013/pk/pmc/BG