**IN THE HIGH COURT OF BOMBAY**

PIL No. 26 of 2011 and Writ Petition No. 1724 of 2010

Decided On: 03.04.2013

Appellants: **Naresh Gangaram Gosavi and others**
**Vs.**
Respondent: **Chembur English School and others**

**AND**

Appellants: **Shree Narayana Mandira Samiti's Shri Narayana Guru Primary and Secondary School, Mumbai**
**Vs.**
Respondent: **State of Maharashtra and others**

**Hon'ble Judges/Coram:**Mohit S. Shah, C.J. and N.M. Jamdar, J.

**JUDGMENT**

**Mohit S. Shah, C.J.**

1. The petitions raise interesting questions about liability of the State to reimburse fees for elementary and secondary education to children belonging to backward classes and weaker sections of the society. Petitioners Nos. 1 to 5 in Public Interest Litigation No. 26 of 2011 are citizens belonging to Scheduled Castes, Vimukta Jati and Nomadic Tribes and Special Backward Classes. Their wards are studying in various private unaided schools in the city of Mumbai and were receiving free ships/scholarships provided by the Department of Social Welfare, State of Maharashtra till 2008-09. Petitioner No. 6 is the Association of Parents from Scheduled Castes, Vimukt Jati and Nomadic Tribes.

2. The petitioners have prayed for directions to the State Government to ensure that the schools, where students belonging to the above categories (hereinafter referred to as the specified backward classes) study, do not prevent them from attending schools and participating in school activities due to non-payment of fees/free ship/scholarship.

3. The petitioner in Writ Petition No. 1724 of 2010 is one such private non-aided school which has also prayed for directions to the State Government to release the amount of fees/free-studentship for students belonging to the above categories of backward classes studying in the petitioner-school.

4. By Government Resolution dated 24 December, 1970 (Exhibit 'A'), the State Government sanctioned the revised rules for grant of free studentship and examination fees to the students belonging to the above categories studying in the educational institutions in the State of Maharashtra. At that time, the amounts payable for reimbursement of fees were as under:-



5. Thereafter, by Government circular dated 25 August, 1980 (Exhibit 'B'), the State Government directed that since the children belonging to Scheduled Castes, Vimukt Jati and Nomadic Tribes etc. were given free education at all levels without income criteria, all the departmental heads were directed to ensure that no fees be charged from such backward class students. The instructions were issued to the officers-incharge of Zilla Parishads also. By circular dated 3 May, 1991 (Exhibit 'C'), the Director of Education, Maharashtra State, Pune again issued instructions for effective implementation of the scheme.

6. Subsequently, in the Government order dated 13 June, 1996 (Exhibit 'D'), it was mentioned that by Government order dated 24 August, 1983, education in the Government recognized schools in the State was free for girls upto Xth standard from the academic Year 1983-84. From the year 1985-86, the scope of the scheme came to be expanded whereby the girls studying in standards I to XII, were to be provided free education in recognised aided as well as non-aided schools in the State. The Government order provided that from the academic Year 1996-97, free education shall be provided to all the students studying in standards I to X in non-Government recognized aided and non-aided schools in which fee is charged as per the standard rate. The scheme was, thus, applicable to girls, wards of primary school teachers and economically backward classes. It was, however, provided that if the student failed in a grade, he would not be eligible to get the reimbursement of fees and only after passing the examination, he would be entitled to get reimbursement in the next academic year.

7. Thereafter, in the year 2000, there was litigation in this Court as there was disparity between the rates of fees sanctioned by the School Education Department under the scheme for free education for students and the rates sanctioned by the Social Welfare Department for reimbursement under the scheme of educational concessions given to the backward class students. This Court required the State Government to take suitable decision and thereafter, the State Government issued the following order dated 15th November, 2000 (Exhibit 'E'):-

Ref: (1) Government Decision, Education Sports and Social Welfare Department No. EBC 1068/83567/J/Dt. 24th December 1970.

(2) Government Decision, School Education Department No. ED/1096/(1978/96)/SaShi-5 dt. 13th June, 1996.

Introduction: A Scheme of free education to the backward class students in the State has been implemented vide the Government decision referred at No. 2 above. Free education for all scheme for Standard First to Standard Tenth in recognized aided and non-aided educational institutions charging fees at certified rate in the State, has been implemented vide Government Decision referred at No. 2 above. There is no required clarity between t e rates for fee sanctioned by the School Education Department and the reimbursement being given under educational concessions given to backward students by Social Welfare Department. Therefore some institutions filed petitions in High Court. During the hearing of petition no. 3596/2000 filed before Mumbai High Court the Court has suggested, "The Government to check 'whether all the backward class students can be given free education' and take suitable decision. According to the above suggestions given by the Court, the Government has given the following clarification:-

Government Decision: Following clarification is given in respect of Government Decision, School Education Department No. FED 1096/(1978/96)/SaShi-5 dt. 13th June 1996.

1) Scheme for giving free education to all in standards First to Tenth will be applicable for only those students from whom the aided or non aided schools are charging the fees at prescribed rate.

2) If the backward class students are pursuing education in the schools charging fees at prescribed rate, they will be eligible for free education. The Government will reimburse the fees of the backward class students in non aided schools charging fees at the prescribed rate.

8. Subsequently, after the judgment of the Apex Court in TMA Pai Foundation and others v. State of Karnataka,  : 1994 (2) SCC 734, the State Government issued order dated 27 May, 2003 (Exhibit 'F') wherein the State Government laid down the principles for fixation of fees by recognized unaided and permanent non-aided secondary and higher secondary schools and junior colleges. As regards the educational concessions to the backward class students, the order dated 27 May 2003 made the following provision in para 5:-

5) Educational Facilities:

In the state free education is for the boys upto 10th Standard and for the girls upto 12th standard. The policy relating to the fee structure and its quantum and criteria will be decided by the Social Welfare Department and the Schedule Tribe Department relating to the backward classes students.

9. Subsequently, by Government Resolution dated 18 February 2010 (Exhibit "O"), the State Government appointed a Committee consisting of the following members:-

1. Principal Secretary, Social Justice, Chairman

2. Principal Secretary, Tribal Development Department, Member.

3. Secretary, School Education Department, Member.

4. Secretary, Rural Development Department, Member.

5. Director, Directorate of Social Welfare, Pune, Member Secretary.

The Committee was constituted to prescribe the rates of fees which the Government would be reimbursing to the schools where the students belonging to specified backward categories are studying. Ultimately, the Committee submitted its report dated 9 April 2010 suggesting the following three options for fee structure:-



The Committee noted that total number of students getting such benefit would be 6.50 lakhs belonging to scheduled castes and another 6.50 lakhs belonging to NT, DT and SBC categories. The Committee then worked out the likely financial burden on the State Government and indicated that the total burden would come to Rs. 226.20 crores under Option-1, Rs. 304.20 crores under option-2 and Rs. 382.20 crores under option-3.

10. The Committee further made the following recommendations in para 13 of the report:-

13. Recommendations of Committee:-

It is the policy of Govt. to reimburse the educational fees of backward class students learning in English Medium Schools. However, the Social Justice Department of the Govt. shall reimburse the fee of these students for backward class categories learning in English and schools of other language medium, as per the rate of Option-3 as aforesaid, irrespective of whatever fee has been charged by the concerned school.

The Committee submits its Report which was appointed to fix-up the rates of reimbursement of Education fees in respect of SC/ST/DT/NT & SBC students learning in 1st to 10th standard in private non-aided and permanent non-aided schools.

11. When the matter reached hearing on 21 December, 2010, this Court permitted the institutions, where students belonging to the above categories are studying, to make their representations indicating the higher rates at which the school managements wanted the Government to make reimbursement. The State Government was required to take into consideration such representations and take a decision on the report of the Committee expeditiously.

12. The State Government did not accept the report of the Committee and decided to form another Committee of Ministers to examine the issue whether pre matric scholarship scheme can be applied to the students of Scheduled Casts, Vimukt Jati and Nomadic tribes and Special Backward classes on the similar lines for pre matric scholarship scheme implemented by Tribal Development Department by Government Resolution of the year 2010. The State Government has, however, not placed on record any report of the Committee of Ministers.

13. Thereafter by order dated 28 April 2011, this Court admitted the PIL and by way of interim relief issued the following directions:

(i) Rule.

(ii) By way of interim relief, the respondent-State Government shall reimburse the fees for pre matric studies (Standards I to X) of students belonging to the Scheduled Castes, Vimukt Jatis and Nomadic Tribes and Special Backward Classes as per option 1 in the Committee's report dated 9th April, 2010 (Exhibit "R" to the petition). The amounts on the said basis shall be worked out by the respondent-authorities within four weeks from today and the same shall be paid over to the concerned schools within two weeks thereafter.

(iii) The arrears on the basis of the above directions shall be paid to the concerned schools within six weeks from today.

(iv) As regards the balance amounts sought to be recovered by the school managements from the students belonging to the above categories, the prayer of school managements for necessary directions will be considered at the next hearing which shall be 29th June, 2011.

(v) In the meantime, the schools where the students belonging to Scheduled Castes, Vimukt Jati, Nomadic Tribes and Special Backward Classes are studying shall declare the results of the students concerned and shall not withhold their results only on the ground of non-payment of fees by students or non-reimbursement of fees by the Government.

(vi) These directions are applicable to all students of Scheduled Castes, Vimukt Jati, Nomadic Tribes and Special Backward Classes who are studying in non-aided schools in the State of Maharashtra.

28. It is clarified that this order does not preclude the concerned authorities from verifying the number and particulars of the students for whom the fees are to be reimbursed and the particulars of the schools where they are studying.

14. The above interim order came to be challenged by the State Government before the Supreme Court in SLP No. 16512-16513 of 2011 which came to be dismissed by order dated 11 July 2011. However, by further order dated 16 November 2011, time limit was further extended by 3 months with a rider that no further time shall be granted.

15. During pendency of the petition, the State Government has issued Resolution dated 30 December 2011 which mistakenly states that these PILs are decided (by referring to interim order dated 30 April 2011 as the decision). Relevant part of the GR reads as under:

Resolution:

Government has decided to reimburse the tuition fees and examination fees of the students studying in Ist to Xth standard, living in below poverty line families of Scheduled Castes, VJNT and Special Backward Class from the academic year 2011-12 for the 10 months at the rates given below:-

Standard-wise rates of reimbursement of fees of students from Scheduled Castes, VJNT and Special Backward Class.



2. The reimbursement of the fees of the students living in below poverty line families of Scheduled Castes, be drawn from the sanctioned provision of the following heads of accounts.

16. Affidavits in reply have been filed on behalf of the State Government. In the affidavit dated 9 December 2010 filed by Mr. U.S. Lonare, Deputy Secretary, Social Justice and Special Assistance Department of the State Government, reliance has been placed on Government Resolutions dated 21 January 1960 and 29 August 1966 for correct understanding of the Government Resolution dated 24 December 1970. The Government affidavit then refers to the Circular dated 19 September 1990 of the Director of Social Welfare Officer, Maharashtra State (Exhibit-4) directing not to reimburse the fees to the students who are studying in those schools which are charging fees higher than the standard fees. This circular was issued on the basis of the guidelines contained in the Government letter dated 4 September 1990.

Reference is made in the affidavit to the State Government Resolutions dated 15 November 2000 and 27 May 2003 which are already referred to hereinabove. Reference is also made to "Smt. Savitribai Phule Scheme" which is a scholarship scheme for girls students belonging to SC/VJNT/SBC categories who are given additional amount of Rs. 600/- per year from standard V to VII and Rs. 1000/- per year for students from standard VIII to X other than the amount mentioned in the fee structure of the Government Resolution of 1996. The object of this scheme is to encourage more girl students of these communities to attend school and take education. These amounts are given by the Government to all the schools irrespective of whether it is aided or unaided, but to students of these communities.

17. Thereafter the Government affidavit indicates that the following amounts were paid to schools by way of reimbursement:

(Rupees rounded off in lacs)



The Government noticed that there was financial irregularity in as much as huge amount of approximately Rs. 45 crores was released by some officers without permission or sanction of the Social Justice Department. The inquiry initiated against those officers is still in progress. During the inquiry, it transpired that the aided and unaided schools in the city of Mumbai were submitting exorbitant bills claiming reimbursement for the students belonging to these categories contrary to the fees as per the fee structure laid down in the Government Resolution dated 13 June 1996. Many of the schools have increased their fee structure, but the Social Justice Department does not have capacity to reimburse the increased fees other than the sanctioned amount in the Government Resolution of 1996. In view of the above financial irregularity, the Secretary, Social Justice Department instructed the Social Welfare Officer, Greater Mumbai on 4 April 2009 that the Government will not reimburse the fees at higher rate.

18. Thereafter the Government filed further affidavit dated 31 August 2012 placing on record the allocations. In the said affidavit, the Government has given the following figures about the funds released by the Central Government for SC and ST students for post-matric scholarship.



19. Written submissions have also been filed on behalf of the State Government. It is contended that in Government Resolution dated 21 January 1960 it was stated that the Central Government cautioned the State Government about desirability to have income limit for reimbursement of fees of students lest the Government may lend itself in indefinite commitments and later on press the Government of India to share additional sum on this scheme. The State Government came to the conclusion that non-imposition of income limit was not likely to result in indefinite commitments as the number of grantees, whose income or whose parent's or guardian' income would exceed the prescribed income limit, was likely to be very small. The question whether any income limit should be imposed for the grant of those concessions during the next year should be left to the discretion of the future States of Gujarat and Bombay.

It is, therefore, contended by Ms. Sreedharan, learned A.G.P. that the Government of Bombay had made it clear that income limit of the marginalised community will be taken into consideration at appropriate stage and that creamy layer belonging to backward classes may not benefit from the scheme.

20. It is further contended that affiliation of schools to the Secondary Education Board is subject to various conditions and one of them is as specified in Rules 49.1 to 49.3 providing that schools shall charge only standard rate of tuition fee and unaided schools shall be allowed to charge higher rate of fee with previous permission of the Director. Vide Government Resolution dated 15 November 2000, the State Government clarified that reimbursement towards freeship and scholarship to backward class will continue which were charging fees at prescribed rate.

21. It is submitted that the respondents are unaided schools recognised by the State Government under Maharashtra Secondary School Code. The Secondary School Code and the Maharashtra Employees of Private Schools Rules, 1981 (MEPS Rules) are applicable to the respondents. The said recognition is sought by the schools under Chapter II Section 1Rule 1 of the Code. Rule 3.2 lays down the conditions to be satisfied by the management to get recognition. Rule 3.2(a) clearly states the rate of fees, pay scale, allowances and conditions of service of staff and amenities to be provided shall be according to the instructions issued by the Department from time to time and the Management undertakes to adopt the rate of fees, pay scale and allowances laid down and provide necessary amenities within the time specified by the Department. This is incorporated in the MEPS Act of 1977 along with MEPS Rule 1981 in the said Act. Section 2(21) of the MEPS, 1977 in sub-clause (3), (9) and (13) specifically states that the Management is to abide by the Rules set out by the State Government. As the respondents have obtained recognition from the Maharashtra Secondary School Board, they are governed by Rules laid down by the State Government through its Education Department.

It is submitted that these schools, when they give admission and distribute admission forms, the said forms are governed by the Rules and Appendix forms set out in the Secondary School Code. Therefore, at the time of admission itself the income criteria, the issue related to caste etc is to be disclosed in the said form laid down by the State which Management is required to submit to concerned authority. Therefore, at the time of admission itself the Management has to take appropriate precautionary measures that the children seeking admission in their school are capable of paying the fees, and Rules prescribed by the Government.

The State Government has relied upon the Government Resolution dated 30 December 2011 which provides for reimbursement of fees to the below poverty line students for 10 months for the academic year 2011-12.

22. The written submissions of the State Government thereafter refer to the provisions of Right of Children to Free and Compulsory Education Act, 2009 (RTE Act) which have come into force from 1 April 2010 including section 12(c) which mandates that a school shall admit children belonging to weaker section and disadvantaged group in the neighborhood for free and compulsory elementary education till its completion to the extent of 25% of the seats.

It is contended that in view of the above Act read in the light of the Supreme Court judgment dated 12 April 2012 upholding the constitutional validity of the Act, there is no scope left for the petitioners and the respondent school managements to canvass any submission on the basis of the Government Resolutions dated 24 December 1970 and 27 May 2003 as these Resolutions cannot override the Act.

23. Having heard the learned counsel for the parties and particularly having regard to the stand of the State Government that now the matter will be governed by the provisions of the Right of Children to Free and Compulsory Education Act, 1999 (for brevity's sake hereinafter referred to as "Right to Education Act" or "RTE Act"), we have also considered the submissions with reference to the provisions of the Right to Education Act.

24. The statement of objects and reasons for the said Act, inter alia, states as under:-

Statement of Objects and Reasons:

The crucial role of universal elementary education for strengthening the social fabric of democracy through provision of equal opportunities to all has been accepted since inception of our Republic. The Directive Principles of State Policy enumerated in our Constitution lays down that the State shall provide free and compulsory education to all children upto the age of fourteen years. Over the years there has been significant spatial and numerical expansion of elementary schools in the country, yet the goal of universal elementary education continues to elude us. The number of children, particularly children from disadvantaged groups and weaker sections, who drop out of school before completing elementary education, remains very large. Moreover, the quality of learning achievement is not always entirely satisfactory even in the case of children who complete elementary education.

2. Article 21-A, as inserted by the Constitution (Eight-sixty Amendment) Act, 2002, provides for free and compulsory education of all children in the age group of six to fourteen years as a Fundamental Right in such manner as the State may, by law, determine.

3. ....

4. The proposed legislation is anchored in the belief that the values of equality, social justice and democracy and the creation of a just and humane society can be achieved only through provision of inclusive elementary education to all. Provision of free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections is, therefore, not merely the responsibility of schools run or supported by the appropriate Governments, but also of schools which are not dependent on Government funds.

(emphasis supplied)

25. Section 2(f) defines "elementary education" from first class to eighth class.

Section 2(d) defines "child belonging to weaker section" as under:-

2(d). 'child belonging to disadvantaged group' means a child belonging to the Scheduled Caste, the Scheduled Tribe, the socially and educationally backward class or such other group having disadvantage owing to social, cultural, economical, geographical, linguistic, gender or such other factor, as may be specified by the appropriate Government, by notification.

Section 2(e) defines "child belonging to disadvantaged group" as under:-

2(e). 'child belonging to weaker section' means a child belonging to such parent or guardian whose annual income is lower than the minimum limit specified by the appropriate Government, by notification.

26. Sub-section (1) of section 8 provides that appropriate Government shall provide free and compulsory education to every child provided that where a child is admitted by his or her parents or guardian in an unaided school, such child or his or her parents or guardian shall not be entitled to make a claim for reimbursement of expenditure incurred on elementary education of the child in such school. Sub-section (b) ensures availability of a neighborhood school. Sub-section (c) ensures that the child belonging to weaker section and the child belonging to disadvantaged group are not discriminated against and prevented from pursuing and completing elementary education on any ground. Sub-section (g) ensures good quality elementary education conforming to the standards and norms specified in the Schedule.

Section 9 provides for similar duties of local authority such as municipal corporation or municipal council, zilla parishad/panchayat.

27. Section 12(1)(c) provides that unaided school not receiving any kind of aid or grant to meet its expenses from the appropriate Government or local authority shall admit in class I to the extent of at least 25% (twenty five per cent) of the strength of that class, children belonging to weaker section and disadvantaged group in the neighborhood and provide free and compulsory elementary education till its completion.

Sub-section (2) of section 12 further provides that such unaided school providing free and compulsory education as above (i.e. to 25% of the strength of class children belonging to weaker section disadvantaged group in neighbourhood) shall be reimbursed expenditure so incurred by it to the extent of per-child-expenditure incurred by the State or the actual amount charged from the child, whichever is less, in such manner as may be prescribed, provided that such reimbursement shall not exceed per-child-expenditure incurred by a school established, owned or controlled by the appropriate Government or a local authority. There is a further proviso that where such unaided school is already under obligation to provide free education to a specified number of children on account of it having received any land, building, equipment or other facilities, either free of cost or at a concessional rate, such school shall not be entitled for reimbursement to the extent of such obligation.

Section 13 prohibits collection of any capitation fee or subjecting a child or his or her parents or guardian to any screening procedure.

28. In view of the aforesaid provisions, learned A.G.P. has submitted that sections 8(a) and 9(a) of the RTE Act make it clear that the child admitted to an unaided school has no right to claim reimbursement of fees nor can his/her parents/guardian make such a claim for reimbursement. It is submitted that the petitioners have, therefore, no right to seek any direction as prayed for in the petition. When the attention of learned A.G.P. was invited to the specific provisions of section 12(1)(c) and 12(2) of the RTE Act quoted above, she submitted that the children who are entitled to claim benefit of the above provisions are only those children who belong both to the disadvantaged group as well as the weaker section. It is vehemently submitted by the learned A.G.P. that child must belong not only to disadvantaged group means child belonging to SC/ST/socially and educationally backward class or such other group having disadvantage as may be notified by notification, but the child must also belong to weaker section means child whose parents/guardian's annual income is lower than the prescribed income stipulated by the notification.

29. Learned A.G.P. has relied upon the Rules made by the State Government in Notification dated 24 May 2012 being Maharashtra Right of Children to Free and Compulsory Education (manner of reservation of seats for admission in respect of Elementary Education for the child belonging to disadvantaged group and child belonging to weaker section) Rules, 2012.

30. The preamble of the said Rules indicates that in exercise of the powers conferred by section 38 read with section2(d), 2(e) and section 8(f) of the Right to Education Act, the Government of Maharashtra makes the Rules for providing the manner of reservation of seats for admission in respect of elementary education for the child belonging to disadvantaged group and child belonging to weaker section and for matters incidental thereto.

Rule 2(b) defines "child belonging to disadvantaged group" which reads thus:

2(b) 'Child belonging to disadvantaged group' means, a child belonging to.-

(i) the Scheduled Caste, the Scheduled Tribe; and

(ii) any other category as is specified to be a group by the State Government for the purposes of section 2(d) of the Act."

Rule 2(c) defines "child belonging to weaker section", which reads thus:

2(c) 'child belonging to weaker section' means a child including a child belonging to the Vimukta Jatis and Nomadic Tribes (VJNT), Other Backward Classes (OBC) and Special Backward Classes (SBC) and the religious Minorities specified by the State Government and annual income of whose parent or guardian is below one lakh rupees.

Rule 3 insofar as relevant reads as under:

3. Provisions for reservation of seats.- Every school in the State shall reserve the seats for admission, to the extent of twenty five percent of its strength of the Class I of the School, for the child belonging to weaker section and child belonging to disadvantaged group in the neighborhood in the manner hereinafter provided and shall provide free and compulsory education to such children till their completion.

(emphasis supplied)

Rule 4 indicates the manner of reservation of seats. Rule 4(e) reads thus:

4. Manner of reservation of seats.-

(e) (i) Every application for the admission of child belonging to weaker section for the purpose of free and compulsory education shall be accompanied by an income certificate of parent, issued by the Revenue officer not below the rank of Tehsildar.

(ii) Every application for the admission of child belonging to SC, ST, VJNT, OBC, and SBC shall be accompanied a caste certificate issued by a revenue officer not below the rank of Deputy Collector or any other competent authority, in the name of child or his parent or guardian.

31. Having seen the aforesaid statutory provisions, it is crystal clear that the submission made by the learned A.G.P. is not only untenable, but contrary to the scheme of the statutory Rules framed by the State Government itself under the Right to Education Act. The State Government, as Rule making authority, has itself noticed that the State Government and the local authority are to provide free and compulsory education for the child belonging to weaker section AND the child belonging to disadvantaged group in the neighborhood. The preamble itself indicates that the number of children, particularly children from disadvantaged group and weaker section, who drop out of school before completing elementary education, remains very large. The proposed legislation is anchored in the belief that the values of equality, social justice and democracy and the creation of a just and humane society can be achieved only through provision of inclusive elementary education to all. Provision of free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections is, therefore, not merely the responsibility of schools run or supported by the appropriate Governments, but also of schools which are not dependent on Government funds.

32. Section 3 of the RTE Act confers on every child of the age of six to fourteen years right to free and compulsory education in neighborhood school and in terms provides that 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. RTE Act is admittedly enacted by the Parliament for implementation of Article 21-A of the Constitution which has been inserted in the Chapter of Fundamental Rights by the Constitution (Eighty-sixth Amendment) Act, 2002. Article 21-A provides for free and compulsory education of all children in the age group of six to fourteen years as a fundamental right in such manner as the State by law may determine. The law enacted by Parliament deals with separate definition of "child belonging to disadvantaged group" and "child belonging to weaker section" in section 2. If Parliament intended that benefits of Right of Education Act were to be conferred only on children belonging to disadvantaged group whose parents/guardians belong to economically weaker section of the society, Parliament would not have given separate definitions of "child belonging to disadvantaged group" and "child belonging to weaker section", but would have given a combined definition of "child belonging to disadvantaged group and weaker section". Similarly, the provisions of section 3 of the RTE Act also clearly indicate that Parliament intended to ensure that no child should be prevented from pursuing and completing elementary education on account of any financial weakness.

33. The Rules referred to hereinabove also clearly indicate that the definition of "child belonging to disadvantaged group" includes child belonging to SC or ST, but there is no reference to income criteria. It is only in the definition of "child belonging to weaker section" that there is reference to income criteria of annual income below Rs. 1 lakh of parent or guardian of a child belonging to Vimukta Jati and Nomadic Tribe (VJNT), Other Backward Classes (OBC), Special Backward Classes (SBC) and the religious minorities specified by the Government.

34. Having carefully considered the provisions of the Right to Education Act and the statutory Rules made by the State Government under the said Act, we are clearly of the view that the benefits of the Right to Education Act are not confined to children who must satisfy both the definitions-"child belonging to disadvantaged group" and "child belonging to weaker section", but the benefits under the Right to Education Act are available to "children belonging to disadvantaged group" as constituting one class and "children belonging to weaker section" as constituting another class. There may, of course, be some cases of overlapping, that is children who may answer both the definitions, but for availing benefits under the RTE Act, it is not necessary that a child must satisfy both the definitions.

35. In view of the scheme of the RTE Act and the statutory Rules made thereunder, the State Government is liable to reimburse expenditure incurred by an unaided school to the extent of per-child-expenditure incurred by the State or the actual charged from the child, whichever is less, provided that such reimbursement shall not exceed per-child-expenditure incurred by a school established, owned or controlled by the State Government.

In view of the above statutory obligations, the State government was required to place on record per-child-expenditure incurred by the State Government and the learned A.G.P. has placed on record a statement showing that the per-child-expenditure incurred by the State Government for the year 2012-13 is Rs. 10,463/- for elementary education (standards I to IV) and Rs. 25,581/- for secondary education (standards V to VIII). It is not the case of the State Government that the per-child-expenditure incurred by a school established, owned or controlled by the State Government is lower than the aforesaid amount either for elementary education or secondary education.

36. Under the RTE Act, elementary education means education from Std. I to Std. VIII.

37. That still leaves question whether the State Government is liable to reimburse the expenditure incurred by unaided schools in the State of Maharashtra in respect of elementary education(Std. I to VIII) being provided to children belonging to VJNT, OBC and SBC whose parents' income is above Rs. 1 lakh per annum.

38. According to learned A.G.P. for the respondent authorities, only the provisions in the RTE Act and the Rules made thereunder are to be seen and any Government Resolutions issued prior thereto cannot be enforced at the instance of the students or the unaided schools in which they are studying.

39. On the other hand, learned counsel for the petitioners (students as well as unaided schools) have submitted that the Government Resolutions issued prior to RTE Act still continue to hold the field insofar as the students and unaided schools are concerned, which are not covered by the RTE Act and the Rules made thereunder.

It is vehemently submitted that the definition of "child belonging to disadvantaged group" in section 2(d) of the RTE Act covers not only the child belonging to scheduled castes and scheduled tribes but also "socially and educationally backward class ....". It is submitted that the words "or such other group having disadvantage owing to social, cultural, economical, geographical, linguistic, gender or such other factor, as may be specified by the appropriate Government" are for adding any further class over and above the "the scheduled caste, the scheduled tribe (and) the socially and educationally backward class" which are already covered in the definition of "child belonging to disadvantaged group". It is submitted that the children belonging to VJNT, OBC and SBC are already being considered as "socially and educationally backward class" and, therefore, the State Government, as rule making authority, has erred in excluding "the socially and educationally backward class" from the definition of "disadvantaged group" in rule 2(e) of the RTE Rules of 2012 made by the State Government and contained in the Notification dated 24 May 2012. The State Government has erred in putting VJNT, OBC and SBC in the category of "child belonging to weaker section" as defined in Rule 2(c) of theRTE Rules of 2012.

40. Learned A.G.P. has countered the above submission by contending that since there is no challenge to the constitutional validity or legality of the Rules 2 (b) and 2 (c) of the RTE Rules as contained in Government Notification dated 24 May 2012, it is not open to the petitioners to contend that the students belonging to socially and educationally backward class also be treated as children belonging to "disadvantaged group". Secondly, it is contended that the words "as may be specified by the appropriate Government, by notification" also qualify the words "the socially and educationally backward class". Thirdly, it is also submitted that acceptance of the petitioners' contentions would place unbearable burden on the public exchequer as students belonging to VJNT, OBC and SBP will have to be given reimbursement of fee, irrespective of the income of their parents/guardians.

41. We note that there is no challenge to the provisions of Rules 2(b) and 2(c) of the RTE Rules of 2012 as contained in the Government Resolution dated 24 May 2012 giving definitions of "child belonging to disadvantaged group" and "child belonging to weaker section". We, therefore, proceed on the basis of the definitions contained in the aforesaid Rules 2(b) and 2(c) of the RTE Rules.

42. While we are prepared to accept the submissions of learned A.G.P., it would not mean that the children belonging to VJNT, OBC and SBC categories, the income of whose parents/guardians is between Rs. 1 lakh and 4.5 lakhs should be denied the benefit of reimbursement of fees even to the extent of the amounts recommended by the Committee headed by Principal Secretary, Social Justice Department and other senior officers in the Education Department, Rural Development Department and Tribal Development Department, in their report dated 9 April 2010.

43. It is necessary to note that the Statement of Objects and Reasons of the RTE Act clearly provides that the object is to ensure provision of free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections. The thrust of submissions of the learned A.G.P. has been that there are adequate number of Government/Municipal schools providing free education to children from disadvantaged and weaker sections and that if the petitioners' submissions were to be accepted, children of parents belonging to VJNT, OBC and SBC earning more than Rs. 1 lakh will be entitled to get free education in private unaided schools charging exorbitant frees by requiring the Government to reimburse such fees.

44. The argument of learned A.G.P. cannot be accepted for more than one reason. In the first place, it is clear from the Statement of Objects and Reasons to RTE Act that the children from disadvantaged and weaker sections are not merely entitled to free and compulsory education but also free elementary education of "satisfactory quality". If the Government/Municipal schools provide education of satisfactory quality, there would be no need for children to go to private unaided schools.

Secondly, whatever may be the scale of fees which may be charged by private unaided schools, there is a ceiling imposed by section 12(2) of the RTE Act, which is the extent of per child expenditure incurred by the State or actual amount charged from the child, whichever is less. As indicated above, the per child expenditure incurred by the State Government in the year 2012-13 is Rs. 10,463/- per annum for Std. I to IV and Rs. 25,581/- for Std. V to VIII.

Thirdly, if the contention of the State Government were to be accepted, children belonging to VJNT, OBC and SBC, on account of restrictive definition of "child belonging to disadvantaged group" (which does not include socially and educationally backward class) and the restrictive definition of "child belonging to weaker section" (which specifies annual income of parents/guardians below Rs. 1 lakh), such students will not only be excluded from the benefit of 25% reservation for admissions, but also the benefit of reimbursement of fees altogether. Judicial notice may be taken of the fact that Rs. 1 lakh per annum would not be sufficient for any family of four to provide anything beyond food, clothing and shelter. The very fact that the Central Government, while charging income tax, has provided for exemption limit of Rs. 2 lakhs is sufficient to indicate that the children, whose parents/guardians' income is Rs. 1-2 lakhs, must be treated as children belonging to weaker section. It is true that these are matters of policy and ordinarily the Courts in judicial review do not sit in appeal over such policy decision, but having regard to the fact that free and compulsory education is a fundamental right enshrined under Article 21A of the Constitution and the RTE Act has been enacted not merely to provide free and compulsory education but also to provide free and compulsory elementary education of satisfactory quality to children from disadvantaged and weaker sections (as specifically mentioned in the Statement of Objects and Reasons to the RTE Act), the children from the disadvantaged and weaker sections vis-a-vis government schools/municipal schools on the one hand and private schools on the other hand must be treated as having right to select an elementary school of their choice. If children belonging to VJNT, OBC and SBC, whose parents/guardians' income is above Rs. 1 lakh, were to be treated as not having any choice of seeking admission to a private unaided school only on the ground that they do not belong either to the "disadvantaged group" as defined in Rule 2(b) or to the "weaker section" as defined in Rule 2(c) of the RTE Rules, it would be violative of their fundamental right under Article 21A of the Constitution. Hence, the Government Resolutions, which were in force prior to enactment of the RTE Act and framing of the Rules thereunder, must be treated to have subsisted even after enactment of the RTE Act and framing of the Rules thereunder, for those students who do not fall under the definitions in Rules 2(b) and 2(c) of the Maharashtra Rules of 2012.

45. It would not be out of place to refer at this stage to the argument of Ms. Gayatri Singh, learned counsel for the petitioner students, that the State Government does provide reimbursement of fees of students belonging to VJNT, OBC and SBC categories when they pursue higher education after XII standard and the income limit applied to such students is the cut off limit for creamy layer students which is Rs. 4.5 lakhs per annum. It is also submitted by Ms. Gayatri Singh that merely because the colleges, where students belonging to VJNT, OBC and SBC with income in the bracket of Rs. 1 lakh to Rs. 4.5 lakhs per annum study, are being run by managements controlled by political leaders in the State and the schools are not being run by such managements cannot be a ground to deny the students belonging to VJNT, OBC and SBC right to have free elementary education of satisfactory quality by studying in private unaided schools. Without prejudice to her contention that the students belonging to these categories are entitled to reimbursement of their full fees or at least fees upto the extent indicated in section 12(2) of the RTE Act, learned counsel has relied upon the Report dated 9 April 2010 of the Committee appointed under the Government Resolution dated 18 February 2010 which has noted in para 13 of its report that it is the policy of the Government, to reimburse the education fees of backward class students learning in English medium and other language schools. The said recommendation of the committee and the three options read as under:-

13. Recommendations of Committee:-

It is the policy of Govt. to reimburse the educational fees of backward class students learning in English Medium Schools. However, the Social Justice Department of the Govt. shall reimburse the fee of these students for backward class categories learning in English and schools of other language medium, as per the rate of Option-3 as aforesaid, irrespective of whatever fee has been charged by the concerned school.

The Committee submits its Report which was approached to fix-up the rates of reimbursement of Education fees in respect of SC/ST/DT/NT & SBC students learning in III 1st to 10th standard in private non-aided and permanent non-aided schools.

(emphasis supplied)



46. It is submitted on behalf of the petitioners that the State Government has not given any justification for not accepting the above report. The Government Resolution dated 30 December 2011 accepts only Option-1 and that too for students belonging to Scheduled Castes, Scheduled Tribes, OBC and NT with parents' income below Rs. 1 lakh per annum giving them reimbursement of fees as per Option-1. It is submitted that while Scheduled Castes and Scheduled Tribes students are to be given reimbursement as per section 12(2) of the RTE Act, students belonging VJNT, OBC and SBC are being denied this benefit only on the ground that income of their parents/guardians is Rs. 1 lakh or above.

47. It is submitted by learned A.G.P. that the Government Resolution dated 21 January 1960 had anticipated that in future the income limit should be imposed for grant of concessions when the number of grantees will be large and there will be indefinite commitments.

48. We may note at this stage that the only ground urged by the State Government for not giving the benefit of the above report is the allegation that there was financial irregularity in the past as huge amount of approximately Rs. 45 crores was released by some officers without permission or sanction of Social Justice Department and that during the inquiry it transpired that the aided and unaided schools in the city of Mumbai were submitting exorbitant bills contrary to the fees structure laid down in the Government Resolution dated 13 June 1996. Many of the schools have increased their fee structure, but the Social Justice Department does not have capacity to reimburse the increased fees other than the sanctioned amount in the Government Resolution of 1996.

49. As already noted earlier, the Government Resolution dated 24 December 1970 and the Government Order dated 13 June 1996 provided for reimbursement of fees only to the extent of Rs. 2 per month/Rs. 3 per month for Std. I to IV, Rs. 6 per month for Std. V to VII and Rs. 10 per month for Std. VIII to X. It appears that no unaided school can provide even elementary education, much less elementary education of "satisfactory quality" by charging fees of only Rs. 2 or Rs. 4 per month, which were rates prescribed in the Government Order dated 13 June 1996. Merely because the Government has chosen not to revise these rates, children coming from families with income between Rs. 1 lakh and Rs. 4.5 lakhs, that is children coming from families above the below poverty line but below the creamy layer, cannot be denied their fundamental legal right to get elementary education of the satisfactory quality by not permitting them to study in a school of their choice providing elementary education of satisfactory quality. As already discussed earlier, merely because there is Government/Municipal primary schools in the neighborhood cannot be a ground to deny the children belonging to weaker section their right to choose elementary school providing satisfactory quality of education.

50. Learned A.G.P. would, however, opposed the grant of any relief on the ground that this Court may not issue any writ of mandamus when the petitioners have no enforceable legal right when the income of their parents/guardians is Rs. 1 lakh or above. The submission deserves to be rejected for more than one reason.

51. In the first place, while appreciating that the authorities may impose some income limit for giving benefits to the students not covered by the RTE Act and the Rules framed thereunder, when the students, whose parents/guardians' income is upto Rs. 4.5 lakhs and who are prosecuting higher education in private colleges are being given reimbursement of fees, the policy of the State Government to restrict the income limit upto only Rs. 1 lakh in case of students belonging to VJNT, OBC, SBC is on the face of it arbitrary and discriminatory. We do appreciate that on account of financial burden on the State Government, the State Government may not agree to reimburse the full fees being charged and recovered by the school managements to such students whose parents/guardians' income exceeds Rs. 1 lakh and is upto Rs. 4.5 lakhs, but at least the fees recommended by the Committee in its report dated 9 April 2010 ought to be reimbursed.

52. Similar submission made on behalf of the State of Maharashtra was repelled by the Supreme Court in the matter of giving grant-in-aid to private Law Colleges in the State. In State of Maharashtra vs. Manubhai Pragaji Vashi, (  : 1995) 5 SCC 730, the Apex Court, inter alia, laid down the following principles:-

13. A plea was taken in the High Court that the petitioner has no right to seek a writ of mandamus under Article 226 of the Constitution basing his relief on a directive principle contained in the Constitution. The High Court, rightly in our opinion, repelled this plea relying on the decision of this Court in State of Himachal Pradesh v. Umed Ram Sharma (  : AIR 1986 SC 847). The High Court referred to the dictum laid down in the aforesaid decision to the effect (a) the Court can in a fit case direct the executive to carry out the directive principles of the Constitution, and (b) when there is inaction or slow action by the executive the judiciary must intervene. We have no doubt that the above conclusion of the court below is also justified.

...... Under the label of self financing institutions, the colleges should not be permitted to hike the fees to any extent in order to meet the expenses to provide the infrastructure and for appointing competent teachers and staff. The private law colleges, on their own, may not afford to incur the huge cost required in that behalf. The 'standard' of legal education and discipline is bound to suffer. It should not so happen for want of funds. .... These aspects necessarily flowing from Articles 21 and 39A of the Constitution were totally lost sight of by the Government when it denied the grant-in-aid to the recognised private law colleges as was afforded to other faculties. We would add that the State has abdicated the duty enjoined on it by the relevant provisions of the Constitution aforesaid. In this perspective, we hold that Article 21 read with Article 39A of the Constitution mandates or casts a duty on the State to afford grant-in-aid to recognised private law colleges, similar to other faculties, which qualify for the receipt of the grant. The aforesaid duty cast on the State cannot be whittled down in any manner, either by pleading paucity of funds or otherwise. We make this position clear.

(emphasis supplied)

53. The same philosophy, logic and reasoning will apply to the petitioners' claim for reimbursement of fees to students belonging to VJNT, OBC and SBC categories, because Article 46 of the Constitution casts the following obligation on the State:

46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.- The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

(emphasis supplied)

Now that the Parliament has enacted Right of Children to Free & Free Education Act, 2009, the provisions of the said Act are required to be read not only in the light of Article 21A but also in the light of Article 46 which provides that the State shall promote with special care educational interests of weaker sections of the people.

54. The Apex Court in U.P. State Electricity Board and another v. Hari Shankar Jain and others,   : AIR 1979 SC 65, has held that since the Directive Principles of State Policy are fundamental in the governance of the country, Article 37 also enjoins upon the Court to keep these principles in mind while interpreting laws. It is not the case of the State Government that they are not required to take special care of the educational interests of the Scheduled Castes and other backward classes covered by the scheme in question. When the scheme was initially introduced, the Government had agreed to reimburse the fees at the rate of Rs. 4, Rs. 5 and Rs. 6 per month but obviously with passage of time, the amount could not have been pegged down to such ridiculous rates and therefore, the State Government rightly appointed the Committee in February, 2010 for recommending the rates at which fees should be reimbursed. The Committee has, accordingly, made the recommendations which are set out in paragraphs 10 hereinabove. The Committee has indicated three options with the financial burden on the State Government under each option.

55. The Committee has given three options. Our attention is also invited to Schedule IA to the Government Order dated 13 June 1996 which divided the State into following zones for the purpose of prescribing rates of standard fees in aided non-Government secondary schools (Std. V to X):

A) Bombay Suburban

B) Pune/Nagpur/Solapur/Kolhapur Municipal Corporation

3) Places other than aforesaid (A) and (B)

We see no reason why Option-3, Option-2 and Option-1 should not be applied respectively to the schools in the City of Greater Mumbai, the schools in other cities having Municipal Corporations and the schools in the rest of Maharashtra. In other words, options may be applied areawise as under:-



[Note: To be read with Recommendation of the Committee in para 13 of the Report dated 9 April 2010 as quoted in para 11 of this judgment.]

56. We may also deal with the submission of the learned A.G.P. that the provisions of the RTE Act are not applicable to the minority schools in view of the judgment of the Supreme Court in Society for Unaided Private Schools of Rajasthan vs. Union of India Ors.,   : (2012) 6 SCC 1 and the consequential amendment to the RTE Act.

57. It is true that in view of the above judgment of the Supreme Court and the statutory amendment, the provisions of the RTE Act cannot be invoked against a minority unaided school against the wish of the school management, but if such school has admitted children belonging to disadvantaged group and/or the children belonging to weaker section as defined by the RTE Act and the Rules, it is open to the minority unaided school to claim reimbursement. There is nothing in the provisions of the RTE Act or the Rules which prohibit a minority unaided schools from claiming the benefit of reimbursement, if it is otherwise ready to admit or have already admitted the children who may belong to the disadvantaged group and/or to the weaker section.

58. For moulding reliefs, the issues to be considered are:-

(i) caste/income of the parent/guardian of the children

(ii) the standards for which the State Government will reimburse the fees of backward class students to unaided schools

(iii) the period for which the State Government will reimburse the unaided schools.

As far as the caste/income of the parent/guardian of the children is concerned, those falling within the definitions of "children belonging to the disadvantaged group" and/or "children belonging to the weaker section" as defined by the RTEAct and State Rules framed under the RTE Act will have to be given benefit from the academic year 2010-11 onwards as the RTE Act came into force from 1 April 2010.

As regards the children who are not covered by the above statutory definitions but who belong to backward classes and whose parent/guardian's income is Rs. 1 lakh and above but below the cut off limit for the creamy layer (i.e. upto Rs. 4.5 lakhs), they will have to be given reliefs with effect from the current academic year 2012-13 onwards.

It is true that the RTE Act and the Rules made thereunder define "elementary education" as from Std. I to VIII, but all along the State Government was giving the benefit of reimbursement of fees in respect of students studying in Std. IX and X also. Article 46 of the Constitution providing for promotion of educational and economic interests of weaker sections also does not restrict the benefits to elementary education only. We are, therefore, inclined to grant relief for reimbursement of fees payable for backward class students of Std. IX and X also.

59. The petitions are accordingly allowed in terms of the following declarations, directions and classifications:

I. From the academic year 2010-11 onwards:

(a) the State Government shall reimburse expenditure incurred by unaided schools in the State of Maharashtra in respect of elementary education (Std. I to VIII) being provided to children belonging to Scheduled Castes and Scheduled Tribes, irrespective of the income of their parent or guardian, reimbursement shall be for the amount specified in section 12(2) of the Right to Education Act (RTE Act).

[the present rates being the amount of Rs. 10,463/- per annum per child (for Std. I to IV) and Rs. 25,581/- per annum per child (for Std. V to VIII), or the actual amount being charged from the child in the same class, whichever is less]

This direction shall be implemented by 10 May 2013.

(b) the State Government shall reimburse the expenditure incurred by unaided schools in the State of Maharashtra respect of elementary education (Std. I to VIII) of the children belonging to VJNT, OBC and SBC whose parents' income is below Rs. 1 lakh per annum reimbursement shall be for the amount specified in section 12(2) of the RTE Act.

[the present rates being Rs. 10,463/- per annum per-child for Std. I to IV and Rs. 25,581/- for Std. V to VIII, or the actual amount being charged from the child in the same class, whichever is less].

This direction shall be implemented by 10 May 2013.

(c) in respect of secondary education (Std. IX and X) of children belonging to Scheduled Castes and Scheduled Tribes, irrespective of the income of their parent or guardian, the State Government shall reimburse the expenditure incurred by unaided schools to the extent specified in the following chart prepared on the basis of the Committee Report dated 9 April 2010:



[Note: To be read with Recommendation of the Committee in para 13 of the Report dated 9 April 2010 as quoted in para 11 of this judgment.]

This direction shall be implemented by 15 July 2013.

II. From the academic year 2012-13 onwards:

(d) in respect of elementary education (Std. I to VIII) and secondary education (Std. IX and X) of children belonging to VJNT, OBC and SBC, whose parents/guardians' income is Rs. 1 lakh or above per annum but upto the creamy layer cut off amount [present upper income limit stipulated for post matric scholarship/freeship/reimbursement for students in private unaided colleges being Rs. 4.5 lakhs per annum], the State Government shall reimburse the expenditure incurred by unaided schools to the extent indicated in the above chart in direction (c).

This direction shall be implemented by 15 July 2013.

III. Clarifications

(e) The amounts which have already been paid by the Government under the interim order dated 28 April 2011 of this Court, no amount shall be required to be refunded by the schools to the State Government. The amounts paid for the academic year 2010-11 onwards shall be adjusted against the amounts required to be paid under this order.

(f) It is clarified that this judgment does not preclude the concerned authorities from verifying the number and particulars of students for whose benefit the fees are to be reimbursed and particulars of the schools where they are studying and also from evolving suitable safeguards for monitoring proper implementation of the above directions.

IV. Minority Schools

(g) The provisions of the RTE Act cannot be invoked against a minority unaided school against the wish of the school management, but if such school has admitted children belonging to disadvantaged group and/or the children belonging to weaker section as defined by the RTE Act and the Rules, it is open to the minority unaided school to claim reimbursement. There is nothing in the provisions of the RTE Act or the Rules which prohibits a minority unaided school from claiming the benefit of reimbursement, if it is otherwise ready to admit or has already admitted the children who may belong to disadvantaged group and/or to the weaker section.

V. Liberty to unaided schools

As regards the claim of the unaided schools for reimbursement of amounts for the academic years 2006-07 till 2009-10, we leave it open to the school managements to make representations to the authorities and/or to institute appropriate proceedings.

The petitions are accordingly allowed in terms of the above directions.