**1IN THE HIGH COURT OF****BOMBAY (AURANGABAD BENCH)**

Writ Petition Nos. 1204, 1205, 1206, 5655, 6018, 6041, 8324, 8336, 8337 of 2009, 128, 345, 355, 365, 366, 374, 385, 405, 466, 470, 504, 555, 562, 666, 712, 738, 770, 806, 812, 868, 904, 921, 1097, 1098, 1100, 1101, 1103, 1145, 1160, 1162, 1165, 1171, 1172, 1244, 1414, 1415, 1417, 1418, 1419, 1420, 1473, 1475, 1476, 1560, 1562, 1563, 1564, 1565, 1566, 1567, 1568, 1569, 1572, 1576, 1577, 1579, 1580, 1581, 1583, 1584, 1585, 1587, 1588, 1589, 1657, 1658, 1661, 1663, 1665, 1666, 1710, 1711, 1739, 1795, 1796, 1804, 1809, 1810, 1821, 1953, 1954, 1955, 1956, 1959, 1961, 2064, 2065, 2066, 2195, 2196, 6477 and 8338 of 2010

Decided On: 08.04.2010

Appellants: **Asha Seva Bhavi Sanstha through its President Pralhad Baburao More and Ors. etc. etc.**
**Vs.**
Respondent: **The State of Maharashtra through its Secretary, School****Education and Sports Department, The Director of****Education (School****Education), The Deputy Director of****Education and The****Education Officer (Primary), Zilla Parishad etc. etc.**

**Hon'ble Judges/Coram:**
A.M. Khanwilkar and S.S. Shinde, JJ.

**JUDGMENT**

**A.M. Khanwilkar, J.**

1. Heard learned Counsel for the parties. Rule. Rule made returnable forthwith. By consent of the learned Counsel for the parties, the matter was taken up for final hearing at the stage of admission itself.

2. All these Petitions are disposed of by this Common Judgment as the same involve common issues. All these Petitions are filed by nonminority institutions which are registered as public charitable trusts, taking exception to Government Resolution dated 20th July, 2009 on the basis of which the proposal submitted by each of these Petitioner institution for starting a primary, secondary or higher secondary school, as the case may be, has been treated as cancelled or rejected. It is the case of each of these Petitioners that pursuant to Government Circular dated 29th July, 2008 they submitted proposal(s) for starting primary, secondary and higher secondary schools on "permanent no grant basis" in "Marathi medium". It is asserted that their proposal was scrutinized by the Committees constituted at the District and State level and recommended to the State Government for approval. Along with the Petitioners, several other institutions had submitted their proposals which were also processed and pending with the State Government for appropriate decision. The State Government, however, by impugned Government Resolution dated 20th July, 2009, decided to terminate all those proposals (about 6028) as cancelled or rejected on the ground that permission cannot be granted until a comprehensive plan (perspective plan/ master plan) is prepared with the assistance of experts. Further, depending upon the requirement of the school and considering the policy regarding grant of permission to start a school, the sub committee of State Cabinet would examine the proposals and take decision regarding permission for a new school. The English translation of the said Government Resolution as appended to Writ Petition No. 345 of 2010 reads thus:

Regarding giving grant to the primary and secondary school (excluding English Medium) that have been given permission on permanent non grant basis.

Govt. of Maharashtra
Dept. of School Education and
Sports
Govt. Resolution No. SCG2009/ (588/09) SE1
Mantralaya Annax Bldg,
Mumbai 32.
Date : 20 July, 2009

Preface,

To secure the fundamental right of right to life to every Indian citizen and to have to right to education to every one, Hon'ble Apex Court has given the direction to give free and compulsory education to children in the age group 6 to 14 and thereby 86th amendment took place in the Indian constitution accordingly the right of the child in the age group 6 to 14 on education was incorporation as fundamental right. To protect this right of child on education as given by Indian constitution central Govt. has initiated the action to pass the enactment on "Right to Education."

Various schemes for extension and development of education has been implemented by Govt. in the state. Various primary, secondary and Higher Secondary schools are in operation in the state on aided partly aided, non aided permanently non aided basis. In the cabinet meeting dt. 24th November, 2004 the resolution has been passed to give permission to Primary, Secondary and Higher secondary schools run by private institutions on permanent non aided basis, accordingly since 2002 the permission has been granted in the state on permanent unaided basis.

Hundred percent grant has been given to the aided school in the state and as per Govt. resolution dated 11th October, 2000 the formula of giving grant has been prescribed. As per the formula 20% grant on fifth running year, 40% on sixth running year, 60% on seventh year, 80% on eighth year and 100 on ninth running year has been given to unaided schools on the state.

Consistently demands have been made to the Govt. to give the grant to the schools which are on permanent non grant basis. With the purpose to enable primary and secondary school, quality of education and enabling the educationsystem as the constitutional responsibility of primary and secondary education is on Govt., the proposal to give grant toprimary and secondary schools in the state who have been given permission on permanent non aided basis has been submitted on 16th June, 2009 for cabinet consideration. As per the resolution passed in cabinet meeting following order has been issued regarding giving grant to the schools which are permanently unaided school.

Govt. Resolution.

On 16th June 2009 in the cabinet meeting at Vidhan Bhavan, Mumbai the discussion took place on the proposal to give grant to the school which are permitted as permanently unaided school and the decision is hereby declared as Govt. resolution.

1. Excluding the English schools which are given permission as permanently unaided schools, the word "permanent" in the permission order of primary and secondary schools of other medium has been excluded.

2. The primary and secondary schools on permanent unaided basis and schools qualifies the assessment with regard to the divisions from three years (i.e. from 20122013) will be given the grant as per the prescribed formula.

3. Right to get grant has not been accrued despite of school being eligible for grant because it is the sole discretion of the Govt. to provide grant and it will depend on availability of funds and will not be implemented with retrospective effect.

4. After giving 100% grant to said school, the non salary grant, pension, medical benefits, grant to additional divisions will be made applicable as per preventing rules and policies and per that separate financial provision has to be made.

5. For the eligibility to get grant, assessment has been conducted for concerned school, committee has been appointed under the chairmanship of the secretary (school education) to decide the criteria of assessment and this committee includes principal secondary (planning) Principal Secondary (Finance) Secretary (Tribal Development) Secretary (Social Justice). The assessment of the schools will be made according to the criteria's fixed by this committee for assessment and those schools will be declared as eligible for grant.

6. As per the Govt. Circular dated 29.4.2008, the proposals were invited from private educations institution to startprimary, secondary and higher secondary schools on permanent unaided basis out of which the proposals those were received to start primary and secondary schools of Marathi medium and those proposals which are not approved, all pending proposals are hereby cancelled. The subcommittee of cabinet will take decision on the proposals for other mediums.

7. With regard to the permission to new primary and secondary schools, a comprehensive plan will be prepared with the assistance (considering the policy regarding permissions to schools, comprehensive plan and requirement of school, the cabinet sub committee will take decisions in relation with permissions of new schools.

This Govt. resolution is available on the portal of Govt. of Maharashtra (www.maharashtra.gov.in) having computer code as 200990720171423001.

By the name and order of Governor of Maharashtra.

Sd/-
Dr. Suvarna S. Kharat
Joint Secretary,
Govt of Maharashtra.

3. Accordingly, in all these Petitions the above said decision of the State is challenged being ultra vires the Constitution and for further relief of direction to the Respondents to consider the proposal of the concerned Petitioners in accordance with provisions of Secondary Schools Code and to permit the Petitioners to start the desired school from academic year 20102011 in Marathi medium on permanent no grant basis. The challenge is essentially on the basis that the Petitioners have a fundamental right to start a new school at a place and in medium of their choice guaranteed by Article 19(1)(g) of the Constitution of India as right to establish and start a school has been recognized as right to occupation within the meaning of the said Article. According to the Petitioners, since they desire to start a new school in Marathi medium without seeking any aid from the State financial or otherwise and on permanent no grant in aid basis, the State can only regulate that right in the interests of the general public and by imposing reasonable restrictions.

4. Besides, invoking Article 19(1)(g) of the Constitution of India, the Petitioners have also asserted that the blanket decision taken by the State Government to cancel all the proposals and thereby reject the same also impinges upon the rights guaranteed under Part III of the Constitution of India under Articles 14, 21 and 21A. In addition, the Petitioners have also invoked Articles 41, 45, 51A (h) (j) and (k) of the Constitution of India to assail the arbitrary action of the State. According to the Petitioners, the mere fact that the perspective plan has not been formulated or is under preparation, cannot be the basis to terminate the proposals submitted by the Petitioners and that ground is not germane and in any case it will not be protected by Clause (6) of Article 19 of the Constitution as in the interests of the general public and reasonable restrictions on the exercise of right conferred on the Petitioners under Article 19(1)(g).

5. According to the Petitioners, considering the constitutional scheme, the existence of a perspective plan and consideration of the proposal by the institution who intends to start a new school without the aid of the State either financial or otherwise, has no causal connection and cannot be the basis to turn down the proposal. Moreover, the State Government could not have ignored the cases of the institutions which were recommended by local committees at the District as well as State level. The fact that such recommendation was made by the local committees of the State presupposes that there was a felt need to start a new school in the given locality and that the institution has complied with all the formalities including providing of infrastructure. According to the Petitioners, the fact that the primary obligation to impart education to the children between the age of 6 to 14 years, does not mean that the State has exclusivity on the said activity; and that right to open educational institutions, which is recognized as a right to occupation within the meaning of Article 19(1)(g) to the citizens or educational institutions who want to start the schools on permanent no grant basis without taking any assistance from the State, financial or otherwise, cannot be eclipsed or rendered nugatory. Both the right of the educational institutions and also obligation of the Government can and ought to coexist. The induction of private institutions in the field of education would introduce competition, healthy for the growth of quality education and not merely imparting of paper compliance education imparted by the State through the schools receiving grant in aid which have dearth of highly trained and professional staff and are notorious for lack of punctuality and efficiency.

6. According to the Petitioners, the State can interdict the right of the private institutions only by way of regulating the institutions in matters of professional or technical qualifications necessary of the staff and of the infrastructure, as precondition for grant of recognition to the school started by the private educational institution.

7. The other issue raised by the Petitioners is that the purported policy decision of the State results in discriminatory treatment meted out to the managements who had submitted proposals to start new schools on the basis of language. In as much as, only the proposals in respect of Marathi medium schools have been cancelled and will not be entertained until the perspective plan is prepared and finalized. There is no such restriction with regard to starting of schools in other languages such as Urdu, English, Hindi, Gujrathi etc. Besides, the policy is applicable only to opening of new schools in Marathi medium by private institutions; whereas the local Governments namely, Municipal Councils or Corporations are free to open Marathi medium schools at the place of their choice in absence of the perspective plan, which also results in discrimination. According to the Petitioners, the provisions of the Secondary Schools Code which are merely compendium of administrative instructions provide for procedure for starting a new school, the constitutional validity thereof itself is questionable. The State Government can only regulate the educational institutions by imposing reasonable restrictions as condition for its recognition.

8. These are the broad issues raised by the Petitioners in these batch of Petitions.

9. The State has opposed these Petitions by filing common affidavit in Writ Petition No. 8337 of 2009 of Anil Madhavrao Battalwar, Joint Secretary, School Education and Sports Department, Mantralaya. The substance of the reply affidavit is that the Government Resolution dated 20th July, 2009 restates the policy decision of the State of not permitting any new Marathi medium school through out the State of Maharashtra until the preparation and finalization of the perspective plan. It is stated that as of now in the State of Maharashtra there are approximately 20,000 secondary schools, 6,000 primary schools and 6,500 higher secondary schools in existence run by private managements. These schools were allowed to start as per the prevailing policy of the State at the relevant time either on grant in aid basis or permanently no grant in aid basis. Insofar as the grant in aid basis schools were concerned, they receive grants in a phased manner as per the policy mentioned in Government Resolution dated 11th October, 2000. They would start receiving 20% grants at the 5th year, 40% at the 6th year, 60% at the 7th year, 80% at the 8th year and 100% at the 9th year. Whereas, schools started in tribal area on grant in aid basis, would receive 100% grant at the 5th year from starting of the school. It is further stated that considering the financial compulsion for providing grants in aid to the schools run by the private management, the Government evolved policy for granting permission to the schools run by the private management only on permanent non grant basis vide Cabinet decision dated 24th November, 2001. On the basis of that policy, permissions were granted on permanent no grant basis if the management was ready and willing to run the school on that basis and were to give undertaking to that effect. However, later on the private management started filing Writ Petitions in the High Court and in one of such Writ Petitions being Writ Petition No. 3894 of 2002 an affidavit was filed on behalf of the State to the effect that the Government after due consideration has decided to formulate the policy to sanction grant in aid to permanently unaided secondary schools on the terms stipulated therein. It was stated that after the financial position of the State Government improves, necessary action for formulating such scheme would be taken. Further, in view of the management, teachers, unions and peoples representatives, a proposal for bringing schools from permanent no grant basis to grant in aid basis was considered by the Cabinet on 16th June, 2009. In view of the 86th Amendment to the constitution which has made right to education as fundamental right and considering the directive principles enshrined in the Constitution such as Article 41 and 45 envisaging constitutional obligation of the State to provide free education to the children in the age of 6 to 14 years, the State Government decided to bring permanent no grant schools on grant in aid basis vide Government Resolution dated 20th July, 2009. It was a conscious decision taken at the highest level after due deliberations in order to reconsider the existing educational system and make it more efficient so as to lay the foundation for the development of common people and to provide school system imparting quality education to all children and in particular, social and economical disadvantaged population in order to maintain high standards of education and to prevent exploitation of teachers in the schools on account of non payment of salary etc. Accordingly, the Government decided to prepare a master plan based on the need of the society with reference to the population and to frame a comprehensive policy for education with reference to grant of permission to the schools. Reference is also made to the decision of our High Court in case of Gramvikas Shikshan Prasarak Mandal v. The State of Maharashtra and Ors. reported in   : AIR 2000 Bombay Page 437 in which the State Government was called upon to prepare a master plan and consider other related issues regarding the opening of new schools in Marathi medium. It is stated that for granting permission to open new schools, the prime consideration is the strength of existing schools visavis the availability of the students. It is stated that the strength of existing schools is sufficient to accommodate the students and in fact the schools are facing shortage of students resulting in difficulty to maintain the divisions in the schools. On account of shortage of students, the divisions are required to be closed down and the teachers are becoming surplus. Considering the situation, the Government changed the criteria of maintaining the divisions and instead of 70 students for first division and for additional division 50 students per division, later on in the year 1996 reduced the said ratio to 25, 20 and 15 students in a division in urban, rural and tribal areas respectively, vide circular dated 20th February, 1996 and 2nd February, 2009. It is stated that the Government had already started preparation of master plan from the year 2006. The preliminary criteria for collating information on the basis of which the master plan would be finalized, is found in Government Circular dated 13th September, 2006. It is stated that granting new permission to the schools could affect quality of education which would be matter of concern for students, teachers and if the school is on grant in aid basis, statutory obligation to absorb such teachers and payment of their salary is on the Government. After considering all these factors, decision was taken as reflected in Government Resolution dated 20th July, 2009 that as per the master plan considering the need of the school of that area, the decision about the new school, permission will be given. Further, the master plan for Marathi medium primary and secondary school submitted by the Director of Primary and Secondary Education is under consideration of the Government. The Government is also considering the school mapping exercise for other medium schools based on road distance, population, gross enrollment rate. It is stated that the experience of the Government to allow private management to start schools on permanent no grant basis was not encouraging. In that, the Government receives many complaints regarding standard of education, availability of infrastructure, non payment of salary and appointment of untrained teachers without following rules in such schools. Therefore, as per the Cabinet decision, with a view to evaluate the situation, it constituted a Committee of Secretaries regarding eligibility and revision of norms to grant in aid schools. It is stated that approximately 7840 proposals were received for secondary schools, out of which 6028 proposals were for starting Marathi medium secondary schools and approximately 10000 proposals were received for primary schools. Therefore, Government took a policy decision not to consider any proposal for Marathi medium primary and secondary schools and would consider the fresh proposals only as per coming into effect of the master plan.

10. It is stated that as on the date of filing of the affidavit, no proposal was pending with the Government. It is further stated that insofar as proposals regarding English medium schools are concerned, the same were in cases where recommendation was made by District as well as State level Committee and even if by any one Committee, the same was approved. Insofar as Urdu and other medium schools are concerned, the proposals which were recommended by both the Committees alone were granted permission and rest were rejected. As such all the proposals have been decided and intimation in that behalf has been given.

11. It is lastly stated that in batch of Petitions being Writ Petition No. 8992 of 2009 along with other Petitions, at the Principal Bench, which involved similar grievance, came to be disposed of on the basis of the statement made on behalf of the Government indicating time frame programme for preparation of master plan and grant of permission thereafter. It is prayed that similar order be passed in the present batch of Petitions.

12. The learned Government Pleader, besides reiterating the above position, has contended that the Petitioners before this Court are private institutions/associations registered as public charitable trusts. The institutions being body corporate and not a citizen, cannot invoke rights guaranteed under Article 19(1)(g) of the Constitution. Further, there can be no right in the Petitioners to start a new school as imparting education is the obligation of the State Government. The Petitioners would only have a statutory right or at best relief for enforcement of the executive instructions. It was argued that since imparting primary education was a constitutional obligation of the State, it is open to the State to grant licence to the deserving institutions and the licencee alone can establish and run the educational institution. He further submitted that in any case exercise of right under Article 19(1)(g) of the Constitution would be subject to law made by the State and in absence of such law, the executive instructions issued by the State as noted in the Secondary Schools Code, which is compendium of executive instructions will have to govern the field. According to him, the decision relied by the Petitioners of the Apex Court in T.M.A. Pai Foundation v. State of Karnataka reported in 2002 A.I.R. S.C.W. 4957 were matters after the grant of permission by the State and not "for grant of permission" as such. According to him, opening of new schools in absence of perspective plan would result in unfair competition between the schools which would be unhealthy and affect the interests of the public. The right to education necessarily includes right to receive quality education. The purpose of perspective plan is to detail the population at the level of Tandas and villages and then take a birds eye view to identify the locality where the requirement of a school is more compelling, depending on factors such as the population and the demand thereof. For that reason, a conscious decision has been taken by the Government to consider proposals for permission to start new Marathi medium schools in the State only after the perspective plan is finalized.

13. Both the sides have relied on reported decisions to buttress their arguments. We shall advert to the same at the appropriate stage.

14. Having considered the rival submissions, we would straight away deal with the argument of the Respondent that same order be passed in these batch of Petitions as in Writ Petition No. 8992 of 2009, disposed of by the Principal Bench on 11th January, 2010. We think it apposite to reproduce the said order in its entirety. The same reads thus:

1) The learned Assistant Government Pleader appearing for State Government states that the State Government will prepare and publish the master plan in relation the establishment of new Primary and Secondary Schools in Marathi medium within a period of six months from today. He further states that in case of persons who may be interested in starting news Primary and Secondary Schools in Marathi medium as per master plan will be free to submit applications to the State Government and in case applications are submitted by interested persons including the petitioners, those applications will be considered in accordance with law by the authorities of the State Government and orders will be passed on those applications as expeditiously as possible and in any case within a period of four months from the date of receipt of applications. Statements are accepted. In view of these statements, in our opinion, no orders are necessary in these petitions. Petitions are disposed off.

Parties to act on the copy of this order duly authenticated by the Sheristedar/ Private Secretary of this Court.

Certified copy expedited.

15. On plain reading of this order, by no stretch of imagination it can be considered as a binding precedent. It merely proceeds to record the statement of the Government Pleader. The Court without examining any issue on merits, disposed of those Petitions. In the present set of Petitions, the Petitioners have raised larger issues including of constitutional validity of the purported policy decision of the State Government reflected in the Government Resolution dated 20th July, 2009. It is not clear from the above order as to whether the pleas taken in the present set of Petitions were also raised in the said Petitions. It is noticed that none of the contentions raised therein have even been adverted to in the above said order. Besides, it is not the case of the Respondents that the Petitioners or any one of them was party to the said proceedings. A priori, there is no substance in the stand taken on behalf of the Respondents that this Court is obliged to dispose of the present set of Writ Petitions on the basis of or account of the above said order and pass similar order. The fact that the Court has recorded statement of the Government Pleader indicating time frame for preparation of master plan and of having accepted the same, does not take the matter any further. The learned Government Pleader vehemently submitted that having regard to the fact that the State was in the process of formulating the perspective plan very shortly, the Court ought not to entertain the present set of Petitions. We see no merit in the submission in as much as we have to consider the larger question as to whether the existence or non existence of the perspective plan will have any relevance to the schools to be established by the private management on permanent no grant basis.

16. The moot question raised in the present set of Petitions is whether the private institutions who intend to start a primary, secondary or higher secondary school, as the case may be, without seeking any aid from the State financial or otherwise and on permanent no grant in aid basis, have a fundamental right to do so on account of Article 19(1)(g) of the Constitution? In the context of this submission, the learned Government Pleader, in the first place submitted that it is not open to the Petitioners before this Court who are registered as public charitable trusts, to invoke Article 19(1)(g) of the Constitution as these institutions are body corporate and not citizens. In support of this submission, he placed reliance on the decision in State Trading Corporation of India Ltd. v. The Commercial Tax Officer and Ors. reported in A.I.R. 1963 Sc 1811 and placed emphasis on the exposition in Paragraph 26 thereof. Reliance is also placed on the decision in the case the Tata Engineering and Locomotive Co. Ltd v. State of Bihar reported in : A.I.R. 1965 Supreme Court Page 40 with emphasis on Paragraph 24 and 28. Reliance is then placed on the decision in the case of Dharam Dutt and Ors. v. Union of India and Ors. reported in   : (2004) 1 Supreme Court Cases Page 712 to contend that Article 19(1)(g) of the Constitution cannot be invoked by the association/private institution. However, this submission has not been pursued further when confronted with exposition of the Constitution Bench of the Apex Court in the Case of Excel Wear v. Union of India and Ors.  : 1978 (4) S.C.C. Page 224 which specifically dealt with similar objection interalia in Paragraph 35 thereof. Paragraph 35 of the reported case of Excel Wear (supra) in turn refers to the decision in Bennett Coleman and Company Ltd. v. Union of India reported in 1972 (2) Scc 288and Rustom Cavasjee Cooper v. Union of India reported in   : 1970 (1) Supreme Court Cases, Page 248. Paragraph 35 of the said decision in Excel Wear (supra) reads thus:

35. On the basis of the decision of this Court in State of Gujarat v. Shri Ambica Mills Ltd. it was urged that even if there is a violation by impugned law of the fundamental right guaranteed under Article 19(1)(g) and not saved by Clause (6) thereof, the said right has been conferred only on the citizens of India and not upon the corporate bodies like a company. Counsel submitted that the company cannot challenge the law by a writ petition merely by making a shareholder join it. Nothing of the kind was said by Mathew, J., who spoke for the Court in the above case. The question which was posed at page 773 was whether a law which takes away or abridges the fundamental right of citizens under Article 19(1)(f) would be void and, therefore, nonest as respects noncitizens. On a consideration of a number of authorities of this Court the principle which was culled out and applied in the case of Ambica Mills (supra) at page 780 is in these words:

For our purpose it is enough to say that if a law is otherwise good and does not contravene any of their fundamental rights, noncitizens cannot take advantage of the voidness of the law for the reason that it contravenes the fundamental right of citizens and claim that there is no law at all.

Contrary to the above submission there are numerous authorities of this Court directly on the point. A reference to the case of Bennett Coleman & Co. v. Union of India it was held that if a shareholder's right is impaired the State cannot impair the right of the shareholders as well as of the company and the Court can strike down the law for violation of a fundamental right guaranteed only to the citizens if the challenge is by the company as well as the shareholder. Referring to the Bank Nationalisation case it is said at page 773 by Ray, J., as he then was : (SCC p.806, para 22).

A shareholder is entitled to protection of Article 19. That individual right is not lost by reason of the fact that he is a shareholder of the company. The Bank Nationalisation case (supra) has established the view that the fundamental rights of shareholders as citizens are not lost when they associate to form a company. When their fundamental rights as shareholders are impaired by State action their rights as shareholders are protected. The reason is that the shareholders' rights are equally and necessarily affected if the rights of the company are affected.

Excel Wear is a partnership concern. The partners in the name of the firm can challenge the validity of the law. In each of other two petitions, as already stated, a shareholder has joined with the company to challenge the law. The contention of Mr. Ramamurthi, therefore, must be rejected.

17. Indeed, in the present case the members/trustees of the institution are not joined as parties by name or filed it for enforcement of their fundamental rights, but that defect was curable by carrying out appropriate amendment in the Petitions. Realizing this position, the argument was not pressed further.

18. Reverting to the question, whether right to start a school without seeking any aid from the Statefinancial or otherwise and on permanent no grant basis, is a fundamental right under Article 19(1)(g) of the Constitution, the issue is no more res integra. The same has been authoritatively answered by the Constitution Bench of the Supreme Court in the case of T.M.A. Pai Foundation (supra). The perspective regarding right to establish an educational institution has undergone a sea change after this decision. The Court has held that right to establish an educational institution is a fundamental right and subject "education" falls within the expression "occupation". At the same time, the Apex Court has observed that fundamental right to establish educational institution should not be confused with the right to ask for recognition or affiliation. We shall deal with the aspect of recognition or affiliation a little later.

19. The Constitution Bench in the case of T.M.A. Pai (supra) has noticed that India is a land of diversity of different castes, peoples, communities, languages, religions and culture. It observed that although these people enjoy complete political freedom, a vast part of the multitude is illiterate and lives below the poverty line. The single most powerful tool for the upliftment and progress of such diverse communities is education. Further, the State with its limited resources and slow moving machinery, is unable to fully develop the genuis of the Indian people. Very often the impersonal educationthat is imparted by the State, devoid of adequate material content that will make the students self-reliant ,only succeeds in producing potential penpushers, as a result of which sufficient jobs are not available. Keeping this in mind, while adjudicating the question, as to whether there is fundamental right to establish educational institutions and if so, under which provision of the Constitution; the Apex Court analyzed the position in the following manner. We would think it apposite to quote some of the extracts of the majority view in the said decision, which reads thus:

20. Article 19(1)(g) employs four expressions, viz., profession, occupation, trade and business. Their fields may overlap, but each of them does have a content of its own. Education is per se regarded as an activity that is charitable in nature See The State of Bombay v. R.M.D. Chamarbaugwala   : (1957) SCR 874 : AIR (1957) SC 699.Education has so far not been regarded as a trade or business where profit is the motive. Even if there is any doubt about whether education is a profession or not, it does appear that education will fall within the meaning of the expression "occupation". Article 19(1)(g) uses the four expressions so as to cover all activities of a citizen in respect of which income or profit is generated, and which can consequently be regulated under Article 19(6).In Webster's Third New International Dictionary at page 1650, "occupation" is, inter alia, defined as "an activity in which one engages" or "a craft, trade, profession or other means of earning a living".

24. While the conclusion that "occupation" comprehends the establishment of educational institutions is correct, the proviso in the aforesaid observation to the effect that this is so provided no recognition is sought from the state or affiliation from the concerned university is, with the utmost respect, erroneous. The fundamental right to establish an educational institution cannot be confused with the right to ask for recognition or affiliation. The exercise of a fundamental right may be controlled in a variety of ways. For example, the right to carry on a business does not entail the right to carry on a business at a particular place. The right to carry on a business may be subject to licensing laws so that a denial of the licence prevents a person from carrying on that particular business. The question of whether there is a fundamental right or not cannot be dependent upon whether it can be made the subject matter of controls.

25. The establishment and running of an educational institution where a large number of persons are employed as teachers or administrative staff, and an activity is carried on that results in the imparting of knowledge to the students, must necessarily be regarded as an occupation, even if there is no element of profit generation. It is difficult to comprehend that education, per se, will not fall under any of the four expressions in Article 19(1)(g). "Occupation" would be an activity of a person undertaken as a means of livelihood or a mission in life. The above quoted observations in Sodan Singh's case correctly interpret the expression "occupation" in Article 19(1) (g).

35. It appears to us that the scheme framed by this Court and thereafter followed by the governments was one that cannot be called a reasonable restriction under Article 19(6) of the Constitution. Normally, the reason for establishing an educational institution is to impart education. The institution thus needs qualified and experienced teachers and proper facilities and equipment, all of which require capital investment. The teachers are required to be paid properly. As pointed out above, the restrictions imposed by the scheme, in Unni Krishnan's case, made it difficult, if not impossible, for the educational institutions to run efficiently. Thus, such restrictions cannot be said to be reasonable restrictions.

36. The private unaided educational institutions impart education, and that cannot be the reason to take away their choice in matters, inter alia, of selection of students and fixation of fees. Affiliation and recognition has to be available to every institution that fulfills the conditions for grant of such affiliation and recognition. The private institutions are right in submitting that it is not open to the Court to insist that statutory authorities should impose the terms of the scheme as a condition for grant of affiliation or recognition; this completely destroys the institutional autonomy and the very objective of establishment of the institution.

38. ...Even in the decision in Unni Krishnan's case, it has been observed by Jeevan Reddy, J., at page 749, para 194, as follows:

The hard reality that emerges is that private educational institutions are a necessity in the present day context. It is not possible to do without them because the Governments are in no position to meet the demand particularly in the sector of medical and technical education which call for substantial outlays. Whileeducation is one of the most important functions of the Indian State it has no monopoly therein. Private educational institutions including minority educational institutions too have a role to play.

39. That private educational institutions are a necessity becomes evident from the fact that the number of government maintained professional colleges has more or less remained stationary, while more private institutions have been established. For example, in the State of Karnataka there are 19 medical colleges out of which there are only 4 government maintained medical colleges. Similarly, out of 14 Dental Colleges in Karnataka, only one has been established by the government, while in the same State, out of 51 Engineering Colleges, only 12 have been established by the government. The aforesaid figures clearly indicate the important role played by private unaided educational institutions, both minority and nonminority, which cater to the needs of students seeking professional education.

20. While considering the question regarding the extent of Government Regulations in relation to private institutions and in particular, in respect of private unaided nonminority educational institutions, the majority view has observed thus:

Private Unaided Non-Minority Educational Institutions:

48. Private education is one of the most dynamic and fastest growing segments of postsecondaryeducation at the turn of the twenty first century. A combination of unprecedented demand for access to higher education and the inability or unwillingness of government to provide the necessary support has brought private higher education to the forefront. Private institutions, with a long history in many countries, are expanding in scope and number, and are becoming increasingly important in parts of the world that relied almost entirely on the public sector.

49. Not only has demand overwhelmed the ability of the governments to provide education, there has also been a significant change in the way that higher education is perceived. The idea of an academic degree as a "private good" that benefits the individual rather than a "public good" for society is now widely accepted. The logic of today's economics and an ideology of privatization have contributed to the resurgence of private higher education, and the establishing of private institutions where none or very few existed before.

50. The right to establish and administer broadly comprises of the following rights:

(a) to admit students:

(b) to set up a reasonable fee structure:

(c) to constitute a governing body;

(d) to appoint staff (teaching and nonteaching); and

(e) to take action if there is dereliction of duty on the part of any employees

53. With regard to the core components of the rights under Articles 19 and 26(a), it must be held that while the state has the right to prescribe qualifications necessary for admission, private unaided colleges have the right to admit students of their choice, subject to an objective and rational procedure of selection and the compliance of conditions, if any, requiring admission of a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the Government. Furthermore, in setting up a reasonable fee structure, the element of profiteering is not as yet accepted in Indian conditions. The fee structure must take into consideration the need to generate funds to be utilized for the betterment and growth of the educational institution, the betterment of education in that institution and to provide facilities necessary for the benefit of the students. In any event, a private institution will have the right to constitute its own governing body, for which qualifications may be prescribed by the state or the concerned university. It will, however, be objectionable if the state retains the power to nominate specific individuals on governing bodies. Nomination by the state, which could be on a political basis, will be an inhibiting factor for private enterprise to embark upon the occupation of establishing and administering educational institutions. For the same reasons, nomination of teachers either directly by the department or through a service commission will be an unreasonable inroad and an unreasonable restriction on the autonomy of the private unaided educational institution.

54. The right to establish an educational institution can be regulated; but such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of maladministration by those in charge of management. The fixing of a rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions.

55. The Constitution recognizes the right of the individual or religious denomination, or a religious or linguistic minority to establish an educational institution. If aid or financial assistance is not sought, then such institution will be a private unaided institution. Although, in Unni Krishnan's case, the Court emphasized the important role played by private unaided institutions and the need for private funding, in the scheme that was framed, restrictions were placed on some of the important ingredients relating to the functioning of an educational institution. There can be no doubt that in seeking affiliation or recognition, the Board or the university or the affiliating or recognizing authority can lay down conditions consistent with the requirement to ensure the excellence of education. It can, for instance, indicate the quality of the teachers by prescribing the minimum qualifications that they must possess, and the courses of study and curricula . It can , for the same reasons, also stipulate the existence of infrastructure sufficient for its growth, as a prerequisite. But the essence of a private educational institution is the autonomy that the institution must have in its management and administration . There , necessarily, has to be a difference in the administration of private unaided institutions and the governmentaided institutions. Whereas in the latter case, the Government will have greater say in the administration, including admissions and fixing of fees, in the case of private unaided institutions, maximum autonomy in the day to day administration has to be with the private unaided institutions. Bureaucratic or governmental interference in the administration of such an institution will undermine its independence. While an educational institution is not a business, in order to examine the degree of independence that can be given to a recognized educational institution, like any private entity that does not seek aid or assistance from the Government, and that exists by virtue of the funds generated by it, including its loans or borrowings, it is important to note that the essential ingredients of the management of the private institution include the recruiting students and staff, and the quantum of fee that is to be charged.

56. An educational institution is established for the purpose of imparting education of the type made available by the institution. Different courses of study are usually taught by teachers who have to be recruited as per qualifications that may be prescribed. It is no secret that better working conditions will attract better teachers. More amenities will ensure that better students seek admission to that institution. One cannot lose sight of the fact that providing good amenities to the students in the form of competent teaching faculty and other infrastructure costs money. It has, therefore, to be left to the institution, if it chooses not to seek any aid from the government, to determine the scale of fee that it can charge from the students. One also cannot lose sight of the fact that we live in a competitive world today, where professional education is in demand. We have been given to understand that a large number of professional and other institutions have been started by private parties who do not seek any governmental aid. In a sense, a prospective student has various options open to him/her where, therefore, normally economic forces have a role to play. The decision on the fee to be charged must necessarily be left to the private educational institution that does not seek or is not dependent upon any funds from the government.

57. We, however, wish to emphasize one point, and that is that inasmuch as the occupation of educationis, in a sense, regarded as charitable, the government can provide regulations that will ensure excellence ineducation, while forbidding the charging of capitation fee and profiteering by the institution. Since the object of setting up an educational institution is by definition "charitable", it is clear that an educational institution cannot charge such a fee as is not required for the purpose of fulfilling that object. To put it differently, in the establishment of an educational institution, the object should not be to make a profit, inasmuch as education is essentially charitable in nature. There can, however, be a reasonable revenue surplus, which may be generated by the educational institution for the purpose of development of educationand expansion of the institution.

61. In the case of unaided private schools, maximum autonomy has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fees to be charged. At the school level, it is not possible to grant admissions on the basis of merit. It is no secret that the examination results at all levels of unaided private schools, notwithstanding the stringent regulations of the governmental authorities, are far superior to the results of the government maintained schools. There is no compulsion on students to attend private schools. The rush for admission is occasioned by the standards maintained in such schools, and recognition of the fact that staterun schools do not provide the same standards of education. The State says that it has no funds to establish institutions at the same level of excellence as private schools. But by curtailing the income of such private schools, it disables those schools from affording the best facilities because of a lack of funds. If this lowering of standards from excellence to a level of mediocrity is to be avoided, the state has to provide the difference which, therefore, brings us back in a vicious circle to the original problem, viz., the lack of state funds . The solution would appear to lie in the States not using their scanty resources to prop up institutions that are able to otherwise maintain themselves out of the fees charged, but in improving the facilities and infrastructure of staterun schools and in subsidizing the fees payable by the students there . It is in the interest of the general public that more good quality schools are established; autonomy and non regulation of the school administration in the right of appointment, admission of the students and the fee to be charged will ensure that more such institutions are established. The fear that if a private school is allowed to charge fees commensurate with the fees affordable, the degrees would be "purchasable" is an unfounded one since the standards of education can be and are controllable through the regulations relating to recognition, affiliation and common final examinations.

66 . In the case of private unaided educational institutions, the authority granting recognition or affiliation can certainly lay down conditions for the grant of recognition or affiliation; these conditions must pertain broadly to academic and educational matters and welfare of students and teachers but how the private unaided institutions are to run is a matter of administration to be taken care of by the Management of those institutions.

21. The Court formulated question Nos. 10 and 11 while dealing with these aspects and the Majority Decision has answered the same as follows:

162M Q.10 Whether the nonminorities have the right to establish and administer educational institution under Articles 21and 29(1) read with Articles 14 and 15(1), in the same manner and to the same extent as minority institutions? and

162N Q.11 What is the meaning of the expressions "Education" and "Educational Institutions" in various provisions of the Constitution? Is the right to establish and administer educational institutions guaranteed under the Constitution?

A. The expression "education " in the Articles of the Constitution means and includes education at all levels from theprimary school level upto the postgraduate level. It includes professional education. The expression "educational institutions" means institutions that impart education, where "education" is as understood hereinabove.

The right to establish and administer educational institutions is guaranteed under the Constitution to all citizens under Articles 19(1)(g) and 26, and to minorities specifically under Article 30.

All citizens have a right to establish and administer educational institutions under Articles 19(1)(g) and 26, but this right is subject to the provisions of Articles 19(6) and 26(a). However, minority institutions will have a right to admit students belonging to the minority group, in the manner as discussed in this judgment.

22. Our attention was invited to the observation made by Justice S.S.M. Quadri as he then was, who while concurring with the opinion of the Majority Decision as well as, the concurring Judgments given by other learned Judges, proceeded to observe thus:

238. Before I advert to these issues, it would be appropriate to record that there was unanimity among the learned Counsel appearing for the parties, institutions, States and the learned Solicitor General appearing for the Union of India on two aspects; the first is that all the citizens have the right to establish educational institutions under Article 19(1)(g)and Article 26 of the Constitution and the second is that the judgment of the Constitution Bench of this Court in Unnikrishnan J.P. and Ors. v. State of Andhra Pradesh and Ors. requires reconsideration, though there was some debate with regard to the aspects which require reconsideration.

241. Article 19 of the Constitution, insofar as it is relevant for the present discussion, is as under:

...Article 19 confers on all citizens rights specified in Sub-clauses (a) to (g). The fundamental rights enshrined in Sub-clause (g) of Clause (1) of Article 19 of the Constitution are to practice any profession, or to carry on any occupation, trade or business. We are concerned here with the right to establish educational institution to impart education at different levels, primary, secondary, higher, technical, professional, etc. Education is essentially a charitable object and imparting education is, in my view, a kind of service to the community, therefore, it cannot be brought under 'trade or business' nor can it fall under 'profession'. Nevertheless, having regard to the width of the meaning of the terms 'occupation' elucidated in the judgment of Hon'ble the Chief Justice, the service which a citizen desires to render by establishing educational institutions can be read in 'occupation'. This right, like other rights enumerated in Sub-clause (g), is controlled by Clause (6) of Article19.... Therefore, it may be concluded that the right of a citizen to run educational institutions can be read into "occupation" falling in Sub-clause (g) of Clause (1) of Article 19 which would be subject to the discipline of Clause (6) thereof.

23. Following the dictum of the Constitution Bench, in the recent decision in the case of Modern Dental College and Research Centre and Ors. v. State of Madhya Pradesh and Ors.   : (2009) 7 Supreme Court Cases Page 751 the two Judges Bench of the Apex Court observed thus:

10. It was also observed, following the decision in T.M.A. Pai Foundation that greater autonomy must be granted to private unaided institutions as compared to private aided institutions. The reason for this is obvious. The unaided institutions have to generate their own funds and hence they must be given more autonomy as compared to aided institutions, so that they can generate these funds. However, this does not mean that the private unaided professional institutions have absolute autonomy in the matter. There can validly be a certain degree of State control over the private unaided professional institution for the reason that recognition has to be granted by the State authorities and it is also the duty of the State to see that high standards of education are maintained in all professional institutions. However, to what degree the State can interfere with respect to private unaided institutions is a matter deserving careful consideration.

15 . In our view, a balance ha s hence to be struck because while on the one hand, the State Government does have an element of interest in the private unaided professional institutions, this does not mean that there will be no autonomy to the private unaided institutions. After all, the private unaided institutions are to generate their own resources and funds and consequently they must have a larger degree of autonomy as compared to the aided institutions or the State Government institutions. In this situation, we are of the opinion that this Court must use its creativity and find out a workable, balanced, via media to safeguard the interest of both parties, namely, the State Government on the one hand, and private unaided institutions on the other, and also to keep the interest of the students in mind.

24. In a recent decision of our High Court, to which one of us was party (A.M. Khanwilkar, J.) in Laxmi Education Society and Ors. v. State of Maharashtra and Ors.   : 2010 (1) All M.R. 680 a question whether the school or junior college has a fundamental right to close the school, came up for consideration. While examining that controversy, the Court has noted that it is well established by now that right to start an educational institution is a fundamental right guaranteed under Article 19(1)(g) of the Constitution of India. It can, however, be controlled by the State by imposing restrictions which are in the interests of general public and are reasonable restrictions on the exercise of such right. In that sense, it is not an absolute right as such. In the same Judgment, the Court in Paragraph 22, has adverted to the decisions of the Apex Court in the case of Cooverjee Bharucha v. The Excise Commissioner   : 1954 (1) SCR 873 and Narendra Kumar and Ors. v. Union of India and Ors.  : 1960 (2) SCR 375 which have considered the question as to whether it is possible to provide for total prohibition of businesses within the meaning of Article 19(6). But, the Court noted with caution that the greater the restriction, the more the need for strict scrutiny by the Court. While applying the test of reasonableness, the Court has to consider the question in the background of the facts and circumstances under which the order was made, taking into account the nature of the evil that was sought to be remedied by such law, the ratio of the harm caused to individual citizens by the proposed remedy, to the beneficial effect reasonably expected to result to the general public. The Apex Court has opined that it will also be necessary to consider in that connection whether a restraint caused by the law is more than was necessary in the interests of the general public. These principles will have to be borne in mind while considering the grievance of the Petitioners before this Court that the impugned policy of the State Government is in the nature of total prohibition for starting and carrying on occupation of establishing Marathi medium schools which inheres in them as citizens. We shall deal with the aspect of reasonableness of the restriction a little later.

25. The argument of the Respondents that there can be no fundamental right to carry on occupation of establishment of educational institution and of imparting education on the specious plea that the said subject is fully occupied by the constitutional obligation of the State to provide free education at least to the children between the age of 6 to 14 years, deserves to be stated to be rejected. In the first place, this argument cannot be countenanced after the exposition of the Apex Court in TMA Pai's case (supra) that it is not the monopoly of the State in this regard. Besides, from the scheme of the constitutional provisions, there is nothing to indicate that the constitutional obligation of the State to provide free and compulsory education to children between the age of 6 and 14 years is complete or partial, within the exclusive domain of the State. In absence thereof, the fundamental right to establish an educational institution can only be regulated in the interests of the general public and by imposing reasonable restrictions. The State can provide for strictest of conditions which are reasonable restrictions and in the interests of the general public for recognition of an educational institution, so as to ensure that quality education is imparted and further the students and the staff employed by the institution are not exploited.

26. Thus, the said constitutional obligation of the State is coextensive with the fundamental right guaranteed under Article 19(1)(g) to establish an educational institution. The latter is supplemental to the primary obligation of the State, subject to grant of recognition and\or affiliation on fulfillment of necessary conditions to establish an educational institution. Indeed, matters relating to right to grant of recognition and/or affiliation to such institutions would be covered within the realm of statutory right, which, however, will have to be in the interests of the general public and by imposing reasonable restrictions. The fact that it is the primary constitutional obligation of the State to provide education cannot whittle down the fundamental right of citizens to establish an educational institution and more so when such institution is self sustaining and is not dependent on the aid of the State in any manner including financial or otherwise and makes adequate provision to ensure imparting of high quality education, proper infrastructure and protect the service conditions of its employees as well as not indulge in profiteering and commercialization.

27. In the context of this question, an incidental issue that may arise is, as to whether the right to establish an educational institution is available "only to" Public Charitable Trusts, such as the Petitioners herein, on account of Rule 2.8 of the Secondary Schools Code or Rule 106(3) and Rule 17(2)(b) of the Bombay Primary Education Rules, 1949 (hereinafter referred to as the Rules of 1949). The said provisions postulate that permission to start new secondary/higher secondary schools by the management will be recommended on fulfillment of conditions amongst others, that the management shall be registered under the Societies Registration Act, 1860 or under Bombay Public Trusts Act, 1950. In the present case, the Petitioners before us are duly registered under the Societies Registration Act as well as Bombay Public Trusts Act, 1950 as public charitable trusts. Therefore, it is unnecessary to dilate any further on this question. Suffice it to observe that right to establish an educational institution, by now, has been recognized as a fundamental right within the meaning of Article 19(1)(g) of the Constitution, which is guaranteed to "every citizen" of India. This view is reinforced by the opinion of the Apex Court noted in Paragraph 162N that all citizens have a right to establish and administer educational institutions under Articles19(1)(g) and 26, but that right is subject to the provisions of Articles 19(6) and 26(a). Thus, this right cannot be limited to only public charitable trusts, especially when the private management intends to establish the same on permanent no grant basis without taking any aid from the State Government whatsoever. It would be a different matter if the proposal for establishment of educational institution by the private management is on grant in aid basis, which institution would be inevitably funded by the Government out of public exchequer. In relation to such institution, the Government may provide for condition that only public charitable trusts would be entitled to establish educational institutions on grant in aid basis. We, however, express no final opinion on that question as it does not arise for our consideration in the present set of cases.

28. The other shade of argument is in the context of Article 21 and 21A of the Constitution. There can be no debate on the issue that right to live, takes within its fold right to education and more so quality education. More over on account of recently introduced Article 21A, the State is duty bound to provide free and compulsory education to all children of the age of 6 to 14 years in such manner as the State may, by law, determine. These Articles are in Part III of the Constitution. In matters governed by Part IV of the Constitution, amongst others, Article 41 postulates that 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. Besides Article 41, Article 45 of the Constitution as substituted by 86th Amendment, provides that the State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

29. To effectuate the constitutional obligation of the State, the Right of Children to Free and Compulsory Education Act, 2009 has been enacted which has received assent of the President on 26th August, 2009. It has come into force with effect from 1st April, 2010. We are conscious of the fact that the impugned decision of the State is in anterior point of time than the coming into force of this Act. Besides, none of the parties based their arguments on the basis of this enactment. But since the said Act is already in place, all concerned would be obliged to give effect to the provisions thereof to examine the issue regarding establishing a school or of recognition thereof on and from 1st April, 2010. In any case, we would independently decide the controversy on the basis of provisions applicable at the relevant time. We think, that our Judgment may not be complete unless we traverse through the Scheme of this enactment. The expansive provisions of this enactment are intended not only to guarantee right to free and compulsory educationto children, but intrinsic regime envisaged therein is of providing right education or quality education by providing required infrastructure and compliance of specified norms and standards in the schools. This enactment opens up new vistas for the children of our country. The aspirations of young people can be accomplished by harnessing quality education. Right education alone can empower the children and make them self reliant. It will enhance their creative skills. Section 3(1) of the said Act provides that every child of the age of 6 to 14 years shall have a right to free and compulsory education in a neighbourhood school till completion of elementary education. Sub-section (2) 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. Section 4 provides for special provision for children not admitted to or who have not completed elementary education. Section 5 deals with the situation where there is no provision for completion of elementary education, a child shall have a right to seek transfer to any other school, excluding the school specified in Sub-clauses (iii) and (iv) of Clause (n) of Section 2, for completing his or her elementary education. Chapter III provides for duties of Appropriate Government, Local Authority and Parents. Section 6 thereof imposes obligation on the Appropriate Government and Local Authority to establish a school within such areas or limits of neighbourhood, as may be prescribed, where it is not so established, within a period of three years from the commencement of the Act. The emphasis is on providing "neighbourhood school" facility to the children at the Gram Panchayat Level. Chapter IV of the Act deals with the responsibilities of Schools and Teachers. Section 12(1)(c) read with Section 2(n)(iii) and (iv) mandates that every recognised school imparting elementary education, even if it is an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority, is obliged to admit in Class I, to the extent of "at least 25 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. As per the proviso, if the School is imparting preschool education, the same regime would apply. By virtue of Section 12(2) the unaided school which has not received any land building, equipment or other facilities, either free of cost or at concessional rate, would be entitled for reimbursement of the expenditure 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. That reimbursement shall not exceed per child expenditure incurred by a School established, owned or controlled by the appropriate Government or a local authority. Section 13 in clear terms envisages that 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 scrutiny procedure. Breach of this stipulation would entail in punishment of specified fine. Section 15 mandates that a child shall be admitted in a school at the commencement of the academic year or within the prescribed extended period. Sections 16 and 17 provide for prohibition of holding back and expulsion and of physical punishment and mental harassment to child. Section 18 is of some significance in the context of the matter in issue. It postulates that after the commencement of the Act, no school other than the excepted category, can be established or function without obtaining a certificate of recognition from the appropriate authority. The authority is obliged to issue the certificate of recognition within the prescribed period specifying the conditions there for, if the school fulfills the norms and standards specified under Sections 19, 25 read with the Schedule to the Act. In the event of contravention of the conditions of recognition, the prescribed authority can withdraw recognition after giving an opportunity of being heard to such school. The order of withdrawal of recognition should provide a direction to transfer the children studying in the derecognised school to be admitted to the specified neighbourhood school. Upon withdrawal of recognition, the derecognised School cannot continue to function, failing which, is liable to pay fine as per Section 19(5). If any person who establishes or runs a school without obtaining certificate of recognition, or continues to run a school after withdrawal of recognition shall be liable to pay fine as specified in Section 18(5). The norms and standards for establishing or grant of recognition to a school are specified in Section 19 read with Schedule to the Act. Notably, all Schools which are established before the commencement of the Act in terms of Section 19(2) of the Act are expected to comply with the specified norms and standards within a period of three years from the date of such commencement. Failure to do so would necessarily entail in derecognition of such School. Another relevant provision in this Act, to answer the controversy on hand, is, Section 22 of the Act. It postulates that the School Management Committee constituted under Section 21, shall prepare a School Development Plan in the prescribed manner. Section 22(2) provides that the School Development Plan so prepared shall be the basis for the grants to be made by the appropriate Government or local authority as the case may be. That plan, however, cannot have any impact on the consideration of application for grant of recognition for establishing an unaided School. To ensure that teachers should contribute in imparting quality education in the school itself, Section 28 imposes total prohibition on them to engage in private tuition or private teaching activities. Chapter VI provides for protection of rights of children. Section 32 which is part of the said Chapter, provides that any person having grievance relating to the right of child under this enactment, may make a written complaint to the local Authority having jurisdiction, who in turn, is expected to decide it "within three months" after affording a reasonable opportunity of being heard to the parties concerned. In addition, in terms of Section 31, the Commissions constituted under the provisions of the Commissions for Protection of Child Rights Act, 2005 can monitor the child's right to education, so as to safeguard the right of the child upon receiving any complaint in that behalf relating to free and compulsory education.

30. From the scheme of the above constitutional provisions and of the Act of 2009, there is no doubt that the primary obligation is of the State to provide free and compulsory education to children between the age of 6 to 14 years and in particular to children who are likely to be prevented from pursuing and completing the elementary education due to inability to afford fees or charges or expenses therefore .That however, does not mean that the fundamental right guaranteed to the citizens of India under Article 19(1)(g) to establish an educational institution would cease to operate or is eclipsed by the said obligation of the State. As aforesaid, it is an activity to be undertaken by the private institutions, which will be supplemental to theprimary obligation of the State in that behalf. The State can only regulate the activities of the private institutions by imposing reasonable restrictions and in the interests of the general public.

31. The State to uphold the fundamental right of the citizens to establish an educational institution and to encourage supplemental activity by the private management, so as to further the object of Articles 21, 21A, 41 and 45 of the Constitution and also the Act of 2009, ought to allow the private management to establish educational institutions subject however, to regulating the quality of education to be imparted by such institutions, by imposing strict conditions as precondition for grant of recognition or affiliation and continuation thereof.

32. Besides the obligation of the State, even every citizen of India, as per Article 51A of the Constitution, is expected to develop the scientific temper, humanism and the spirit of inquiry and reform; and further to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement; and the duty of the 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. In the case of Avinash Mehrotra v. Union of India and Ors.  : (2009) 6 Supreme Court Cases Page 398 when the Apex Court considered the question about the rights of life and educationguaranteed to all school going children under Article 21 and 21A, the Court revisited the Authorities to opine that education occupies an important place in Constitution and culture. The Court observed thus:

24. Education occupies an important place in our Constitution and culture. There has been emphasis on free and compulsory education for children in this country for a long time. There is a very strong historical perspective. The Hunter Commission in 188283, almost 125 years ago, recommended Universal Education in India. It proposed to make educationcompulsory for the children.

25. The Government of India Act, 1935 provided that "education should be made free and compulsory for both boys and girls." While debating in a bill in Imperial Legislation Council in 1911, Shri Gopal Krishna Gokhale strongly advocated that elementary education should be both compulsory and free.

26. Our original Framers of the Constitution placed free and compulsory education in the Directive Principles. The unamended Article 45 provided that:

45. Provision for free and compulsory education for children. The State shall endeavour 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 fourteen years.

27. The Kothari Commission on Education set up by the Government of India in 1966 strongly recommended free and compulsory education for children up to 14 years. The Commission observed that there is no other way for the poor to climb their way out of this predicament.

28. Education occupies a sacred place within our Constitution and culture. Article 21A of the Constitution, adopted in 2002, codified this Court's holding in Unni Krishnan, J.P. and Ors. v. State of Andhra Pradesh and Ors.  : (1993) 1 SCC 645 in which we established a right to education. Parliament did not merely affirm that right; the Amending Act placed the right to education within the Constitution's set of Fundamental Rights, the most cherished principles of our society. As the Court observed in Unni Krishnan (supra), para 8:

8. The immortal Poet Valluvar whose Tirukkural will surpass all ages and transcend all religious said ofeducation:

Learning is excellence of wealth that none destroy; To man nought else affords reality of joy.

29. Education today remains liberation a tool for the betterment of our civil institutions, the protection of our civil liberties, and the path to an informed and questioning citizenry. Then as now, we recognize education's "transcendental importance" in the lives of individuals and in the very survival of our Constitution and Republic.

30. In the years since the inclusion of Article 21A, we have clarified that the right to education attaches to the individual as an inalienable human right. We have traced the broad scope of this right in R.D. Upadhyay v. State of A.P. and Ors.  : AIR 2006 SC 1946 holding that the State must provide education to all children in all places, even in prisons, to the children of prisoners. We have also affirmed the inviolability of the right to education.

31. In Election Commission of India v. St. Mary's School and Ors.   : (2008) 2 SCC 390 we refused to allow the State to take teachers from the classroom to work in polling places. While the democratic State has a mandate to conduct elections, the mundane demands of instruction superseded the State's need to staff polling places. Indeed, the democratic State may never reach its greatest potential without a citizenry sufficiently educated to understand civil rights and social duties, Bandhua Mukti Morcha v. Union of India and Ors.   : (1997) 10 SCC 549. These conclusions all follow from our opinion in Unni Krishnan.

32. Education remains essential to the life of the individual, as much as health and dignity, and the State must provide it, comprehensively and completely, in order to satisfy its highest duty to citizens.

33. 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 herself. Article 21A, which reads as follows, places one obligation primarily on the State:

21A. Right to education The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine." By contrast, Article 51A(k), which reads as follows, places burden squarely on the parents:

51A. Fundamental duties it shall be the duty of every citizen of India

(k) who is the parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and years.

The Constitution directs both burdens to achieve one end: the compulsory education of children, free from the fetters of cost, parental obstruction, or State inaction. The two articles also balance the relative burdens on parents and the State. Parents sacrifice for the education of their children, by sending them to school for hours of the day, but only with commensurate sacrifice of the State's resources. The right to education, then, is more than a human or fundamental right. It is a reciprocal agreement between the State and the family, and it places an affirmative burden on all participants in our civil society.

34. This Court has routinely held that another fundamental right to life encompasses more than a breath and a heartbeat. In reflecting on the meaning of "personal liberty" in Articles 19 and 21, we have held that "that `personal liberty' is used in the article as a compendious term to include within itself all the varieties of rights which go to makeup the `personal liberties' of man." Kharak Singh v. State of U.P. and Ors.   : AIR 1963 SC 1295 para 16. Similarly, we must hold that educating a child requires more than a teacher and a blackboard, or a classroom and a book. The right toeducation requires that a child study in a quality school, and a quality school certainly should pose no threat to a child's safety. We reached a similar conclusion, on the comprehensive guarantees implicit in the right to education, only recently in our opinion in Ashoka Kumar Thakur v. Union of India and Ors.   : (2008) 6 SCC 1.

35. The Constitution likewise provides meaning to the word "education" beyond its dictionary meaning. Parents should not be compelled to send their children to dangerous schools, nor should children suffer compulsory education in unsound buildings.

36. Likewise, the State's reciprocal duty to parents begins with the provision of a free education, and it extends to the State's regulatory power. No matter where a family seeks to educate its children, the State must ensure that children suffer no harm in exercising their fundamental right and civic duty. States thus bear the additional burden of regulation, ensuring that schools provide safe facilities as part of a compulsory education.

37. In the instant case, we have no need to sketch all the contours of the Constitution's guarantees, so we do not. We merely hold that the right to education incorporates the provision of safe schools.

38. This Court in Ashoka Kumar Thakur's case (supra) observed as under:

482 It has become necessary that the Government set a target within which it must fully implement Article21A regarding free and compulsory for the entire country. The Government suitably revise budget allocations for. The priorities have to be set correctly. most important fundamental right may be 21A, which, in the larger interest of the nation, must be fully implemented. Without Article 21A, the other fundamental rights are effectively rendered meaningless. Education stands above other rights, as one's ability to enforce one's fundamental rights flows from one's education. This is ultimately why the judiciary must oversee Government spending on free and compulsory education.

39. In view of the importance of Article 21A, it is imperative that the education which is provided to children in theprimary schools should be in the environment of safety.

33. Counsel appearing for the Petitioners also invited our attention to the decision of the Supreme Court of the United States in the case of Brown v. Board of Education of Topeka 347 U.S. 483. In that Case the Court considered the challenge that children of Negro race were denied admissions to the schools attended by White children under laws requiring or permitting segregation according to race. The Court while considering the said question, opined as follows:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it 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 aneducation. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

34. It is unnecessary to underscore the significance of imparting quality education. At the same time it cannot be overlooked that impersonaleducation is imparted in the educational institutions established by the Government or funded by the Government due to the limited resources and slow moving machinery of the State, which fact has been taken note of by the Apex Court while considering the case of T.M.A. Pai (supra), to which reference has been made in the earlier part of this Judgment. Besides, considering the inability of the State to provide sufficient number of educational institutions on account of its limited resources and necessity of encouraging private participation of unaided institutions to fulfill the constitutional objective of imparting education with adequate material content that will make the students self reliant, coupled with the fact that the right to establish an educational institution is recognized as a fundamental right within the meaning of Article 19(1)(g), we have no hesitation in taking the view that such right cannot be lightly interfered with so long as the private educational institutions are willing to carry on their activities as per the strict terms and conditions to be imposed for grant of recognition and affiliation and also for continuation thereof. Indeed, it ought to be reasonable restrictions and in the interests of the general public. In the case of T.M.A. Pai (supra) in Paragraph 36 of the said decision, which we have already reproduced, the Court plainly stated that if the private unaided institution fulfills the terms and conditions for grant of recognition and affiliation and abides by the regime of no profiteering and commercialization and secure the service conditions of its employees as also provides mandatory infrastructure, there would be hardly any option for the State but to grant recognition and affiliation. In that, the Apex Court has observed that affiliation and recognition "has to be available" to every institution that fulfills the conditions for grant of such affiliation and recognition.

35. Keeping the above principles in mind, we shall now examine the sweep of the provisions or conditions which obliges private management even if it intends to start an unaided educational institution, to fulfill as precondition. Insofar as Secondary or Higher Secondary schools are concerned, the State is relying on the provisions of the Secondary Schools Code and particularly on Chapter II in Section I thereof which deals with starting of a new school. For the sake of convenience, we would reproduce the said provisions, which reads thus:

CHAPTER II

RECOGNITION, ORGANISATION AND MANAGEMENT OF SCHOOLS

SECTION 1 CONDITIONS, GRANT, REFUSAL AND WITHDRAWAL OF RECOGNITION

Conformity to Rules

1. Schools may be recognised by the Department provided they confirm to the Rules set forth in this Code.

Starting a New School

2.1. Application for permission to start a new Secondary School/Higher Secondary School shall be made in the form given in Appendix one to the Education Officer (Secondary)/Education Inspector(Greater Bombay) concerned by registered post, so as to reach him before 30th October in the year, preceding the year in which the school is proposed to be started. The management desirous of submitting an application for permission to start a school or to start a Technical High School as mentioned in Sub-rule (2) below, shall pay a fee of Rs. 1000/to start a school in tribal area and Rs. 5000/to start school in nontribal area for each such application into Government Treasury and attach the original challan to the application.

2.2. Application for permission to start a Technical High School or technical classes in school imparting general educationshall be made in the form given in Appendix one to the Regionals Deputy Director of Technical Education concerned by registered post, before the date prescribed in Rule 2.1 above.

2.3. Permission to start English Medium Secondary School/ Higher Secondary School shall be given on unaided basis.

2.4. All such applications will be scrutinized by the Education Officers (Secondary)/Education Inspectors (Greater Mumbai). These applications, with remarks, shall be sent to the concerned Deputy Director by the Education Officers (Secondary)/Education Inspectors (Greater Mumbai) before 30th November of the year.

2.5. Applications received by the Education Officers (Secondary)/Education Inspector (Greater Mumbai) will be sent with remarks to the Director of Education by the Deputy Directors before 30th December,

2.6. Applications received with the remarks by the Deputy Directors shall be sent with remarks to the Government by the Director of Education before the end of January in the year of starting a school.

2.7. The applications for starting a new school will be considered if the criterion earmarked by the Government from time to time for that location.

2.8. Permission to start new Secondary/ Higher Secondary Schools by the Management will be recommended on fulfillment of the following conditions:

(1) Management shall be registered under Societies Registration Act, 1860 and Bombay Public Trusts Act, 1950,

(2) The fund to the tune of Rs. Thirty Thousand shall be at the credit of Management for the preceding two years. The Management wishing to start a school in the tribal area will have a balance of Rs. 10000/or bank guarantee shall be given of that amount.

(3) The Audit Report of the preceding two years shall be submitted.

(4) The Management shall have a rented place or building of their own where they want to start a school.

(5) At least 30% members of the Management shall be women.

(6) No member of the Management was earlier convicted under Indian Penal Code.

2.9 While recommending to start a new school, Education Officer (Secondary), Education Inspector (Greater Mumbai), Divisional Deputy Director of Education, shall send the recommendations of starting English medium Secondary/ Higher Secondary School on permanently non aided basis separately.

2.10. The Government shall communicate the decision on the application for proposing to open a school ordinarily before the end of March of the year in which the School is proposed to be opened to the Director of Education, concerned Deputy Director of Education, Education Officer (Secondary)/ Education Inspector (Greater Mumbai). The Government will communicate the Societies who have applied for starting a school, the permission to open a new Secondary/ Higher Secondary School before the end of March of the year.

Note: Rule 2.1 to 2.10 shall not be applicable to Secondary/ Higher Secondary Schools which are to be opened during the year 199495.

2.11. The application for starting a new Secondary/ Higher Secondary School will not be considered except the applications obtained by the procedure laid down for that purpose.

2.12. The applications for obtaining permission to start a Secondary/ Higher Secondary School as per the procedure laid down for that purpose, will be considered only for that year, the applications will not be considered next year or they will not be kept on waiting list. The application along with the fee will automatically extinguish.

2.13. In no case should the School be started, unless the written previous permission of the Government is obtained. Schools started without such permission shall not ordinarily be considered for permission (read recognition).

2.14. If permission has been granted by the Government, the Management shall open Schools within 45 days from the beginning of the ensuing School year and inform the Appropriate Authority within two weeks from the date of opening thereof.

36. Significantly, the above Rules 2.1 to 2.14 have been added by G.R. No. SED/SSN/5393/3562 dated 11.1.1994 and deal with the subject of permission to start a new "secondary/higher secondary school". In other words, the same have been introduced much prior to the exposition of the Apex Court in T.M.A. Pai's case (supra). As a matter of fact, after the introduction of Act of 2009, which not only encompasses the aspects of right of children to free and compulsory education but to carry out the provisions of that Act, it also elaborately deals with the matters pertaining to establishment of School and in particular grant of recognition thereof. In that, Section 18 of the Act of 2009 provides that no school other than the excepted category shall be established or function without obtaining a "certificate of recognition" to be given by the appropriate Authority. Thus, after the commencement of that Act, the private Management intending to establish a school has to make an application to the appropriate Authority and till certificate of recognition is granted by that Authority, it cannot establish or run the school. Breach of that condition would entail in payment of specified fine to be paid by the person or Management who establishes or runs the school. The matters relevant for grant of recognition are also provided in Sections 19, 25 read with Schedule of that Act. The said provisions read thus:

18. No school to be established without obtaining certificate of recognition.

(1) No school, other than a school established, owned or controlled by the appropriate Government or the local authority, shall, after the commencement of this Act, be established or function, without obtaining a certificate of recognition from such authority, by making an application in such form and manner, as may be prescribed.

(2) The authority prescribed under Sub-section (1) shall issue the certificate of recognition in such form, within such period, in such manner, and subject to such conditions, as may be prescribed:

Provided that no such recognition shall be granted to a school unless it fulfills norms and standards specified under Section 19.

(3) On the contravention of the conditions of recognition, the prescribed authority shall, by an order in writing, withdraw recognition:

Provided that such order shall contain a direction as to which of the neighbourhood school, the children studying in the derecognised school, shall be admitted:

Provided further that no recognition shall be so withdrawn without giving an opportunity of being heard to such school, in such manner, as may be prescribed.

(4) With effect from the date of withdrawal of the recognition under Sub-section (3), no such school shall continue to function.

(5) Any person who establishes or runs a school without obtaining certificate of recognition, or continues to run a school after withdrawal of recognition, shall be liable to fine which may extend to one lakh rupees and in case of continuing contraventions, to a fine of ten thousand rupees for each day during which such contravention continues.

19. Norms and standards for school.

(1) No school shall be established, or recognised, under Section 18, unless it fulfills the norms and standards specified in the Schedule.

(2) Where a school established before the commencement of this Act does not fulfill the norms and standards specified in the Schedule, it shall take steps to fulfill such norms and standards at its own expenses, within a period of three years from the date of such commencement.

(3) Where a school fails to fulfill the norms and standards within the period specified under Sub-section (2), the authority prescribed under Sub-section (1) of Section 18 shall withdraw recognition granted to such school in the manner specified under Sub-section (3) thereof.

(4) With effect from the date of withdrawal of recognition under Sub-section (3), no school shall continue to function.

(5) Any person who continues to run a school after the recognition is withdrawn, shall be liable to fine which may extend to one lakh rupees and in case of continuing contraventions, to a fine of ten thousand rupees for each day during which such contravention continues.

25. Pupil Teacher Ratio.

(1) Within six months from the date of commencement of this Act, the appropriate Government and the local authority shall ensure that the Pupil Teacher Ratio, as specified in the Schedule, is maintained in each school.

(2) For the purpose of maintaining the Pupil Teacher Ratio under Sub-section (1), no teacher posted in a school shall be made to serve in any other school or office or deployed for any noneducational purpose, other than those specified in Section 27.



37. In the scheme of the provisions of that Act, there is no requirement of taking prior permission to start a school as is envisaged by the Rules 2.1 to 2.14 of the Secondary Schools Code. Whereas, no school can be started without a "certificate of recognition" issued by the authority. In that sense, the provisions in the Secondary Schools Code permitting the starting of a school merely on fulfillment of conditions specified in Rule 2.8 thereof, are contrary to the scheme of the Central Act of 2009. On the other hand, if the private Management intending to start an unaided School not receiving any kind of aid or grants, were to fulfill the norms and standards specified in Sections 19, 25 read with Schedule of the Act of 2009, the authority can have no choice but to grant certificate of recognition to such a school within the prescribed period specifying the conditions therefore .That is the mandate of Law.

38. Nevertheless, we shall examine the question as to whether the regime provided in the above said Rules is reasonable one or is in the teeth of the dictum of the Apex Court qua the private management intending to establish an unaided School not receiving any kind of aid or grants from the Government or local authority. From the Scheme of Chapter II of the Code, it is seen that it pertains to recognition, organization and management of schools. From the plain language of the said rules it would apply to all types of schools be it grant in aid schools or unaided schools. Section 1 thereof deals with matters relating to conditions, grant, refusal and withdrawal of recognition. Rule 1 is a general provision that the schools would be recognized by the department only if they were to conform to the rules specified in the Code. In so far as starting a new school is concerned, the same is governed by Rules 2.1 to 2.14. Rule 2.1 envisages submission of application by the desirous management who intends to start the proposed school. The Application is required to be accompanied by specified fees. Rule 2.2 is in respect of application for permission to start a technical High School or technical classes in school and the authority designated to receive such application before the prescribed date. Rule 2.3 postulates that permission to start English medium Secondary School/Higher Secondary School shall be given on unaided basis. This is obviously the policy of the State Government. Rule 2.4 contemplates that the applications so submitted by the management within the prescribed time will be scrutinized by the Education Officers (Secondary/Education Inspectors, Greater Mumbai) who in turn shall forward the same with their remarks to the Dy. Director before the prescribed date. Those applications, as per Rule 2.5, are required to be forwarded by the Dy. Directors to the Director of Education before the prescribed date; and as per Rule 2.6, the Director then forwards the same with his recommendation to the State Government before the prescribed date. Rule 2.7 is of some significance. It postulates that the application for starting a new school will be considered if the criteria is earmarked by the Government from time to time for that location. It is on account of this provision the Government has discretion either to grant permission or to refuse the same irrespective of the recommendation of the concerned officers referred in Rule 2.4 to 2.6 above. This rule presupposes existence of a perspective plan on the basis of which the Government would take its decision either to grant permission in respect of the proposal under consideration or to reject the same, if the location where the private management intends to start a new school is not notified in the perspective plan. Admittedly, as of now there is no perspective plan in existence. In absence of such perspective plan, the Government while exercising discretion available under Rule 2.7 would naturally be obliged to examine the concerned proposal on its own merits so as to ascertain, amongst others, whether starting of new school is necessary keeping in view the local population, need and strength of students and while avoiding unnecessary concentration of schools in an area discouraging unhealthy competition. At the same time the State cannot remain oblivious of its constitutional obligation to provide education and recognizing rights of children to free and compulsory education. The fact that there is already an existing school in the locality, per se, may not be sufficient ground for rejection of the proposal unless the State Government were to also record its subjective satisfaction that the new school in the given locality of the same type would result in unhealthy competition amongst the existing institutions or result in concentration of schools or that it did not have requisite infrastructure and not in a position to secure the interests of students and staff. In other words, the existence of a school in the locality by itself cannot be a decisive factor. In a given case, inspite of existence of a school in the locality, there may be need for an additional school on account of the strength of students in the locality. It is also possible that the existing school in the given locality is a nonperforming or under performing school in comparison to the national or state level bench mark and is not in a position to impart quality education as may be evident from its past performance. To give better opportunity to the children in that locality, it would be in the larger interest to allow another new school in the same locality. At any rate, the State Government cannot reject the proposal of the private management to start a school on "unaided basis not receiving any kind of aid or grants", on account of existence of an aided school in the same locality. In as much as, Government school and private unaided schools cannot be treated as equals. Necessarily, therefore, there would be no question of unhealthy competition between the government aided schools and private unaided schools. We shall elaborate on this aspect a little later. It would be a different matter, however, if there was already an existing school of the "same type", namely, government aided or private unaided educational institution, as the case may be, in the same locality, so as to justify its decision of rejection of the proposal to start a new school in the same locality. That aspect, however, will have to be decided or examined on case to case basis.

39. Rule 2.8 deals with when the permission to start a new secondary/higher secondary school by the management should be recommended. The conditions to be fulfilled in that behalf have been spelt out therein such as availability of sufficient fund not below the amount referred to therein (i.e. Rs. 30,000/and Rs. 10,000/respectively), Audit report of the preceding two years has been submitted, the management must have a rented place of building of its own where they want to start a school, no member of the management was earlier convicted under Indian Penal Code and atleast 30% members of the management shall be present. These requirements are not sufficient in the context of Sections 19, 25 read with Schedule of the Act of 2009.

40. Be that as it may, Rule 2.9 is in the nature of instructions to the concerned officers who are expected to send recommendation to start a new English medium Secondary/Higher Secondary school. It provides that recognition should be only on permanent nonaided basis for such schools to be sent separately. Rule 2.10 envisages that the Government shall communicate its decision on the proposals made by the private management to the concerned officers and to the Societies before the specified time. Rule 2.11 postulates that the application for starting a new secondary/higher secondary school will not be considered except the applications obtained by the procedure laid down for that purpose. Rule 2.12 envisages that the applications for permission shall be considered only for that year and will not be considered for next year or kept on waiting list. In the present set of cases, it may not be necessary to consider the efficacy of this provision as all the applications for permission have been treated as rejected by one fiat issued by the State Government. Rule 2.13 provides that in no case the School shall be started unless written previous permission of the Government is obtained and school so started shall not ordinarily be considered for permission. Rule 2.14 postulates that upon grant of permission by the Government, the management shall open the school within 45 days from the beginning of the ensuing school year and inform the appropriate authority within two weeks from the date of opening thereof.

41. The primary Schools are governed by the provisions of Bombay Primary Education Act, 1947 (hereinafter referred to as the `Act of 1947'). Besides the said Act, in exercise of powers under Section 63 thereof, the State Government has made Rules known as The Bombay PrimaryEducation Rules 1949 (hereinafter referred to as the 'Rules of 1949'). We would now traverse through the scheme of the said Act and the Rules. The relevant provisions of the Act of 1947 to decide the matter in issue are reproduced thus:

2(2) "Approved school" means a primary school maintained by the [State] Government or by a school board [or Zilla Parishad] or by an authorised municipality or which is for the time being recognized as such by a school board [or Zilla Parishad] or by the [State] Government or by an officer authorised by it in this behalf".

2(15) "Primary Education" means education in such subjects and upto such standards as may be determined by the [State] Government from time to time.

2(17) "Primary School" means a school or a part of a school in which primary education up to any standard is imparted;

25. It shall be the duty of the Parishad Education Officer to prepare in accordance with the directions received from the Director in this behalf a scheme to provide compulsory primary education in such area and for children of such ages and upto such standard and within such period as the Director may specify. The Parishad Education Officer shall obtain the comments and suggestions of the Zilla Parishad upon the scheme to be prepared by him and shall submit it together with such comments and suggestions, if any, to the Director who shall forward it to the State Government with his remarks."

26. (1) An authorised municipality may by a resolution declare its intention to provide compulsory primary education in the whole or any part of its area in the case of children of such ages and up to such standard as the municipality may decide and shall submit its proposals to the State Government through the Director in the form of a scheme.

(2) An authorized municipality, if called upon by the State Government so to do, shall within a time to be specified by the State Government submit to the Director a scheme to provide compulsory primary education in such area and in the case of children of such ages and upto such standard and within such period as the State Government may specify."

39. Recognition of and grants to approved schools under private management - (1) Every primary school of her school other than a primary school maintained by the [State] Government or by a [Zilla Parishad or school board] or by an authorized municipality which fulfills the conditions prescribed in this behalf shall be entitled to recognition as an approved School.

(2) Such recognition shall be given by the [Zilla Parishad or school board] or by the [State] Government or by an officer authorized by it in this behalf, and the manner in which grantinaid is to be given to such approved schools shall be as prescribed.

54. Notwithstanding anything contained in this Act the State Government shall have power to give to a Zilla Parishad all such directions as it may consider necessary in regard to any matter connected with primary education and the Zilla Parishad shall comply with such directions.

The definition of "Approved School" is of some significance. It means a primary School maintained by the specified Authorities or which is for the time being recognised as such by the specified Authorities in this behalf. The benefits of being an approved primary school are spelt out in the Rules of 1949 to which we shall make a reference little later. By the very nature of provisions in the Act of 1947 read with the Rules of 1949, it would appear that once a School is approved, the appropriate Authority becomes duty bound to provide grants in aid to such a School under "private management". For that purpose, the Zilla Parishad and the Municipality are required to prepare a scheme to provide compulsory primary education in the identified areas to children of specified age. The Scheme, as is the case of perspective plan prepared for the identification of areas to establish and allow Secondary/Higher Secondary Schools in the locality, is with a view to ensure proper allocation of public funds to the concerned Schools having regard to the need of such locality, subject to the availability of finance with the State. Notably, Section 39 of this Act is the only provision dealing with recognition of and grants to approved primary schools under "private management". It does not provide for taking prior permission of the appropriate Authority. That requirement, however, flows from the provisions of the Rules of 1949 which have been amended in the year 1998. We have also noticed Section 42 of this Act which obligates the State Government to contribute half of the additional recurring and nonrecurring annual cost of the scheme sanctioned by the State. As per Section 54 of the Act, the State Government has power to give to a Zilla Parishad all such directions as it may consider necessary in regard to any matter connected with primary education and the Zilla Parishad has to comply with such directions.

42. Turning to the Rules framed in exercise of powers under Section 63 of the Act of 1947, we may usefully refer to the following Rules:

2(1)(g) "Private School" means a primary school which is maintained by an agency other than Government of District School Board or Authority Municipality and includes night schools and other schools under private management similar to those which were recognised under the Grantinaid Code."

2(1)(h) "Public School" means a primary school maintained by the Government or District School Board or Authority Municipality, as the case may be.

104. Opening of new primary schools by the School Board - (1) [Subject to Rule 33], a District School Board shall not open a new primary school or take over a private school or incur additional expenditure on primary schools maintained by it without the sanction of Government or an officer authorised by Government in this behalf.

(2) Except as otherwise provided in these rules, a Municipal School Board may, subject to the provision made in its budget, open new primary school where necessary or to take over private school or incur additional expenditure onprimary schools maintained by the authorised municipality.

104A(i) "Private School" means an approved school referred to in Section 39 of the Act.

106. Application for permission to start a new private primary school

(1) Subject to the provisions of this rule, the Department shall invite the applications for permission to start a new private primary school, from the management of Educational Institutions.

(2) Such application shall be made by the management of Education Institution to the competent Authority, in the form `A' set out in Appendix `C' to these rules accompanied by an undertaking in writing that the conditions of employment of teachers in such private primary school shall be as near as possible to those specified in schedule `F' appended to principal rules. Every such application shall also be accompanied by the scrutiny fee prescribed by the Department from time to time.

(3) The application shall be accompanied with duly attested documents of registration of the Management under the society's Registration Act, 1860 or under the Maharashtra Public Trusts Act, 1950 under both.

(4) The application shall state the name and address of the correspondent, and the management shall report any change in this behalf, to the Competent Authority, as soon as possible.

107. Recognition of private school,

(1) As soon as the Department grants permission to start a new private primary school, the Competent Authority shall communicate the same to the management of the concerned Education Institution. The management on receipt of such communication from the Competent Authority, shall start the primaryschool, in the medium and at place mentioned in the communication. Thereafter, the management, which has been permitted to start a new primary school shall apply for recognition of that school to the Competent Authority, which shall arrange for the inspection of the concerned school and shall forward the Inspection Report to the Education Committee, or School Board, as the case may be, together with its recommendations relating to the recognition of such private primary School.

(2) The Inspecting Officer shall, in making his report to the Competent Authority, take the following matters into account, namely:

(a) Whether there is genuine demand in the locality for opening of the proposal primaryschool;

(b) Whether the management is registered under the Society's Registration Act, 1860, under the Maharashtra Public Trusts Act, 1950, or under both;

(c) Whether the site and premises occupied for the purposes of the school are congenial for educational purpose and are kept neat and clean;

(d) Whether the staff engaged is adequate, qualified and competent;

(e) Whether the resources of the school are adequate to meet the expenses of the school.

(3) The Inspecting Officer shall inter alia state in his inspection report

(a)Whether the conditions on which the school is to be recognised are duly fulfilled;

(b) Whether the attendance of pupils at the school is regular and satisfactory;

(c) Whether the school building is well ventilated and provision is made for playground, craft shed, work experience; and whether the furniture, books, educational appliance and teaching aids are provided according to the syllabus.

(d) Whether the arrangement for registering the admission attendance and age of the pupils are adequate and satisfactory;

(e) Whether adequate arrangement is made for maintaining accounts of income and expenditure upto date, and in accordance with the instructions issued by the Department from time to time;

(f) Whether the teaching staff is adequate, competent, qualified according to the stands prescribed by the State Government and is not changed unduly, frequently;

(g) Whether the payscale and other conditions of service as laid down by the State Government, or as the case may be, by the local authority are made applicable to the teaching and nonteaching staff engaged in the schools;

(h) Whether the quality of education imparted in the school is considered by the Inspecting Officer as of desirable standard and is proved to be satisfactory;

(i) Whether the records are properly maintained, and shall statistical returns and formal certificate given by the school are trustworthy;

(j) Whether the discipline and behaviour of pupils, and in particular, their conduct and regularity of attendance are satisfactory;

(k) Whether the Head Master appointed by the management is qualified, trained, experienced and is proved to be efficient for maintaining the school in accordance with the instructions issued by the Department from time to time.

(4) The School Board, or as the case may be, the Education Committee shall consider the inspection report and the recommendations of the Competent Authority thereon ordinarily as its next meeting, and may, if it is satisfied about the need of the school in the locality, the standard of work in, and the general management of, the private school, recognise the private school as approval school; and may, if the school has also applied for grantinaid, direct that it should be treated as eligible for the grantinaid from theprimary education fund or as case may be, from the district fund.

(5) The School Board, or as the case may Education Committee may, for reasons to be recorded in writing, reject an application for recognition; and thereupon, the Competent Authority shall forthwith communicate the decision to the Management or Correspondent of the school.

(6) The Management of the School which has been refused recognition may, within 45 days from the date of receipt of the decision, prefer an appeal to the Deputy Director of the Education division concerned.

(7) Nothing in this rule shall be deemed to prevent the Management of a school which has been refused recognition from submitting a fresh application in the next academic year.

108. Benefits of recognition.

(1) Subject to the provisions of Rule 110 and 111, a private school, recognised as an approved school, shall unless it denies admission to pupils on grounds only of religion, race, caste, language of any of them or decline to employ any person on the ground only of religion, race and caste or any of them, be eligible for grantinaid on application made in that behalf under Rule 110, in accordance with the rules hereinafter contained.

(2) Recognition as an approved school shall also entitled the management of the school-

(a) to present its pupils at any public examination conducted by the Department;

(b) to present its pupils as candidates for scholarships and to admit scholarship holders; and

(c) to claim such other benefits as Government may, from time to time, declare in this behalf.

109. Withdrawal of recognition-

(1) A private school which is once recognised as an approved school shall continue to be so recognised unless its recognition is withdrawn under Sub-rule (2).

(2) Such recognition may at any time be withdrawn by the School Board, or Education Committee on the recommendations of the Inspecting Officer, if any of the conditions on which the school was recognised is not observed or if the standard of instruction in the school falls materially below the level obtaining in public schools or for other reasonable and sufficient cause:

Provided that the due warning has been given to the managers of the school and that reasonable time has been allowed to them to carry out the requirements of the School Board or Education Committee:

Provided further that a school which is aggrieved by the decision of the School Board of EducationCommittee withdrawing recognition may submit an appeal to the Deputy Director of Educational Division concerned whose decision shall be binding.

[Rule 106 and Rule 107(1) is substituted vide Government Notification dated 2nd March 1998 by Sections 3 and 4 thereof respectively.]

43. The above Rules have been framed to further the objective of Act of 1947. The definition of "Private School" as envisaged in Rule 2(1)(g) means aprimary school which is maintained by an agency other than the Government or District School Board or Authorised Municipality and includes night schools and other schools under private management similar to those which were recognised under the Grandinaid Code. The other definition of "private school" is found in Rule 104A (i) of the same Rules. It means an approved School referred to in Section 39 of the Act. This is in contradiction to the meaning of "Public School" given in Rule 2(1)(h). The "Public School" means a primary school maintained by Government or District School Board or Authorised Municipality, as the case may be. While considering the scheme of the Act and the Rules, we may have to keep in mind the distinction between the terms "Private School" and "Public School". Both these Schools may be approved Schools. The purpose of approval is to recognise such school being entitled for grants in aid from public funds to be paid to that school, as the locality where such a school is established, is part of the scheme prepared by the appropriate Authority. Therefore, the distinction between the term "Approved School" and the "Recognised School" will also have to be kept in mind. In that, all approved schools are necessarily recognised schools, but all recognised schools need not be approved schools so as to receive grants in aid.

44. Be that as it may, Chapter III of the Rules of 1949 provide for the duties and functions of the District School Boards, Authorised Municipalities and Municipal School Boards, Chairmen and ViceChairman. Part (a) of this Chapter deals with aspects relating to primary schools. Chapter III, in our view, deals with primary schools under the control of appropriate Authority and not in relation to private unaided schools in particular. Rule 32 in the said Chapter obliges the District School Board or authorised Municipality to maintain an adequate number of primary schools in which instruction is given through the medium of the local regional language. In addition to primary schools referred to in Sub-rule (1) of this rule, a District School Board or authorised Municipality is expected to maintain Schools specified in Clauses (i) to (iii) thereof. Rule 33 envisages that a District School Board with the previous sanction of Government and a Municipal School Board, so far as the budget provision made by the authorised municipality will allow, may, wherever necessary, open new primary schools. Thus, Rule 33 is in relation to new Primary Schools to be opened by the Board in the prescribed manner. Rule 34 is of some relevance. It mandates that it shall be the duty of every authorised Municipality to make such provision in its budget as will enable the "approved private schools" in its area to receive grants at the rates prescribed in Chapter VII of these rules. Notably, the expression used in this provision is "approved" private schools and not "recognised" private schools. The other provision in the Rules to which reference can be made is in Chapter VI which deals with preparation and enforcement of the Schemes of Compulsion. Rule 84 deals with preparation of a rough estimate of a scheme by the competent Authority to be later on approved by the Government. Rule 85 deals with preparation of detailed scheme by the competent Authority. Rule 89 which follows the rules for preparation of schemes provides that before a detailed scheme is prepared, the School Board shall on the recommendation of the Administrative Officer, fix the maximum distance measured according to the nearest road between an approved school and the residence if a child for purposes of Clause (c) of Section 33 of the Act. It further provides that such distance shall not ordinarily exceed one mile and may be different for different localities and may be less than a mile in the case of villages where communications are specially difficult throughout the year. Once again, the primary school referred to in the context of distance between two such schools is of an "approved school". Obviously, this provision is an enabling provision to not only keep in mind that there is no crowding of schools but at the same time, to identify the localities where it is necessary to establish a School either managed by the local Authority or on grant in aid, to achieve the objective of the enactment of providing free and compulsory education through primary school in the neighbourhood, while preparation of detailed schemes, subject to availability of funds. This provision cannot be pressed into service against the private management intending to establish a primary School on permanent nogrant basis subject to fulfilling the conditions for grant of recognition thereof.

45. The crucial chapter in these Rules is Chapter VII, which specifically deal with the "approved schools". From the scheme of Chapter VII, conjointly read with other provisions of the Act and the Rules, it would appear that grant of recognition to a primary private school permits the private management to establish the school; but recognition to the school as approved School would have different connotation, indicating that the private management is not only allowed to establish and run a Primary Private School but the School is recognised as approved to receive grants in aid. The provisions of Chapter VII therefore, will have to be understood in the context of this distinction. Insofar as Rule 104 is concerned, it deals with opening of new primary schools by the School Board. It provides that a District School Board shall not open a new primary school or take over a private school or incur additional expenditure on primary schools maintained by it without the sanction of Government or an officer authorised by Government in this behalf. It further provides that except as otherwise provided in these rules, a Municipal School Board may, subject to the provision made in its budget, open new primary school where necessary or to take over private school or incur additional expenditure on primary schools maintained by the authorised municipality. The provisions regarding recognition of and grant in aid to private schools are found in part (B) of this Chapter. In this part, Rule 106 provides that the Management of educational institutions should apply for permission for establishing a private primary school. Notably, before 1998 the requirement was to take recognition. There was no provision to take permission for opening of a new primary school. Rule 106 and Rule 107(1) as it appears now came to be introduced in 1998. It specifies as to what requirements should be complied by the management and educational institutions to be entitled for grant of permission to start a new private primary school. On grant of such permission, the management is expected to start the primary school and thereafter apply for recognition of that school to the competent Authority. As in the case of provisions in Secondary Schools Code, we may have to observe that Rule 106 is in relation to private management intending to establish a primary school on "grant inaid basis" and will have no application to school to be started on permanent unaided basis. Moreover, the opening part of Rule 107(1) is contrary to Section 18 of the Act of 2009 which mandates that the School shall not function or run unless it is recognised by the appropriate Authority. We have already dealt with this aspect in some detail while considering the issue regarding the Secondary/Higher Secondary Schools and the same reasoning would apply to the regime provided in the Rules of 1949. Inasmuch as, the compliances to be made by the private management while applying for permission are of elementary nature and the crucial matters are examined only at the stage of considering grant of recognition to the School under Rule 107. The view taken by us that there is distinction between the terms "recognised school" and "approved school" is also reinforced from the language of Rule 107(4). It provides that the appropriate Authority shall consider the inspection report and the recommendations of the Competent Authority thereon and if satisfied about the need of the School in the locality, the standard of work in and the general management of the private school, recognise the private school as approved school and may, if the school has also applied for grant in aid, direct that it should be treated as eligible for the grant in aid from theprimary education fund or as the case may be, from the district fund. Even Rule 108 also throws some light on this interpretation. It provides that a private school recognised as an approved school, shall be eligible for grant in aid on application made in that behalf under Rule 110. The scheme of the Rules is that once a school is an approved school, it is ordinarily entitled to receive grants in aid from the Government or appropriate Authority. The situation as to when grant in aid can be refused, is spelt out in Rules 111, when the approved private primary school disqualifies itself to receive such grant on the grounds specified in that Rule. Although Rule 107(3)(b) refers to one of the condition to be stated in the inspection report as to whether the attendance of pupils at the School is regular and satisfactory, considering the scheme of Section 18 of the Act of 2009, this condition cannot be insisted upon as the School cannot function until recognition is granted by appropriate Authority. On similar lines, the requirement of Clauses (h) and (j) of Rule 107(3) presupposes that the School has already started soon after grant of permission. The application for permission can be and ought to be insisted upon only if the new Private Primary School is to be started on grant in aid basis but grant of permission, however, by itself, would not entitle nor permit starting of the Primary School in absence of recognition of the School by the appropriate Authority. Before issuing recognition to the School concerned, conditions specified in Rule 107(2) as well as Rule 107(3) will have to be fulfilled by the private management. If the private management intends to start the School on "permanent no grant basis", the appropriate Authority in exercise of powers under Rule 107(4) may only issue order to recognise the Private School. But if the private management intends to start the private Primary School on "grant in aid basis or any other aid from the Government" and have applied for that purpose, the appropriate Authority in the same order can direct that the School be treated as eligible for grant in aid being an approved School from the Primary Education Fund or as the case may be, from the District Fund. The recognition of the private PrimarySchool as approved School would result in treating the School being eligible for the grant in aid. We may also advert to Rule 109 which provides for mechanism for withdrawal of recognition. Rule 110 provides for when application for grant in aid can be made and the manner in which the same will have to be processed. Rule 111 provides when the application for grant in aid may be refused. It may not be necessary to advert to other provisions in these rules. Suffice it to observe that for the reasons already recorded, while considering the question as to whether prior permission ought to be taken by the private management who intends to establish the Secondary or Higher Secondary School, on the same reasoning, inspite of the provisions in theAct of 1947 and Rules of 1949 to which we have already made reference, we have no hesitation to hold that such requirement will be unreasonable one when the private management intends to establish the Primary School on permanent no grant basis and without receiving any aid from the Government whatsoever. The provisions requiring applying for permission would be relevant and ought to be insisted upon in respect of Primary Private Schools intending to start the same on grant in aid basis. Once the private management applies for permission to establish a School on no grant in aid basis, cannot later on turn around and insist for providing grant in aid or any other aid whatsoever for the School. We shall presently deal with this aspect.

46. Turning to the question as to whether prior permission of the appropriate Authority to start a primary school or for that matter secondary or higher secondary school is essential, the same will have to be considered on the touchstone of reasonableness of such stipulation. The necessity of taking prior permission to start a school is, primarily, to give option to the appropriate Authority to consider whether it was prepared to take the additional financial burden arising on account of opening of a new school. The appropriate Authority can exercise its Veto to avoid its further financial obligation arising due to providing for grant in aid to such school immediately or at a later point of time. The allocation of grant would be dependent on the availability of funds earmarked for that purpose in the budget or outlay plans.

47. However, when the private management intends to start a new school on unaided basis without taking any assistance of the State Government in any manner, financial or otherwise, the only consideration that may be relevant before allowing the private management to start a school can be analogous to the requirements specified under Rule 2.8 read with Rule 3.2 of the Secondary Schools Code in relation to Secondary/Higher Secondary Schools or Rule 107(2) and (3) of the Rules of 1949 applicable to Primary Schools so as to ensure that the financial position of the private management is proper and the school would be capable of imparting quality education and also ensure security in respect of working conditions of the teaching and non teaching staff to be employed by the management. Those aspects will have to be considered to examine the application of the private management for grant of recognition of the school, who intend to start a primary or secondary or higher secondary school on unaided basis. The Rules in the Secondary School Code which deal with the conditions for grant of recognition and of withdrawal of recognition, the same read thus:

Conditions of Recognition

3.1 The management which have been permitted by the Government to open a new Secondary School/Higher Secondary School shall apply in duplicate for recognition of that school, to the Deputy Director through the Education Officer (Secondary) concerned within thirty days from the date of opening of the school. The application shall be made in the forms given in appendix two.

3.2 A School seeking recognition of the Department shall satisfy it as regards the following conditions:

(1) The School is actually needed in the locality and it does not involve any unhealthy competition with any existing institutions of the same category in the neighbourhood;

(2) The management is competent and reliable and is in the hands of a properly constituted authority or managing committee;

(3) The financial stability of the management is assured;

(4) The premises of the school are sufficiently healthy, well lighted and well ventilated, with due provision for the safety of the pupils and contain sufficient accommodation, furniture and appliances for the instructions and recreation of the pupils attending it. Separate and satisfactory arrangements are provided for girls, in the case of boys' schools in which girls are admitted;

(5) The education imparted in the school is considered by the appropriate authority to be satisfactory in all respects. All the members of the teaching staff are suitable and possess the prescribed qualifications and are sufficient in number and the school does not employ any member notified as unsuitable for employment by the Deputy Director, under Rule 77.9 and Rule 77.11;

(6) The school follows the curriculum approved by and uses textbooks sanctioned or recommended by the appropriate authority;

(7) Admission in various standards are accordingly to the rules and instructions of the Department/ State Board of Secondary and Higher Secondary School Education, as the case may be;

(8) Promotions made from standard to standard are in accordance with the principles laid down by the Department/ State Board of Secondary and Higher Secondary Education, as the case may be;

(9) The rates of fees, the pay scales, allowances and conditions of service of the staff and amenities provided are according to the instructions issued by the Department, from time to time, or the managements undertakes to adopt the rates of fees and pay scales and allowances laid down and provide the necessary amenities within the time specified by Department.

(10) The school has adopted for its staff the conditions of service as prescribed by rules in this code or as may be laid down by Government, from time to time;

(11) The school maintains the necessary registers and records in a proper manner. (Please also see Rule 83 and Annexure 15):

(12) The records, statistical returns and certificates given by the school or the management are trustworthy,

(13) The school undertakes to make provisions, to the satisfaction of the Department, that the general rules of discipline as laid down by Government from time to time are duly observed by the school employees as well as by the pupils;

(14) The school undertakes to abide by such orders relating to any of the above conditions or to the working of the school or its hostel, as may be, issued by the Department, either generally or in specific cases from time to time;

(15) The management undertakes not to conduct or allow unrecognised schools or classes to be conducted in the premises of the school or elsewhere;

(16) The management shall adopt within the time specified by the Department:

(i) In case of aided schools Government Provident Fund Scheme for the members of teaching and nonteaching staff who were appointed prior to 1st April 1966 and have opted for such a scheme;

(ii) In case of unaided schools Provident Fund Scheme based on the Government Provident Fund Scheme for its teaching and nonteaching staff.

(17) The establishment and functioning of Guardians and Teachers Associations in school is necessary.

(Government order No. SSN/2696/Pra No 622 / Secondary Education 2 dated 16th May 1996)

3.3.(i) The Management of a school not in receipt of any grant in aid, which fails to abide by the rules or orders of the Department already laid down or issued by it or that may be issued or laid down from time to time or to set right any irregularity committed by them, within the stipulated period, inspite of a specific warning to do so, shall deposit with Government such amount as may be prescribed by the Director with due regard to the merit of the case.

(ii) The deposit shall be liable to be forfeited in full or in part if the action taken in abiding by the rules or in setting right irregularities is, in the opinion of the Director, inadequate or unsatisfactory or if similar breach of rules or irregularities is committed thereafter.

(iii) A fresh deposit to make up the forfeited amount or a larger amount will have to be given after the forfeiture of the previous deposits within fifteen days from the date of the Director's order to that effect.

(iv) In case, the Management is found to persist in its defaults inspite of these steps, the Department may proceed to withdraw the recognition of the school partially or fully as may be considered necessary. The condition of the school shall be tested by due inspection."

4.1. The recognition of the schools shall be continued provisionally from year to year for subsequent four years by the appropriate authority, after their first year of recognition, provided they continue to fulfill the conditions of recognition laid down in Rule 3.

4.2. After the period of five years, they may be considered for permanent recognition by the Deputy Director, provided they continue to fulfill the conditions laid down in Rule 3.

Power to Grant Recognition

5.1. Schools will be recognised for the first time by the Deputy Director.

5.2. Subject to the fulfillment of the conditions laid down and those that may be laid down, from time to time and subject to satisfactory working, the appropriate authority, may continue the recognition of the school for the next year(s) after inspection.

Refusal of Recognition

6.1. When the recognition to a school is refused for the first time by the Deputy Director or its further continuance is refused by the appropriate authority, the officer concerned shall send a copy of the order to the correspondent showing the reasons for which the recognition or its further continuance is refused. The Deputy Director shall endorse a copy of his order to the Education Officer.

6.2. Such an order of refusal will be communicated to the correspondent before the end of January of the year concerned provided application for recognition was sent in time as per rules.

6.3. The Management of the school, recognition to which is refused, may submit an appeal to the Secretary to the Government of Maharashtra in the Department dealing with Education within thirty days from the date of receipt of the order of refusal or recognition. The appeal shall be sent by registered post. Appeals received after the prescribed time limit shall not be entertained.

Withdrawal of Recognition

7.1. When a school, including a permanently recognised school, has ceased in the opinion of the Department, to fulfill any of the conditions of recognition, recognition of that school may be withdrawn.

7.2. When recognition is to be withdrawn, the management will be allowed a full opportunity for its explanation. In such a case, the management will be informed of the specific defects and called upon to explain within a time limit to be specified by the Deputy Director, why recognition of the school should not be withdrawn.

7.3. If the management is prepared to remove the defects communicated to it, a reasonable time to be fixed by the Deputy Director, may be allowed to the Management to do so. If the response of the management is, in the opinion of the Deputy Director, satisfactory, recognition may be continued, subject to such further condition and instructions as may be deemed necessary. But if the response is not satisfactory, the recognition may be withdrawn.

7.4. The power of withdrawal of partial or total recognition, including permanent recognition shall rest with the Deputy Director.

7.5. The Management of the school, the partial or the total recognition to which has been withdrawn by the Deputy Director, may submit an appeal to the Director within thirty days from the date of the said order. The appeal shall be sent by registered post. Appeals received after the prescribed time limit will not be entertained. (The Director or his representative not below the rank of the Joint Director of Education, may decide the appeal after giving hearing to the representatives of the Management and his decision shall b e final and binding on the Management.)

This portion is added vide (G.R. No. GAC1080/ 147/3037 Dt. 14/4/80)

(No Management shall close school or any of the recognised classes or make voluntary change in approved school subjects, which may result in any of its permanent staff being rendered surplus, without due notice to the Regional Deputy Director of Education, atleast one academic term in advance, and act as per his decision. An appeal on the decision of the Deputy Director of Education in this case shall lie with the Director of the Education.)

This portion is added vide (G.R. No. GAC1090/ 234/SE.2 Dt. 17/12/90)

7.6. The Management shall not shift any school run by it from its existing location to any other location for any reason, without prior written permission of Government. If the Management shifts the school without prior permission of Government, the recognition of such a school shall automatically stand withdrawn on ground of such unauthorised shifting.

The rule is added vide (G.R. No. GAC1081/ 283/SE.2 Dt. 24/7/81).

48. A priori, the regime provided in Rule 2.1. to 2.14 of the Secondary Schools Code or Rule 106 of the Rules of 1949 can be insisted upon only in respect of proposals for starting new school "on grant in aid basis" as that may result in financial implication for the Public Funds. But, in the light of the provisions of Act of 2009, grant of permission by itself would not entitle the management to start the school. That can be done only upon grant of Certificate of recognition.

49. What is significant to notice is that the compliances to be made for grant of permission are of very preliminary nature, as referred to in Rule 2.8 of the Secondary Schools Code or Rule 106 of the Rules of 1949. The crucial and material conditions are considered only at the time of scrutiny of the proposal for recognition, in terms of Rule 3.2 of the Code or Rule 107 of the Rules of 1949. Only at the stage of recognition, the Department has to be satisfied that the school is actually needed in the locality and it would not result in unhealthy competition with any existing institutions "of the same category" in the neighbourhood; competence and reliability of the management of the proposed school; financial stability of the management; regarding the infrastructure and the due provision for safety of the pupils and separate sufficient arrangement for the girls is provided. There are other matters provided in Rule 3.2 of the Code and Rule 107 of the Rules of 1949, which are to be reckoned while considering the proposal for recognition of the school.

50. The fact that the private management intending to start an unaided school is not obliged to take prior permission of the State, does not extricate the said management from complying and fulfilling the strict norms and standards including the terms and conditions for grant of recognition. Notably, the factor regarding existence of another school in the locality or non inclusion of the locality for a school in the perspective plan are not ascribable to the conditions provided in Rule 2.8 of the Code or Rule 106 of the Rules of 1949, but are found in Rule 3.2 (1) of the Code and Rule 107(2)(a) of the Rules of 1949, which is relevant to consider proposal for "recognition" of the school. Thus, in relation to proposal for private unaided schools, the regime regarding recognition provided in Rule 3.1 to 7.6 of the Code and Rules 106 to 109 of the Rules of 1949 would be material; and compliance of conditions specified in Rules 3.1 and 3.2 of Code and Rule 107 of the Rules of 1949 would be necessary. Indeed, hereafter these conditions may be in addition to the norms and standards specified in Sections 19, 25 and Schedule to the Act of 2009.

51. As aforesaid, the entire perspective regarding right to establish an educational institution by private unaided educational institution has undergone a sea change after the decision of the Apex Court in T.M.A. Pai (supra) and the enactment of Act of 2009. The argument of the State that the said decision was at the instance of the private management in whose favour permission to run educational institution was already granted can be no basis to distinguish the said decision or to overlook the exposition therein.

52. Be that as it may, it is well established position that the provisions of Secondary Schools Code are only a compendium of administrative instructions. If the requirements under the said Rules 2.1 to 2.14 of Code or for that matter Rule 106 of the Rules of 1949 can be insisted upon even qua the private management intending to start an unaided educational institution, can it be said that those requirements are in the interests of the general public and reasonable restrictions? To answer this controversy, we would advert to Clause (6) of Article 19 of the Constitution of India, which reads thus:

(6) Nothing in Sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said Sub-clause, and, in particular, (nothing in the said Sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,-

(i) the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business,

or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

53. We have already held that the subject of imparting education cannot be said to be in the exclusive domain of the State. It can be supplemented by the private entrepreneurs or Associations and institutions. If so, the restrictions such as to take prior permission to start the school (even if the private management intends to establish the educational institution with proper infrastructure and willing to abide by the strictest regime to be articulated by the State to maintain high quality of education and adequate security to its employees coupled with guarantee of no commercialization or profiteering that too without seeking any aid from the State financial or otherwise), would impinge upon the fundamental right guaranteed under Article 19(1)(g) of the Constitution. For, the State can only regulate the activity by imposing reasonable restrictions in the interests of the general public. The reasonable restrictions can be in the form of imposing strictest of conditions for regulating the said activity whilst at the stage of granting recognition and later on for continuation of such recognition of the educational institutions. However, insistence for prior permission for establishing an educational institution on permanent no grant basis; and more so that requirement being insisted by the State in the context of the perspective plan formulated or to be formulated by it, cannot stand the test of reasonable restriction, much less in the interests of the general public.

54. Once the right to establish an educational institution is recognized as a fundamental right available to any private management, the State cannot lightly interfere with such right of private management on the ground that the location chosen by the private management is not specified in its perspective plan. For, the perspective plan referred to in the Secondary Schools Code or the Scheme envisaged in Rules of 1949 or for that matter the School Development Plan in Section 22 of the Act of 2009, would be and ought to be relevant only to those educational institutions which are to be run by the local Authority or by the private management on "grant in aid basis or receiving any other aid from the Government". The primary objective of the perspective plan or the school Development Plan as the case may be, is to ensure that there is uniform and need based allocation of grant in aid to aided institutions so as to invest and spend public funds to provide a platform for pursuing compulsory education to the deserving children in the given region, considering the population and the felt need of an educational institution at that place. The perspective plan is relevant only to discharge theprimary obligation of the State of providing free and compulsory education to children of specified age and can have no bearing on the private management intending to start private institutions on permanent no grant basis without taking any aid from the State financial or otherwise. Whereas, such private unaided institutions would not only lend support to the Government in discharging its constitutional obligation but also provide for healthy competition to the Government aided schools and more importantly fair opportunity to the children in the locality to choose between the two institutions subject to their capacity to pay the fees of the private institution run on permanent no grant basis. In Paragraph 56, in T.M.A. Pai's case (supra), the Apex Court has taken judicial note of the fact that better working conditions will attract better teachers. More amenities will ensure that better students seek admission to that institution. Further, one cannot lose sight of the fact that we live in a competitive world today, where providing quality education alone can lead to emancipation and empowerment. A large number of institutions have been started by private management who do not seek Governmental aid. Resultantly, the children will have various options open to him/her.

55. In Paragraph 61 of the same decision, the Court proceeded to observe that it is no secret that the examination results at all levels of unaided private schools, notwithstanding the stringent regulations of the Governmental Authorities, are far superior to the results of the Government maintained schools. There is no compulsion to attend private schools. The rush for admission is occasioned by the standards maintained in such schools, and recognition of the fact that Staterun schools do not provide the same standard of education. It has further observed that the State says that it has no funds to establish institutions at the same level of excellence as private schools. To avoid lowering of standards from excellence to a level of mediocrity, the solution would appear to lie in the States not using their scanty resources to prop up institutions that are able to otherwise maintain themselves out of the fees charged, but in improving the facilities and infrastructure of Staterun schools and in subsidizing the fees payable by the students there. It will be in the interests of the general public that more good quality schools are established. In Paragraph 49 of the same decision, the Apex Court opined that not only the demand has overwhelmed the ability of the State to provide education, but there has also been a significant change in the way ofeducation is perceived. It went on to observe that the logic of today's economics and an ideology of privatization have contributed to the resurgence of private higher education, and the establishment of private institutions where none or very few existed before. Even in the case of Unni Krishnan (supra), in Paragraph 149, the Apex Court took judicial notice of the fact that the hard reality which emerges is that private educational institutions "are a necessity" in the present day context. Further, it is not possible to do without them as the State is in no position to meet the ever growing demand. It also found that education is one of the most important functions of the State but have no monopoly therein. Even the private educational institutions too have a role to play.

56. Considering the above, we are of the view that children and their parents who exercise choice in favour of the private unaided schools would take admissions in those schools by choice and not by compulsion. Indeed, no private unaided school can compel the students in the locality to take admission in their school. Nor such a private unaided school can be compelled to admit children in its school after its establishment so as to impart freeeducation to "all its students" as a precondition for grant of recognition. We have no doubt that such restriction by no standards, can be said to be reasonable restriction qua the private unaided institution. However, after commencement of Act of 2009, by virtue of Section 12(1)(c) read with 2(n)(iv), the State whilst granting recognition to the private unaided school, may specify permissible percentage of the seats to be earmarked for deserving children who may not be in a position to pay their fees or charges or expenses of the private school. The Apex Court in T.M.A. Pai's case (supra), in Paragraph 53, has observed that the State while prescribing qualification for admissions in a private unaided institutions may provide for condition of giving admission to a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the Government. Applying the said law, such condition can be imposed while granting recognition to the private unaided institutions, provided, however, the percentage should not result in a situation that running of the school would become unviable in the long run. Indeed, by virtue of Section 12(2) read with Section 2(n)(iv), private unaided school would be entitled to be reimbursed with the expenditure incurred by it in providing free and compulsory elementary education to children belonging to weaker sections and disadvantaged group in the neighbourhood to the extent of per child expenditure incurred by the State in a school specified in Section 2(n)(i), or the actual amount charged from the child, whichever is less. That reimbursement, however, is not in the nature of grant or aid as such, but simplicitor reimbursement of the expenses incurred by the school qua the specified percentage of children at the prescribed rate. Imposing of such restriction however, would not create any right in favour of the private unaided school to ask for grant in aid for the school on the assertion that it is virtually discharging the obligation of the State of providing free education to children below the age of 14 years. In as much as, by virtue of Section 12(1)(c) of the Act of 2009, it is as much the statutory obligation of every recognised school to provide free and compulsory education to the specified percentage of children admitted in that regard and also a condition for grant and continuation of recognition. Some what similar arrangement is provided in respect of hospitals run by the public charitable trusts to offer free medical aid to specified percentage or number of patients. Such a restriction is in the interests of the general public and also a reasonable restriction. Such measure addresses both the aspects, namely, upholding the fundamental right of the private management to establish an unaided educational institution of their choice and at the same time securing the interests of the children in the locality, in particular, those who may not be able to pursueeducation due to inability to pay fees or charges or expenses of the private unaided schools. Further, starting of private unaided school in a given locality may provide a platform to the children in the locality to avail of the facility offered by the private unaided school on agreed terms and conditions which terms, however, should not result in profiteering or commercialization. In case any complaint in that behalf is received, it will be the obligation of the State to step in immediately so as to remedy such mischief at the earliest opportunity.

57. It may be relevant to mention that at the national level, there is a serious debate of having uniform education policy to integrate the different educational streams so as to provide quality and meaningful education. Significantly, the restriction to take prior permission is only essential in relation to the schools governed by the provisions of the Secondary Schools Code or the Rules of 1949. Besides the schools governed by the said Regulations, it is common knowledge that other schools are also established in the same locality which are governed by different Boards and Regulations such as I.C.S.E., C.B.S.E., I.B. and I.G.C.E. etc. The existence of perspective plan or non existence thereof, has no relevance for establishment of those schools. Thus, the logic given by the State of existence of another school in the locality, so as to deny the claim of private institution to establish an educational institution on permanent no grant basis in the same locality in the context of its perspective plan, is inapplicable qua other institutions not governed by the stated Regulations. The Logic of the State is founded on Rule 3.2(1) of the Code or Rule 107(2)(a) of the Rules of 1949, which provide that the Authority should be satisfied that the school is actually needed in the locality and it would not involve in any unhealthy competition with any existing institutions of the same category in the neighbourhood. Besides, the restriction of observing 5 kms. distance was on the basis of policy placed before this Court in Gramvikas S.P. Mandal (supra). In the first place, having regard to the mandate of Section 6 read with 9(b) of the Act of 2009 the Government is obliged to ensure that school is established in the neighbourhood at the Gram Panchayat level. Besides, in the recent decision of Full Bench of our High Court in the case of Shikshan Prasarak Mandal v. State of Maharashtra and Ors. reported in 2009 (5) Mh.L.J. 969 to which one of us was party (A.M. Khanwilkar, J), it is held that the condition of 5 kms. radius or distance is not a mandatory or absolute condition as it has an inbuilt element of relaxation. At any rate, even as per the abovesaid provisions, the existing institution must be of "the same category", e.g., aided or unaided as the case may be. Further, even if the existing school in the locality is of the same category, that would not justify the rejection of its proposal to grant recognition to start an unaided school of the private management, unless it is further found that the establishment of the new school of the same category would result in unhealthy competition. In a given case it is possible that the new school to be established in the locality on unaided basis where another unaided school already exists, may be able to cater to the requirement of entirely different class or category of children or with ultra modern facilities and for more and better opportunities to the children. Such a school may broadly fit into the description of "the same category" in the locality being an unaided school, but still it can be a school with a difference and not stricto senso of the same category. These are matters to be decided on case to case basis.

58. The controversy which has arisen before us, in our opinion, is the making of the State Government for having recently extended grant in aid to large number of private institutions which were initially started on permanent no grant basis in absence of the perspective plan. The consequences of financial implication to the State flowing from that decision can be no justification to negate the right recognized by the Constitution guaranteed to every citizen to establish an educational institution on permanent no grant basis, by issuing one fiat. The State Government at best is competent only to impose reasonable restriction as condition for grant of recognition, such as to maintain high quality education and provide security to the staff to be employed by the School; but cannot reject the proposal merely because the location where the private management intends to start the school on permanent no grant basis, is not specified in its perspective plan or non existence thereof. As aforesaid, the perspective plan or the School Development Plan, as the case may be, are primarily to identify the localities in which the Government intends to provide free and compulsory education by way of giving grants to the private aided schools. That has no relevance to the consideration of proposal of the private management to grant recognition to start school on permanent nongrant basis or any aid whatsoever.

59. The right of the private management need not be confused with the constitutional obligation of the State to provide free and compulsory educationto all children of the age of 6 to 14 years. Granting recognition to a private management school started on permanent no grant basis, by itself cannot be the basis to assume that the State has failed to discharge its obligation to provide free and compulsory education to all children of the age of 6 to 14 years in that locality. The private management institution which has been started on clear understanding that recognition is granted to run the school on permanent no grant basis and not receiving any other aid whatsoever from the Government, cannot be heard to say that it is entitled for grant in aid because there was no existing school in the said locality to provide for free and compulsory education to children of specified age. For, it would be a case of a conscious decision of the Private Management to start the school on permanent no grant basis and without taking any kind of assistance from the State. It would be a different matter if the State recognizing the fact that there is no school run by the local Authority or the State or grant in aid school in a given locality and "that locality is specified in the perspective or School Development Plan" coupled with the fact that substantial number of children of that locality are unable to pursue and complete the elementary education inspite of the private unaided school providing for specified seats for that purpose, due to inability to afford fees or charges or expenses therefor, may on its own consider to provide grants to that school in terms of Section 22(2) of the Act of 2009. Whereas, if a locality is not included in the perspective/School Development Plan the question of giving grants to private schools in such locality does not arise. In that case, however, the unaided school would be entitled only for reimbursement of the expenses incurred by it on the children admitted against the specified percentage at the prescribed rate, in terms of Section 12(2) read with Section 2(n)(iv) of the Act of 2009. Thus understood, the provisions requiring prior permission from the State Government for establishment of an educational institution to be started on permanent no grant basis and without taking any aid from the State whatsoever financial or otherwise, cannot stand the test of reasonable restrictions or in the interests of the general public as such. That, however, does not mean that the private management intending to establish an educational institution would be entitled for recognition of the school as a matter of course.

60. In the age of Globalisation and privatization, it would be a pedantic approach of the State to insist that without its prior permission and more so unless the locality where the proposed institution is to be started is identified in the perspective plan to be prepared by it, the private management intending to establish school strictly on permanent no grant basis, cannot avail of the fundamental right guaranteed under Article 19(1)(g) of the Constitution. On the other hand, the State should be encouraging private investment in educational institutions on unaided basis which the private management is entitled to pursue on condition that it would fulfill the prescribed norms and standards and not indulge in profiteering and commercialization of education. Those are matters of regulation and strict enforcement of such regime. In our view, establishment of private unaided institution would not affect the prospects of the municipal schools or grant in aid schools. No hard facts to hold otherwise are placed before us. The children who do not have paying capacity to pursue studies in a private institution would continue with the municipal or grant in aid schools or take admission in the private unaided schools against the seats earmarked for as per Section 12(1)(c) of the Act of 2009. But those children who can afford fees and charges of the private institution, alone would be attracted to the private institution provided the performance of that institution is better and it offers higher quality education and amenities in relative terms. The children from the locality will have a choice between the private unaided school and the municipal or grant in aid schools. Taking any other view would be denial of opportunity to the children to exercise the option to pursue qualityeducation to be imparted by the unaided schools to make them self reliant and not merely potential penpushers. The apprehension of the State that by induction of the private institution in the locality, the strength of the students ratio in the municipal or grant in aid school would be affected, making it difficult to sustain the divisions, is completely misplaced for the same reason. The demand for more educational institutions is ever growing. If the State cannot provide educational institutions imparting quality education at every nook and corner of the State, even though constitutionally obliged to do so, on account of financial compulsions or inadequate infrastructural resources, there is no justification to deny opportunity to the private management to establish an unaided educational institution in such locality, on the specious reasoning that the locality is not included in its perspective or School Development Plan.

61. We have no hesitation in taking the view that preparation of a perspective plan and School Development Plan or for that matter, non inclusion of the locality in the said plans where the proposed school is to be established by the private management on permanent no grant basis, can be no ground to disallow the private management to establish an unaided educational institution in such locality. That approach cannot be sustained either on the touchstone of the interests of the general public or reasonable restriction as such. At any rate the approach of the State to take a blanket decision and cancel or reject all the pending proposals, by no standards can stand the test of judicial scrutiny. It is a clear case of arbitrary exercise of power and non application of mind, hit by Article 14 of the Constitution of India. For, each proposal was expected to be examined on its own merits on case to case basis in the context of conditions for grant of recognition and not assumed authority to grant permission.

62. As aforesaid, the perspective plan or School Development Plan would be only a barometer of the requirement of educational institutions to be "funded by the State" at the macro level as well as micro level across the State. At the macro level, the State would decide about the total number of schools to be established across the State subject to its financial capability to bear the burden of grant in aid therefor. At the micro level, it would be the felt need of the local area (Tanda, village, Taluka, District) where free and compulsory education is indispensable and imperative. While determining the number of schools to be established at the micro as well as macro level, to make the perspective plan or School Development Plan meaningful and effective, it is expected that the State must first thoroughly investigate so as to identify the schools which are receiving grant in aid but are either non performing or performing below the bench mark level, either in terms of infrastructure or quality of education imparted and other incidental matters. Now, by virtue of the Act of 2009, all schools established prior to the commencement of the said Act are obliged to fulfill the norms and standards specified interalia in Sections 25, 26 and Schedule of that Act, as per Section 19(2) thereof. The State is expected to first weed out those schools which are non performing, under performing or noncompliant schools and upon closure of such schools, the students and the teaching and non teaching staff thereof should be transferred to the neighbourhood school. That would not only strengthen the latter school by adequate number of students to consolidate the division and also impart quality education due to addition of teaching staff. Needless to observe, that if there is inadequate response to the Government funded school, it is but appropriate that either the divisions thereof or the school itself be closed and the students and staff of such school be transferred to another neighbourhood school by resorting to Section 18(3) of the Act of 2009. Only after taking such hard decisions the perspective plan or the School Development Plan would represent the correct position regarding the need of Government aided schools in every locality across the State, to fulfill the aspirations of the Act of 2009 to provide free and compulsory quality education. Besides, it will ensure proper and meaningful utilisation of public funds. If we may say so, it is trite to keep in mind that right spending of limited finance by the State would give impetus to right education (quality education) in the schools which deserve the Government aid. Besides, it will ensure proper and meaningful utilisation of public funds. In absence of this exercise, the end result would be that on account of existing non performing or under performing and noncompliant school, the perspective plan or School Development Plan would not reckon that locality for establishment of another school. If the State is right in its stand that unless additional school in the locality is permitted under the said plans, no other school can be established in that locality; would have direct bearing on the rights of the children who are the consumers of the facility of imparting free and compulsory education in that locality to get quality education. For, they would be compelled to pursue their studies in the non performing or under performing and noncompliant schools. In other words, before the final perspective plan or School Development Plan is finalised by the State Government in regard to schools run on grant in aid basis, we expect the State to examine the above position and take appropriate corrective and remedial steps in that behalf in right earnest. In our view, the State Government, by resorting to the provisions of Act of 2009, must take opportunity to reorganise its financial outflow at the micro level by weeding out the nonperforming or under performing and noncompliant schools receiving grant in aid, so as to ensure that only such Government funded Schools, who fulfill the norms and standards, are allowed to continue, to achieve the objective of the enactment of not only providing free and compulsory educationto the children in the neighbourhood school but also to provide them quality education. The end product of such exercise would be to identify the genuine need be it at the micro level or macro level across the State from all angles, which will then be reflected in the perspective/School Development Plan and at the same time, the public exchequer would be saved on avoidable expenditure of propping the noncompliant schools. That is the power coupled with duty of the State, even in terms of the Scheme of the Act of 2009.

63. That takes us to the argument of the State that the experience shows that the divisions of some of the existing grant in aid schools were required to be closed down and that the existing number of schools was sufficient to cope with the demand of students in the concerned localities. In the first place no details to substantiate this plea has been placed before us. Besides, the counsel appearing for the Petitioners contend that this stand of the State is incorrect if not misleading. According to them, the divisions of some of the aided schools were required to be closed down because new schools were started in the neighbourhood villages where no school was in existence. Students from such villages preferred to take admissions in the newly started school in their neighbourhood locality. If that is the position, it is not open to the State to contend that since the divisions of some of the grants in aid schools were required to be closed down, addition of any new school would lead to unhealthy competition.

64. As observed earlier, entry of private institutions on permanent no grant basis and without receiving any kind of Government aid, who are willing to abide by the strictest regime and terms and conditions for grant of recognition and for continuation of such recognition, would only create an atmosphere of healthy competition between the aided schools and unaided schools. Further, the children from the locality can make a choice to opt for unaided school if they have capacity to pay the fees or charges or expenses of that school. But that would be entirely by choice and not by compulsion. On the other hand, if they are comfortable with the quality of education and the facilities available in the Municipal or aided school itself, there is no reason for them to withdraw from such school and take their chance in the private unaided school where they will be required to pay relatively high fees or charges or expenses. They would do so only if they have the means to pay such fees or charges or expenses and are convinced that taking admission in unaided school in their neighbourhood would be more beneficial and would give them better opportunity and exposure to become a self reliant person and not be a mere potential penpusher.

65. We are conscious of the fact that in rural areas and more so in tribal areas the financial capacity may not permit the parents to admit their children in private management schools on payment of fees or charges or expenses. In a given case, inspite of the necessity to have a school in such locality, if the perspective or School Development Plan does not provide for a school in such locality, there would be no school in that locality. We are informed across the Bar that according to the Petitioners, in the State of Maharashtra there are at least 11,000 villages where no primary school is available and about 50,000 villages where no secondary school is available. On account of the inability of the State to establish schools in such regions due to financial constraint, the students of such villages are being denied opportunity of education or are forced to travel some distance to attend schools in another locality. If, in such places, the private institutions were to establish educational institutions on permanent no grant basis and provide education to the locals either free of cost or offer a package to them which would be affordable as any philanthropic organization or citizen with mission in life would do, there is no reason why private school on permanent no grant basis in such a locality should not be permitted. Recognizing a private institution started by a private management on permanent no grant basis, does not absolve the State of its constitutional obligation to provide free and compulsoryeducation in that locality. In due course, subject to availability of finance, the State can start a new grant in aid school or may consider of extending grant in aid to the private management school or consider of giving subsidy or free scholarship to the students deserving free and compulsoryeducation. That decision will have to be taken on case to case basis and not the manner in which it has been taken by the State to convert large number of schools started on permanent no grant basis without the perspective plan to grant in aid basis by issuance of one fiat. The justification to extend grant in aid to large number of schools started on permanent no grant basis without the perspective plan, is only due to some statement made on affidavit before the High Court in one of the Writ Petitions. We will not dilate any further on this matter as we are not called upon to examine the legality and correctness of the said decision in the present proceedings. Suffice it to observe that the interests of the general public would be subserved by recognizing the schools to be started by the deserving private institutions on permanent no grant basis in such locality.

66. The argument of the Respondents that the private institutions exploit the students and the teaching and nonteaching staff, is an argument exposing the weakness of the State in having proper and effective mechanism to regulate and control the private institutions which are started on permanent no grant basis. Instead of advancing such argument, the State should play a proactive role in setting up permanent Regulatory Authority invested with the task of continual monitoring of such institutions, both in respect of infrastructure, quality of education and also matters relating to the staff employed by the school as well as charging of fees or charges from the students whether results in profiteering and commercialization of education so as to deal with such acts of commission and omission with promptitude. In terms of Section 32 of the Act of 2009, any person having any grievance relating to right of a child can make a complaint which has to be disposed of within "three months". In addition, the responsibility to monitor child's right toeducation is on the Commissions established under the provisions of the Commissions for Protection of Child Rights Act 2005 by virtue of Section 31 of the Act of 2009. There is need to revitalize this machinery if already in place to address these aspects.

67. What is required to be addressed by the State Government is to not only focus on the strict norms and standards for grant of recognition, but equally on strict regime for ensuring that the conditions imposed are being complied in its letter and spirit by the private institutions run on permanent no grant basis, failing which steps to withdraw recognition of that school should be resorted to with utmost dispatch. While providing for mechanism to keep complete tab on the requirements of infrastructure and quality education as also to provide security to staff employed in such institution and related issues as well as to ensure that the said private institutions do not indulge in profiteering and commercialization, may if thought proper, consider of imposing conditions in addition to the conditions specified in Sections 19, 25 read with Schedule of the Act of 2009 and provisions of Rules 3 to 7 of the Secondary School Code, such as;

(i) No exploitation of staff and of mandatory requirement to pay the monthly salary only through the nominated bank account.

(ii) The management of unaided school should be asked to set apart sufficient amount in advance to secure the full salary and emoluments for a specified period of the entire staff to be employed by the school, to be invested in an escrow account of which the Education Officer should be made signatory and authorized to operate the same in case of exigency.

(iii) The management should be made to deposit at least an amount equivalent to one term (half year's) tuition fees to be collected by the unaided school from the prospective students permitted to be admitted in the school and that amount to be invested in an escrow account of which the Education Officer should be made signatory and authorized to operate that account in case of exigency.

(iv) Strict compliance about the basic infrastructure specified in the Schedule to the Act of 2009 including regarding building, playground, electricity/permanent D.G. Set or such other device to generate alternative energy, Library, proper furniture and fixtures, sports equipments etc., security, school transport, drinking water and proper hygiene commensurate with the strength of the students of the school.

(v) Commercialization or profiteering should be eschewed and there should be zero tolerance level in that behalf. (There should be a permanent Regulatory Authority constituted for timely resolution of such grievance. That is necessary even in the context of Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act, 1987.

(vi) Provide for transparency and fairness in admission procedure. The same is adhered to in compliance of Sections 13 and 15 of the Act of 2009.

(vii) Require the private management until the school to be established by the private management is recognized, to "prominently" display on its web site, school board, pamphlets, receipts, bills and letter heads and all other official documents that it is not a recognized school.

68. These are some of the measures which if followed, would subserve the interests of the general public. The above stated condition Nos. (ii) and (iii) would ensure that the fly by the night schools are not allowed to start even though they may intend to do so on permanent no grant basis.

69. The learned Government Pleader for the State has placed emphasis on the decision in the case of Gramvikas Shikshan Prasarak Mandal (supra) to justify the impugned action of cancellation of all the proposals pertaining to Marathi medium school in absence of perspective plan. In the first place, we are in agreement with the argument of the Petitioners that the said Judgment is mere restatement of the policy and scheme formulated by the State and as modified on the basis of suggestions made by the Court. No more and no less. Secondly, we find force in the argument of the Petitioners that assuming the said decision was to be treated as a binding precedent on the question that no private management can be permitted to start a school in absence of a perspective plan even if it was to be started on permanent no grant basis; that opinion has been impliedly overruled by the Apex Court in the case of Superstar Education Society (supra). In that, relying on the former decision, another Division Bench of this Court in the case of Maharashtra Rajya Shikshan Sanstha Mahamandal v. State of Maharashtra and Ors.   : 2006 (6) Bom.C.R. Page 139 had quashed and set aside permissions granted to as many as 1495 new primary, secondary and higher secondary schools in the State of Maharashtra granted for the academic session 2006-2007 in absence of a perspective plan. However, the Apex Court in the case of Superstar Education Society (supra), reversed that view and unambiguously held that non existence of a perspective plan does not bar grant of permission to schools. In any case, for the reasons mentioned earlier and more particularly, in the context of the exposition of the Constitution Bench of the Apex Court in T.M.A. Pai (supra) and the enactment of Act of 2009, the issue will have to be considered in entirely different perspective. For, by now it is well established position that to establish and start an educational institution is a fundamental right which can only be regulated by imposing reasonable restrictions and in the interests of the general public. Besides, we have already taken the view that the perspective plan has relevance only in relation to the schools, which would receive grant in aid from the State or are Government funded schools. That perspective plan cannot whittle down the fundamental right of the private management to establish an unaided school of their choice, even if they were to fulfill all the mandatory requirements to impart quality education and secure the interests of the stake holders in that school and abide by the regime of no profiteering and no commercialization. The Government would have no option but to grant recognition or affiliation to start such school on permanent no grant basis and without receiving any other aid from the Government. In the circumstances, the decision in Gramvikas Shikshan Prasarak Mandal (supra), would be of no avail to the State to answer the controversy on hand.

70. Our attention was also invited to the decision of the Apex Court in Vidarbha Sikshan Vyawasthapak Mahasangh v. State of Maharashtra and Ors.  : 1986 (4) Supreme Court Cases Page 361 to contend that if the view which we intend to take was to prevail, it would lead to a chaotic situation as there will be excessive schools than the number of students available. We have already rejected this argument being devoid of merits. The argument proceeds on the assumption that there will be a mad rush for opening of unaided educational institutions throughout the State, which may result in unhealthy competition and unregulated situation. The argument clearly overlooks that no private management or entrepreneur would venture into an occupation which is unviable and in any case would not be able to sustain for a long if that situation prevails except that the said activity is mission in his life. In any case this apprehension will be adressed by imposing strict conditions at the time of grant of recognition. Notably, in terms of Rule 4.1 of the Secondary Schools Code, only provisional recognition from year to year basis is granted for first four years by the appropriate Authority on fulfillment of the conditions of recognition. And only on completion of period of five years, the School is considered for grant of permanent recognition. Thus, there is inbuilt mechanism provided to ensure that only Schools which would impart quality education and comply with the essential norms and standards and conditions for grant of recognition would continue to function.

71. We are conscious of the fact that on account of inadequate response, the newly started school may close down with the result, the students in the said school will have to be absorbed in another recognized school, but that would be the evolving process of consolidation of unaided institutions which are able to compete and sustain on its own and at the same time impart quality education to the students in the locality. The apprehension of disastrous situation arising on account of closure of the school also can be addressed if the State were to impose restrictions as condition for grant of recognition, as indicated by us earlier, so as to avoid exploitation of staff and students. Insofar as the apprehension of students becoming surplus due to closure of school, clearly overlooks that the students from the said school can be accommodated in a neighbourhood recognized school either unaided or aided as the case may be. As it is the primary obligation of the State to ensure education to children between the age of 6 to 14 years, such absorption would be ascribable to that obligation. If the State were to impose precondition of depositing one term (half year's) tuition fees of all the students of that school in the escrow account of which the Education Officer would be the signatory and authorized to operate in case of exigency, he can direct transfer of commensurate amount or fees received from such transferee students by the school to the school to which the students would be transferred and admitted to pursue their further education. In that case, the school to which such students are transferred can have no grievance whatsoever and in fact would be benefited by getting more number of students and of wind fall gain of commensurate tuition fees. In a given case the State may have to consider of permitting the transferee school to open additional division(s) or relax the number of students in the available division. Similarly, the sufficient deposit of advance amount towards the salary of the entire staff, may come in handy to atleast partly redress the financial claim of the staff of the derecognised unaided school.

72. The learned Government Pleader placed emphasis on the dictum of the Apex Court in the Case of Ugar Sugar Works Ltd. v. Delhi Administration and Ors.   : 2001 (3) Supreme Court Cases Page 635 in particular Paragraph Nos. 16, 17, 22 and 23 to justify the policy decision of the State as reflected in the Government Resolution dated 20th July, 2009. The Apex Court observed that there is no fundamental right under Article19(1)(g) of the Constitution to carry on trade in liquor and that the State has power to formulate its own policy regarding such trade. The observations in this decision as is pressed into service are inapposite. The claim of the Petitioners that they have fundamental right under Article 19(1)(g) of the Constitution to establish an educational institution on permanent no grant basis, is now squarely answered by the Constitution Bench Decision in T.M.A. Pai (supra). Reliance was placed on the decision in Dhampur Sugar (Kashipur) Ltd. v. State of Uttaranchal and Ors.   : 2007 (8) Supreme Court Cases Page 418 in particular Paragraph Nos. 52, 62, 63 and 66 to contend that the scope of judicial review of the policy of the State is circumscribed. The learned Government Pleader was at pains to persuade us to take the view that the restrictions provided in the Secondary Schools Code are in the interests of the general public. To buttress this submission, reliance was placed on the dictum of the Apex Court in Paragraph 16 in the case of Directorate of Film Festivals and Ors. v. Gaurav Ashwin Jain and Ors.   : 2007 (4) Supreme Court Cases Page 737 wherein the Court has noted that the scope of judicial review while examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary. Courts cannot interfere with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available. We have already indicated reasons as to why restriction of obtaining prior permission to establish a school on permanent no grant basis violates the fundamental rights of the Petitioners and similarly placed persons on the touchstone of Article 19.

73. The next argument that needs to be addressed is, can the State discriminate between the management intending to open unaided school on the basis of language e.g., Marathi, Urdu, Hindi, English, Gujarathi etc. The policy adopted by the State is that no new "Marathi school" will be permitted until the finalization of the perspective plan. We are informed that as many as 842 new schools to impart education in mediums other than Marathi medium have been permitted by the State after issuance of the impugned Government Resolution dated 20th July, 2009. The necessity of preparing perspective plan arose in the context of the policy of the State which has been restated in the decision of Gram Vikas Shikshan Prasarak Mandal (supra). Although the perspective plan was to be prepared and brought into force immediately, the same has not seen the light of the day since year 2000. Even now the State has asked for further six months time as noted in the order dated 11th January, 2010 in Writ Petition No. 8992 of 2009. However, even after the decision in Gram Vikas Shikshan Prasarak Mandal (supra) in 2000, till the year 2006 the State Government kept on granting permissions to private institutions to start primary, secondary and higher secondary schools including in Marathi medium on permanent no grant basis to substantially large number of private institutions i.e. about 1495 institutions. Besides the number of private institutions involved in the said decision, it is common ground that some more private institutions which is substantial in number, were allowed to start Marathi medium schools after 31st May, 2006 even though there was no perspective plan in place. However, that was under the Orders of the Court. That State action was put in issue in the case of Maharashtra Rajya Shikshan Sanstha Mahamandal v. State of Maharashtra and Ors. reported in   : 2006 (6) Bom.C.R. Page 139. This decision, however, has since been reversed by the Apex Court in the case of Superstar Education Society v. State of Maharashtra and Ors. reported in: 2008 (3) Supreme Court Cases Page 315. In paragraph 8 of the said decision, the Apex Court has noted that the objects of regulating permissions for new private schools are:

(i) to ensure that they have the requisite infrastructure,

(ii) to avoid unhealthy competition among educational institutions;

(iii) to subject the private institutions seeking entry in the field of education to such restrictions and regulatory requirements, so as to maintain standards of education;

(iv) to promote and safeguard the interests of students, teachers and education; and

(v) to provide access to basic education to all sections of society, in particular the poorer and weaker sections; and

(vi) to avoid concentration of schools only in certain areas and to ensure that they are evenly spread so as to cater to the requirements of different areas and regions and to all sections of society.

74. In paragraph 9 as well as 12 of the decision in Superstar Education Society (supra), the Court has observed that non formulation of a master plan does not bar the grant of permission to schools before the master plan was finalized. As mentioned earlier, the only distinguishing feature for treating Marathi medium different than the other mediums is that there are enough number of schools imparting education in Marathi medium. This is a very wide, vague and unsubstantiated assumption.

75. Assuming that requirement of perspective or School Development Plan should be the quintessence for considering the proposals of even the private management to establish an unaided school, whether there was felt need in that locality in absence of a perspective plan, could be answered on the basis of the subjective satisfaction of the committees at the District level and the State level as has been done in the case of other mediums. Thus understood, the policy of the State to totally prevent opening of new Marathi Medium Schools including unaided Schools, throughout the State, results in discrimination amongst the managements on the basis of language. There is no rationale behind the policy as to why the same parameter cannot be applied to "Marathi medium" schools as in the case of other mediums, of considering the recommendation of the local committees at the District level and State level. On the other hand, a blanket decision is taken that no new Marathi medium school will be permitted to be opened in the State until the finalization of the perspective plan. Such decision is not only arbitrary and discriminatory but also suffers from the vice of non application of mind. Such blanket decision, in any case, cannot be sustained if the report regarding no secondary schools in 50,000 villages and no primary schools in 11,000 villages through out the State of Maharashtra, is to be accepted as it is.

76. The argument of discrimination is also advanced in the context of the fact that the restriction regarding preexistence of perspective plan is not applicable insofar as Marathi Medium schools to be started by the local Authority. No doubt the primary obligation to start a new school is on the local Authority and it can be presumed unless proved to be contrary, that the local Authority has taken conscious decision to start such new school keeping in mind the felt need of that locality to provide free and compulsory education. Even so, the question whether there is already existing school and whether the State Government in its perspective plan has identified that locality for the purpose of establishing a new school to be funded from the public exchequer, remains unanswered. Notably, nonexistence of perspective plan is the only test applied to justify the policy decision of the State to cancel or reject all the proposals of Marathi Medium Schools.

77. As aforesaid, if the two local committees of the State have recommended opening of a new unaided Marathi medium school in the locality, there can be no justification for rejecting the proposal of such institution, who would otherwise fulfill the necessary requirements for grant of recognition. The fact that the District level as well as State level committee has recommended opening of a new Marathi medium school in the locality and in particular, the proposal of the concerned school, presupposes that( i) there is a felt need of establishing a Marathi Medium School in that locality; (ii) the proposal of the concerned management fulfills the necessary requirements for grant of permission. (iii) the locality needs to be included in the perspective plan; (iv) In case the perspective plan exists and the given locality is not included therein, it would mean that the Government is unable to fulfill the need of that locality due to financial constraints. Rejection of even such proposal by the State would necessarily suffer from the vice of arbitrary action and non application of mind. At any rate, at least the proposals of private management for starting an unaided school with no aid from the Government whatsoever, which have been recommended by the District level committee as well as the State level committee, ought to be considered by the State Government on case to case basis, even in relation to Marathi medium schools.

78. According to the Petitioners, the impugned Government Resolution suffers from non application of mind also on the ground that the title of the Resolution would suggest that the Government intended to take a policy decision of converting the permanent no grant basis primary schools andprimary (excluding English medium) schools to grant in aid basis. But, without indicating any basis, the Resolution concludes with the decision that all the proposals for Marathi medium schools stand cancelled and no request for starting Marathi medium school would be considered till the finalization of the perspective plan.

79. Considering the above, in our opinion, the impugned Resolution and the policy of the State articulated therein, is illegal and unconstitutional. We hold that the private management intending to start schools on permanent no grant basis, have a fundamental right to establish such schools, subject, however, on fulfilling the conditions for grant of recognition of such schools.

80. We have already noticed that in the reply affidavit filed before this Court, several other issues have been raised by the State to justify its action of rejection of all the pending proposals relating to Marathi medium schools. It is unnecessary to dilate on the said issues considering the fact that the decision of the State, which is subject matter of challenge in this Petition, is Government Resolution dated 20th July, 2009. The State cannot be permitted to enlarge the grounds which do not form part of the said decision. In the decision which is impugned before us, the sole ground stated as can be discerned from Paragraph 6 and 7 thereof, is that a comprehensive (perspective) plan will be prepared and the request for permissions to start Marathi medium schools would be taken for consideration only thereafter. The substance of the reason is that in absence of a perspective plan, no proposal pertaining to starting of Marathi medium school can be considered. Hence all those proposals were cancelled. Any other reason stated on behalf of the State in the reply affidavit cannot be looked into as it is well established position that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise; else an order bad in the beginning may, by the time it comes to Court on account of a challenge, may get validated by additional grounds later brought out See Mohinder Singh Gill and Anr. v. The Chief Election Commissioner, New Delhi and Ors.   : (1978) 1 Supreme Court Cases Page 405 Para8.

81. That takes us to the another shade of argument of the Petitioners that the decision of the State Government is hit by principles of estoppel. It is the case of the Petitioners before us that on the basis of invitation given to the private managements to apply on the basis of the Government circular dated 29th July, 2008, they applied to the appropriate Authority for grant of permission to start Marathi medium school on "permanent no grant basis". Besides, they have already invested substantial amount in creating the necessary infrastructure such as building, furnitures, fixtures etc. In other words, they have acted to their disadvantage on the basis of the promise expressed through the Government circular dated 29th July, 2008 that they would be permitted to start Marathi medium school on permanent no grant basis subject to complying necessary formalities. To buttress this contention, reliance is placed on the exposition in the case of Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh and Ors.   : 1979 (2) S.C.C. Page 409. In the first place, if this Court were to hold that there is no fundamental right available to the Petitioners to establish a Marathi medium school and that the provisions of the Secondary Schools Code and Act and Rules of 1949 would prevail, it would necessarily follow that the Petitioners cannot be heard to invoke promissory estoppel. For, there can be no estoppel against the law. However, for the view we have taken that the Petitioners have a fundamental right to establish a school on permanent no grant basis without requiring to obtain prior permission under Rules 2.1 to 2.14 of the code or Rule 106 of the Rules of 1949, it is not necessary to dilate further on this issue. Indeed, as we have observed earlier that if the management were to provide mandatory infrastructure and abide by the regime of no profiteering and no commercialization as also secure the interests of the employees, the State would have no option but to accord recognition to such schools. If there was any deficiency with regard to such mandatory requirements, the Petitioners cannot be heard to complain of promissory estoppel as it is well settled by now that the fundamental right to establish educational institution need not be confused with the right to ask for recognition or affiliation.

82. To sum up, we conclude that:

(a) Right to establish an educational institution of its choice on permanent no grant basis, is a fundamental right guaranteed to all the citizens within the meaning of Article 19(1)(g) of the Constitution of India.

(b) That fundamental right, however, cannot be confused with the right to ask for recognition of the School.

(c) The proposals for recognition of the school to be established by the private management on "permanent no grant basis and not receiving any other aid whatsoever" from the Government, will henceforth have to fulfill the conditions specified, amongst others, in Sections 12, 19, 25 read with Schedule of the Act of 2009 and of the Rule 3.2 of the Code (for Secondary/Higher Secondary School) or Rule 107 of the Rules of 1949 (for Primary School), as the case may be, and also in the recognition order itself.

(d) Indeed, it will be open to the State to impose strictest terms and conditions including, interalia, mentioned by us in Paragraph 67 above, fulfillment whereof can be made precondition for grant of recognition and continuation thereof, by the private schools to be established and run on no grant in aid basis and without receiving any other aid whatsoever from the Government. The terms and conditions, however, will have to be reasonable restrictions and in the interests of the general public.

(e) The unaided Schools so established and recognised will be obliged to admit specified percentage of children in the neighbourhood belonging to weaker section and disadvantaged group and provide free and compulsory elementaryeducation to them till its completion, as per the mandate of Section 12(1)(c) of the Act of 2009.

(f) The unaided schools, however, would be entitled only for reimbursement of the expenditure 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, in terms of Section 12(2) of the Act of 2009.

(g) These unaided schools after grant of recognition cannot stake claim for grants in aid, or any other kind of aid from the Government, at a later point of time, as a matter of right.

(h) Initially provisional recognition shall be granted to the unaided private Secondary/Higher Secondary School, if it fulfills the conditions specified in Act of 2009 and Rule 3.2 of the Code for grant of recognition, as provided in Rule 4.1 of the Secondary Schools Code; and recognition shall be granted to unaided private primary school, if it fulfills the conditions specified in Act of 2009 and Rule 107 of the Rules of 1949, as provided in Section 39 of the Act of 1947 read with Rule 107 of the Rules of 1949.

(i) It will be open to the Government to consider to amend the opening part of Rule 107(1) of the Rules of 1949 so as to make it consistent with Section 18 of the Act of 2009 as also to provide for the regime of issuance of provisional recognition to even primary Schools in the first place as per the mechanism provided in Rule 4.1 of the Code.

(j) The preexistence of a perspective plan or inclusion of the location in the perspective plan or School Development Plan, as the case may be, for considering the proposal for recognition of the "private unaided schools" on permanent no grant in aid basis or not receiving any other aid from the Government whatsoever, cannot be a condition precedent.

(k) The perspective plan or School Development Plan will be relevant and ought to be insisted upon only in relation to proposals for establishment of schools on "grant in aid basis or receiving any other aid" from the Government.

(l) The impugned decision of the State reflected in the Government Resolution dated 20th July, 2009 to cancel all the proposals for permission to start "Marathi medium" schools by issuing one executive fiat or blanket order on the premise that such proposals can be considered only after the enforcement of the perspective plan, is illegal and unconstitutional being discriminatory and arbitrary and also suffers from the vice of nonapplication of mind.

(m) We further hold that the provisions of the Secondary Schools Code relating to permission under Rules 2.1 to 2.14 of the Code and Rule 106 of the Rules of 1949 to start a school would apply only to the proposals for establishing a school on "grant in aid basis or receiving any other aid" from the Government. However, even after grant of permission, such School shall not function or run until the grant of recognition, as per Section 18 of the Act of 2009. Only on this interpretation the constitutional validity of the abovesaid provisions and the opening part of Rule 107(1) of the Rules of 1949 can be saved.

(n) We also hold that the State shall forthwith consider the proposals of all the private institutions "for grant of recognition" for Marathi medium School on permanent no grant in aid basis and not receiving any other aid from the Government whatsoever, in the given locality on its own merits and in accordance with law.

(o) That be done expeditiously and the decision so taken be communicated to the concerned Management, in any case, not later than 31st May 2010, so that, if recognition were to be granted, the concerned School can commence at the beginning of the academic year 20102011, from June 2010.

(p) We have also made some broad suggestions in Paragraph 62, as to the factors to be considered and remedial measures taken before finalizing the perspective plan or School Development plan. We hope and trust that the Government would consider the same in right earnest.

(q) We therefore allow all these Petitions on the above terms.

83. Accordingly, Rule is made absolute in all these Petitions on the above terms with no order as to costs. We however, make it clear that the State will have to examine every individual proposal of the concerned private management "for recognition" of Marathi medium school on permanent no grant basis and without receiving any other aid from the Government on its own merits, in accordance with law; and this Judgment is not an expression of opinion either way in relation to the questions to be examined in that behalf including that the proposed terms and conditions to be imposed for grant of recognition by the appropriate Authority are reasonable and in the interests of the general public or otherwise.

84. Ordered accordingly.