

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

WP(C) No. 1070/2022

Reserved on: 27.11.2025
Pronounced on: 28.01.2026
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Whether the operative part or full
judgment is pronounced:Full

1. New Convent High School, Gogji Bagh Srinagar
2. Green Valley Educational Institute Illahi Bagh
3. Dolphin International School Pulwama
4. Oasis Educational Institute Gogji Bagh Srinagar
5. Delhi Public School Budgam
6. Doon International School, HMT Srinagar
7. National Innovations Public School Zainpora

Petitioners

Through: - Mr. NA Beigh Sr. Advocate with
Mr. Mohd. Murshid Rashid Advocate

vs

Union of India and others

...Respondent(s)

Through: - Mr. T.M.Shamsi DSGI with
Ms. Shagufta Maqbool Advocate for
R-1 & 2
Mr. Mohsin Qadri Sr. AAG with
Ms Maha Majeed and
Mr Mohd Younis Hafiz Advocates

CORAM: **HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR. JUSTICE SANJAY PARIHAR JUDGE**

JUDGMENT

Sanjeev Kumar, J

1 This petition, filed by the petitioners-private schools under Article 226 of the Constitution of India, seeks to challenge the following orders:

- (i) Government Order No. S.O. 3466(E) dated 05.10.2020, issued by the Department of Jammu & Kashmir and Ladakh Affairs, Ministry of Home Affairs, Government of India, whereby major amendments were introduced in the *J&K School Education Act, 2002*, as applicable to the Union Territory of Jammu & Kashmir, providing for the constitution of the Committee for Fixation and Regulation of Fee of Private Schools, J&K (FFRC) by inserting Sections 20A to 20J, empowering the Committee to fix and regulate the fee structure of private unaided schools;
- (ii) S.O. No. 177 of 2022 dated 15.04.2022, whereby further amendments have been made to the *J&K School Education Act, 2002*;
- (iii) **Order No. 01-FFRC of 2022 dated 09.03.2022**, issued by the Committee for Fixation and Regulation of Fee of Private Schools, enhancing the transport fee by 12%, which had earlier been fixed by the Committee in October 2019;
- (iv) **Order No. 09-FFRC of 2022 dated 06.10.2022** whereby an increase of 14% has been allowed in the transport/bus fee;
- (v) **S.O. No. 233 of 2022 dated 10.05.2022**, framing the *J&K Private Schools (Fixation, Determination and Regulation of Fee) Rules, 2022*, enabling and empowering the respondent Committee to exercise its powers regarding fixation, determination, and regulation of fees, which the petitioners contend is violative of the law declared by the Hon'ble Supreme Court in *T.M.A. Pai Foundation* and subsequent judgments;

2 Before we advert to the grounds of challenge, a brief look at the factual foundation laid by the petitioners in this petition is necessary.

3 The petitioners-private schools are unaided private educational institutions, duly recognized and registered under law, and managed by their respective Chairmen and duly approved Management Committees. They submit that they impart quality education and have never violated any statutory norms or the law laid down by the Hon'ble Supreme Court regarding fixation, determination, and charging of fees,

including tuition fee, admission fee, and transport charges. Vide Government Order No. SO 3466(E) dated 05.10.2020 and SO 177 of 2022 dated 15.04.2022, the Ministry of Home Affairs introduced major amendments to the Jammu and Kashmir School Education Act, 2002 [“the Act of 2002”], inserting Sections 20-A to 20-J and creating the Committee for Fixation and Regulation of Fee of Private Schools, J&K. Thereafter, the Government issued S.O. 233 of 2022 dated 10.05.2022 framing the Jammu and Kashmir Private Schools (Fixation, Determination and Regulation of Fee) Rules, 2022 [“Rules of 2022”], which prescribe the powers and functions of the Committee under Rules 5, 6, and 7 of the Rules of 2022. According to the petitioners, although the Committee was intended to curb commercialization and profiteering, the amended provisions conferred sweeping powers enabling it to fix, determine, and regulate the fee structure of private schools. The petitioners contend that the functioning of the Committee has been inconsistent and arbitrary sometimes requiring schools to submit proposed fee structures for approval, and at other times unilaterally fixing the fee without any proposal from the schools. They further submit that the Committee has been determining fee without physical verification of factors mandated under the Act, such as location, infrastructure, and administrative expenditure. Consequently, the orders passed by the Committee are alleged to be violative of the Act of 2002 and, therefore, illegal.

4 It is submitted that the Hon’ble Supreme Court and various High Courts have repeatedly emphasized the need to encourage private, particularly unaided, educational institutions. In **T.M.A. Pai**

Foundation v. State of Karnataka, 2002 (8) SCC 481, the Hon'ble Supreme Court has categorically held that an educational institution is established for imparting education of the kind it chooses to provide, and that such institutions must have the freedom to appoint qualified teachers, maintain proper infrastructure, and provide amenities necessary for quality education. The Hon'ble Supreme Court has further observed that better working conditions attract better teachers and that good amenities require substantial financial investment. Therefore, where an institution does not seek Government aid, the determination of its fee structure must necessarily be left to the institution itself. The Court noted that in a competitive educational environment, private unaided institutions must retain autonomy in fixation of fees. The said judgment constitutes binding law under Article 141 of the Constitution. The Hon'ble Supreme Court also held that the earlier decision in *Unnikrishnan, J.P. and ors vs. State of Andhra Pradesh 1993 (1) SCR 594* regarding admission and fee-fixation was incorrect, and that the role of the Government is limited only to preventing profiteering or charging of capitation fees. Any regulatory interference must be minimal, based on evidence, and cannot curtail the autonomy of private unaided schools. In this background, the amendments to the J&K School Education Act, 2002 (Sections 20A–20J), empowering the Committee for Fixation and Regulation of Fee of Private Schools, are unconstitutional, as they directly violate the principles laid down in *T.M.A. Pai Foundation's case* (supra), particularly the freedom to establish and administer an unaided educational institution and to determine its fee structure in accordance with its infrastructure and

expenditure. The functioning of the Committee has, in fact, severely curtailed the petitioners' autonomy by imposing unreasonable restrictions on tuition fee, transport charges, and other components, adversely affecting the ability of schools to maintain infrastructure, pay qualified staff, and impart quality education. The Committee's order dated 09.03.2022 increasing transport fee by only 12%, despite substantial increase in fuel prices, road taxes, and insurance since 2019, shows complete disregard of ground realities. As held in paras 35–36 of **T.M.A. Pai Foundation's case (supra)**, restrictions that make it difficult or impossible for educational institutions to function efficiently cannot be treated as reasonable restrictions under Article 19(6). The impugned amendments and the actions of the Committee thus violate constitutional guarantees and the binding law declared by the Hon'ble Supreme Court, and therefore deserve to be quashed.

5 The respondents have contested the petition by filing their objections/reply affidavits.

6 Having heard learned counsel for the parties and perused the material on record, the following important issues arise for determination in this petition:

(i) Whether the amendment made to the Act of 2002 in terms of S.O. 3466(E) dated 05.10.2020, issued by the Central Government in exercise of powers conferred by Section 96 of the Jammu and Kashmir Reorganisation Act, 2019, violates the mandate of law laid down in *T.M.A. Pai Foundation's case (supra)* and various other judgments rendered by the Supreme Court subsequent thereto;

(ii) Whether a Government officer of the rank of Financial Commissioner of the Union Territory or above can be appointed as Chairperson of the Committee for Fixation and Regulation of Fee of Private Schools [“FFRC”], as prescribed

in Section 20A(2) of the Act of 2002, without doing violence to the judgments rendered by the Supreme Court in the case of **T.M.A. Pai Foundation (supra) and Islamic Academy of Education v. State of Karnataka, AIR 2003 SC 3724**, whereby the State Governments were directed to set up a Committee headed by a retired High Court Judge, to be nominated by the Chief Justice of that State, to approve the fee structure or to propose some other fee which could be charged by a private educational institution;

(iii) Whether the Jammu and Kashmir Education Act, 2002 and the rules framed thereunder, in particular the Jammu and Kashmir Private Schools (Fixation, Determination and Regulation of Fee) Rules, 2022, lay down adequate guidelines for the Committee to determine whether a particular private educational institution is indulging in commercialization and profiteering.

8 The answers to the aforesaid questions and issues would take care of the grievance projected by the petitioners in this petition.

9 It is an undeniable fact that private schools have come to play a significant role in school education in India. Various factors, such as the increasing demand for quality education, the expansion of the middle class, and the perceived inadequacies of the public education system, have contributed to this trend. According to data from the National Sample Survey Office (NSSO), the proportion of children enrolled in private schools in India has been steadily increasing over the years. In 2017–18, the proportion of children studying in private schools was 36.3%, up from 19.3% in 2007–08. This trend is particularly pronounced in urban areas, where a large proportion of children go to private schools. There is an upward trend seen even in rural areas. The failure of the public education system has led to the mushroom growth of private institutions. Unemployed educated youth have taken up this occupation for earning their livelihood. The elements of profit-making and employment generation

involved in establishing private institutions by making substantial investment cannot be ignored. While there may be instances of commercialization of school education and profiteering in urban and semi-urban areas, the same may not be true of small schools established in rural areas by the educated unemployed youth. Private schools in India can broadly be categorized into three types;(i) elite schools catering to the wealthy; (ii) low-cost schools catering to the economically disadvantaged, and, (iii) mid-range schools catering to the middle class. Elite private schools are often affiliated with International Boards and offer curricula oriented towards global standards. On the other hand, low-cost private schools cater to families who cannot afford the high fees charged by elite schools but still wish to provide their children a quality education, which the public school system has failed to deliver. These schools typically offer a basic or primary-level curriculum and are often unregulated. Mid-range private schools fall somewhere in between and cater to the growing middle class. In Jammu and Kashmir, the proportion of children attending private schools is quite high (43.6%) as compared to other States, as is revealed by the Annual Status of Education Report (ASER), 2022.

10 The mushroom growth of private schools in Jammu and Kashmir, like in many other States, is largely as a result of the failure of the public school education system. Private schools have out performed public schools in terms of students' learning outcomes and in providing basic infrastructure such as classrooms, toilets, and drinking water facilities. They have also been found to be more efficient with respect to teacher absenteeism and financial management.

It is, therefore, an undeniable fact that private schools have been providing quality education in the country, whereas the public education system is often criticised for its inefficiencies. Once it is conceded that private education has emerged as a robust alternative to public education, it becomes necessary for the Government to extend support to private institutions, particularly those catering to economically disadvantaged students or offering programmes not available in public institutions. We are not suggesting, even for a moment, that privatisation of education should be done at the cost of public education. Both public and private education systems are necessary to meet the diverse educational needs of a country like India. However, it needs to be borne in mind by the Government that the private education system is not merely supplementing the public education system but is, in fact, on the verge of supplanting it. There is, therefore, a dire need to invest in the public education system and to ensure that the quality of education and infrastructure provided in Government schools matches with the schools in the private sector.

11 Article 41 of the Constitution of India casts an obligation on the State to make effective provision for securing, *inter alia*, the right to education within the limits of its economic capacity. Indian view on education is a mix of decentralised autonomy and government-led provision. Historically, Indian education has been dominated by the Gurukul system, an arrangement where individual schools, or Gurukuls, were run by gurus who taught students matters of religion, spirituality, the arts, sciences, and practical skills. These institutions operated independently, free from any Governmental control, and

formed the primary mode of education in ancient India. This system makes education a proto-private sector activity, in the sense that the kingdom had relatively low levels of oversight into the Gurukuls' operations, and curricula were decided at a school level. Additionally, as tuition, students would have to pay in labour, by maintaining the Gurukul and providing a gurudakshina, a gift, at the end of their tutelage. However, it must be noted that Gurukuls have in the past received high levels of patronage from the State due to their limited profit-making capabilities. The ancient Gurukul system was, by and large, a non-profit activity, and the gurudakshina received by the Gurukuls was hardly sufficient to maintain the Gurukuls and their infrastructure.

12 Understandably, India's historical precedence of values strongly informed the nation's driving ideology enshrined in the Constitution. These have been manifested through the core tenets of socialism, egalitarianism, and secularism. The Republic of India's power is bounded and guided by Fundamental Rights and the Directive Principles of State Policy. The Fundamental Rights in the Indian Constitution are the core set of individual freedoms guaranteed to every citizen, designed to protect personal liberty from State overreach and anchor democracy in individual dignity. The counterbalance comes through the Directive Principles of State Policy, where the State has provision to ensure livelihood, economic opportunity, etc. The Directive Principles of State Policy grant the Government broad flexibility to share economic and social policy across sectors, so long as these actions do not offend the Fundamental Rights. Education is

placed in the Concurrent List under Article 246 of the Constitution. Both the Union and the State Governments have played a role in shaping the public sector's dominance in the funding, regulation, and management of educational institutions across the country. Among the most consequential legislations reflecting this constitutional mandate is the Right to Education Act, a Central Act passed in 2009, where school reservation of 25% seats to disadvantaged sections of society is mandated. The Act is known as the Right of Children to Free and Compulsory Education Act, 2009. Despite all the efforts made by the State and the Central Governments to revitalise the public school system, and the establishment of Kendriya Vidyalayas and Navodaya Vidyalayas across the length and breadth of the country, there has not been a substantial improvement in the beleaguered public school education system. This has necessitated the growth of private schools.

13 Realizing that there is unstoppable growth of the private sector in the field of school education and failure of the public school system to come up to the expectation of the school-going children, the Government of late initiated steps to control and regulate the schools in the private sector. How far it is permissible under the Constitution for the State to control and regulate admission and fee in private unaided education institutions has bothered the Apex Court on a plethora of occasions.

14 Despite the Supreme Court making an effort to answer the above-mentioned question, much has been left unanswered. In the case of **Unni Krishnan J.P and others vs State of Andhra Pradesh, 1993 (1) SCR 594**, the Supreme Court has held that the Constitution of India

guarantees a fundamental right to education to its citizens. Paragraph 196 of the judgment makes interesting reading and is set out below:

“196. Even so, some questions do arise whether cost-based education only means running charges or can it take in capital outlay? Who pays or who can be made to pay for establishment, expansion and improvement/diversification of private educational institutions? Can an individual or body of persons first collect amounts (by whatever name called) from the intending students and with those monies establish an institution- an activity similar to builders of apartments in the cities? How much should the students coming in later years pay? Who should work out the economics of each institution? Any solution evolved has to take into account all these variable factors. But one thing is clear: commercialization of education cannot and should not be permitted. The Parliament as well as State Legislatures have expressed this intention in unmistakable terms. Both in the light of our tradition and from the standpoint of interest of general public, commercialization is positively harmful; it is opposed to public policy. As we shall presently point out, this is one of the reasons for holding that imparting education cannot be trade, business or profession. The question is how to encourage private educational institutions without allowing them to commercialize the education? This is the troublesome question facing the society, the Government and the courts today.”

15 As is apparent from reading of the paragraph (supra), the activity of imparting education was held not a trade, business or profession. The Supreme Court also posed to itself a question as to how to encourage private educational institutions without allowing them to commercialise education. The Supreme Court, in the case of **Modern School vs Union of India, (2004) 5 SCC 583**, in paragraph (4) made reference to a book titled “*Higher Education Law*” (Second Edition) by David Palfreyman and David Warner, wherein the authors have stated that in modern times, all over the world, education is a big business, and that while individuals may derive benefits from an educational charity, the main purpose of charity must be for the benefit of the

public. The Apex Court, however, clarified in paragraph (5) of the judgment that though they are broadly in agreement with the authors, yet they would not like to generalise. It was stated that in the Indian context, there are good schools which run keeping in mind laudable charitable objects.

16 The journey of development of law on the subject under discussion commenced as far back as 1957 when the Supreme Court, in the case of **State of Bombay vs R. M. D. Chamarbaugwala, 1957 SCR 874** held that imparting of school education in the private sector is an activity charitable in nature. It was acknowledged that imparting of education was primarily a State function but owing to its financial constraints, the State may not be in a position to perform its duties. It is, in these circumstances, the function of imparting education has been to a great extent taken over by the citizens themselves.

17 A five-Judge Bench of the Supreme Court in the case of **Unni Krishnan, J.P and ors (supra)** addressed the issue at greater length. The aforesaid judgment threw up a number of ambiguities which made the Supreme Court to constitute a Constitution Bench comprising of eleven Judges to clarify the doubts that had arisen in the case of **Unni Krishnan J.P and others**. In the said case, the Supreme Court was seized of an issue of charging of capitation fee in professional colleges. The Supreme Court formulated a self-financing scheme under which professional institutions were entitled to admit 50 per cent students of their choice as they were self-financing institutions, whereas the rest of the seats were to be filled up by the States. A common entrance test was provided for admission of the students, and

the concept of free seats and payment seats was coined to give effect to the scheme.

18 As stated above, the issue was elaborately considered by an eleven-Judge Bench of the Supreme Court in **T.M.A. Pai Foundation**. The scheme proposed to be formulated in **Unni Krishnan** was held to be an unreasonable restriction within the meaning of Article 19(6) of the Constitution as it resulted in revenue shortfalls making it difficult for educational institutions to function and operate. The Supreme Court held that the right to establish and administer an institution included the right to admit students; the right to set up a reasonable fee structure; the right to constitute a governing body; the right to appoint staff; and the right to take disciplinary action, etc. It was for the first time the concept of education as an occupation, a term used in Article 19(1)(g) of the Constitution, came into existence. Per majority, it was held that Article 19(1)(g) and Article 26 confer rights on all citizens and religious denominations respectively to establish and maintain educational institutions. The Apex Court observed that since providing good amenities to the students in the form of competent teaching faculty and other infrastructure needs money, it would be apt to leave it to the private unaided institutions to determine the scale of fee that can be charged. Reiterating that since education is regarded as charitable, the Government can provide regulations that will ensure excellence in education while preventing commercialization and profiteering by the institutions.

19 The judgment in **T.M.A. Pai Foundation's case** (supra) was interpreted and understood by the Union of India, the State

Governments, and the educational institutions in different perspectives. This led to the constitution of another Constitution Bench of five Judges in **Islamic Academy of Education vs. State of Karnataka, AIR 2003 SC 3724**. The Constitution Bench was constituted to clarify the true import of the law laid down in **T.M.A. Pai Foundation**'s case. One of the primary issues that came up for consideration in the case of **Islamic Academy of Education** (supra) was whether the educational institutions are entitled to fix their own fee structure. It was held that there could be no rigid fee structure to be fixed by the Government. Each institute must have freedom to fix its own fee structure after taking into account the need to generate funds to run the institution and to provide facilities necessary for the benefit of students. The judgment also recognized the need of the institute to generate surplus for the betterment and the growth of educational institutions. It also delineated factors which must inform the fee fixation by providing that fee structure must be fixed keeping in mind the infrastructure and facilities available, investment made, salary paid to the teachers and staff, future plan for expansion and/or betterment of institution, subject to two restrictions, namely non-profiteering and non-charging of capitation fee. It was, thus, held that surplus/profit can be generated by a private educational institution but the same shall always be used for the benefit of that educational institution.

20 With a view to regulating the fee fixation and to prevent profiteering and commercialization of the school education, the Supreme Court directed all the State Governments to set up a Fee Fixation Committee headed by a retired High Court Judge, to be

nominated by the Chief Justice of that State. The Committee headed by a retired High Court Judge nominated by the Chief Justice was tasked to approve fee structure and propose some other fee which could be charged by the institute. The judgment in the case of **Islamic Academy of Education** clearly mandated the constitution of a Committee headed only by a retired Judge of the High Court, to be nominated by the Chief Justice of the State concerned. The Committee was given the mandate to approve or propose fee structure to be charged by the educational institute.

21 The similar question came up for consideration before a three-Judge Bench of the Supreme Court in the case of **Modern School (supra)**, wherein the Supreme Court was confronted with various provisions of the Delhi School Education Act, 1973. The Supreme Court interpreted various provisions of the Delhi School Education Act, 1973 to bring in transparency, accountability, expenditure management and utilisation of savings for capital expenditure/investment without infringement of the autonomy of the institute in the matter of fee fixation. The Supreme Court also gave meaning to the provisions of the Delhi School Education Act to prevent commercialization of education to the extent possible. In a separate judgment written by Justice S.B.Sinha, it was held that while the private educational institutions, in the matter of setting up a reasonable fee structure, may not resort to profiteering, they may take into consideration the need to generate funds to be utilised for betterment and growth of educational institution, the betterment of education in that institution and to provide facilities necessary for the benefit of students. Justice Sinha further said

that the regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure and prevention of maladministration by those in- charge of management.

22 The powers conferred on the Regulatory Committee constituted by the Government of Kerala under the Kerala Education Act, 2006 were examined by the High Court of Kerala in **Lisie Medical and Educational Institutions vs. State of Kerala, 2007 (1) KLT 409**, in which the High Court of Kerala, placing reliance on the decisions of the Supreme Court in the cases of **T.M.A. Pai Foundation, Islamic Academy of Education (supra)** and **P.A. Inamdar & ors vs State of Maharashtra, 2005 (6) SCC 537**, held thus:

(i) The right to establish and administer a private educational institution is a fundamental right, and implicit therein is the right to (a) admit students, (b) set up a reasonable fee structure, (c) constitute a governing body, (d) appoint teaching and non-teaching staff, and (e) take disciplinary action against its employees (**T.M.A. Pai Foundation vs State of Karnataka**).

(ii) The establishment of a private educational institution is an occupation within the meaning of Article 19(1)(g) of the Constitution of India, and therefore a fundamental right, subject only to reasonable restrictions that may be imposed by law under clause (6) thereof.

(iii) Private unaided educational institutions cannot be deprived of their choice in matters, inter alia, of selection of students and fixation of fee, and it is not open to the Government, through legislation or otherwise, to impose any condition for grant of affiliation or recognition which, if permitted, would completely destroy institutional autonomy and the very objective of establishing the institution.

(iv) Private educational institutions may have autonomy in the matter of setting up a reasonable fee structure, but they ought not to resort to profiteering and commercialization of education. While setting up a reasonable fee structure, a

private educational institution needs to generate funds to be utilised for the betterment of education and the growth of the institution. Government regulations must therefore be put in place generally to ensure the maintenance of proper academic standards, atmosphere, and infrastructure, as also to prevent maladministration by the management. The fixation of a rigid fee structure by the Government or a statutory authority appointed by it would be an unacceptable restriction on the right to establish a private educational institution. The private educational institution must enjoy autonomy in its management and administration.

(v) A distinction between the administration of private unaided institutions and Government-aided institutions must be borne in mind. In the latter case, the Government may have a greater say in the matter of fixation of fee, but in the former, maximum autonomy in day-to-day administration must be accorded.

(vi) In the matter of determination of fee structure, unaided educational institutions exercised greater autonomy. Like any other citizen carrying on an occupation, they are entitled to a reasonable surplus for the development of education and expansion of the institution. The doctrine of reasonable surplus, as laid down in **Islamic Academy of Education** (supra), can be given effect to only if institutions make provision out of their investments. Economic forces have a role to play, and therefore institutions have to plan their investments and expenditure in such a manner as to generate some surplus. To put it succinctly, what is forbidden is (a) capitation fee and (b) profiteering. The fee structure of each private unaided educational institution must be determined separately, and there can be no uniform formula in this regard. Factors such as facilities available, infrastructure put in place, age of the institution, investment made, future plans for expansion, and improvement of educational standards are required to be kept in view while determining the fee structure of a particular institution. Each case must be considered by an appropriate Committee, and for that purpose even the books of accounts maintained by the institutions may be examined and, in appropriate cases, audited.

(vii) The determination made by the Fee Fixation Committee constituted by the Government in respect of a school, after taking into consideration the relevant factors, would be binding on the management of the institution.

(viii) Ordinarily, the fee structure fixed by an institution and supported by relevant material should be accepted by the Fee Fixation Committee. The scrutiny should be

confined to examining whether the institution is indulging in profiteering or commercialization of education. If the Committee finds discrepancies in the proposed fee structure or finds it unsupported by relevant material, it must put the institution to notice and afford it an opportunity to explain the deficiencies. For this purpose, the Committee may requisition any material, documentary or otherwise, relied upon by the institution to justify its fee structure. In such cases, the Committee would be required to perform an adjudicatory function to determine whether the fee structure fixed or proposed is commensurate with the relevant factors enumerated hereinabove.

23. We fully concur with the view taken and conclusion drawn by Kerala High court. We, however, would like to make following additions:-

(ix) Since what is prohibited by the law enunciated by Supreme Court is “commercialization” and “profiteering”, as such, it would not be wholly unjustified if the private educational institutions are allowed to derive reasonable profits on the investments made by them in establishing and maintaining the school infrastructure. Such profit, in our, opinion, shall not exceed the commercial rate of interest at the relevant point of time.

(x) Transport fee should, ordinarily, be outside the purview of FFRC, yet, if the same is treated as a fee charged by private educational institutions, it must be determined in association with expert agencies like the Department of Transport and the Department of CAPD, with inputs from concerned PSUs selling and distributing fuel, including the Ministry of Petroleum and Natural Gas.

(xi) The FFRC must lay down regulations providing for the procedure and manner in which cases/proposals of fee submitted by schools shall be picked up for detailed scrutiny, apart from taking up those matters when specific complaints and information with regard to undue profiteering are received from parents’ bodies, individuals, and social activists, etc.

24. Having discussed the legal position on the subject, it is now necessary to analyse the submissions made by the learned Senior Counsel challenging various provisions of the Act of 2002 and the rules

framed thereunder. We shall also be analysing the orders issued by the Fee Fixation Committee regulating the fee structure of the petitioner educational institutions.

25 Learned Senior Counsel appearing for the petitioners would submit that the petitioners are private unaided schools, receiving no financial aid from the Government, and therefore enjoy constitutionally protected autonomy in matters of administration, including fixation of fees. This autonomy, it is submitted, has been consistently recognised by the Hon'ble Supreme Court in the cases of

T.M.A. Pai Foundation, Islamic Academy of Education, P.A. Inamdar, and Modern School (supra). It is contended that the amendments introduced by S.O. 3466(E) dated 05.10.2020 and S.O. No. 177 of 2022, by inserting Sections 20A to 20J in the Act of 2002, confer wide powers upon the Fee Fixation Committee to fix, determine, and regulate the fee structure of private unaided schools. According to the petitioners, such powers amount to direct State control over fee fixation, which is impermissible in law. Learned Senior Counsel would further argue that the Supreme Court has consistently held that the role of the State is limited to preventing profiteering and the charging of capitation fee. The Committee, however, has been travelling beyond its limited role and has unilaterally determined fees, even in the absence of any allegation of profiteering. It is further contended that the functioning of the Committee has been arbitrary and inconsistent. At times, schools are required to submit their proposed fee structures, while on other occasions, the Committee fixes the fee without calling for any proposal or supporting material. Such an approach, it is

submitted, is contrary to the law laid down in the cases of **Islamic Academy of Education** and **Modern School** (supra). Reference is made to the orders dated 09.03.2022 and 06.10.2022, whereby transport fees were enhanced by 12% and 14%, respectively. It is argued that these increases do not reflect the rise in fuel prices, insurance, road taxes, maintenance costs, and staff salaries since 2019. These orders, it is submitted, were passed without any institutional assessment or physical verification.

26 Learned Senior Counsel also challenges Section 20A(2) of the Act of 2002, which provides for appointment of a serving Government officer as Chairperson of the Committee. It is submitted that this provision is contrary to the law laid down in **Islamic Academy of Education**, where the Supreme Court mandated that the Fee Fixation Committee must be headed by a retired High Court Judge nominated by the Chief Justice. Since the Committee performs quasi-judicial functions affecting valuable fundamental rights, its independence from the executive is essential. On these grounds, it is contended that Sections 20A to 20J, the Rules of 2022, and the impugned orders deserve to be quashed as violative of Articles 14 and 19(1)(g) of the Constitution and the binding law declared by the Supreme Court.

27 We have two sets of counter affidavits; one filed by respondent No. 4, i.e., the Committee for Fixation and Regulation of Fee of Private Schools, and the other filed by respondents Nos. 3, 5 and 6. In the counter affidavit filed by respondents Nos. 3, 5 and 6, it is pleaded that although the right to set up a private school is a

fundamental right under Article 19(1) (f) of the Constitution, such right is not absolute and is subject to reasonable restrictions. It is submitted that the Supreme Court has time and again emphasised that imparting of education is not a business or trade but an occupation, and therefore citizens entering such occupation cannot be permitted to commercialise education or indulge in profiteering. It is further submitted that, pursuant to the directions issued by the Supreme Court way back in the year 2003, the erstwhile State of Jammu and Kashmir constituted a Committee headed by a retired High Court Judge in exercise of its executive power. The Central Government, with a view to carrying forward the mandate of the Supreme Court in an effective manner and to ensure implementation of its directions in the Union Territory of Jammu and Kashmir, made amendments to the Act of 2002 by issuing the Union Territory of Jammu and Kashmir Reorganisation (Adoption of State Laws) Third Order, 2020 issued vide S.O. 3466(E) dated 05.10.2020, which is assailed by the petitioners in the present petition. It is in terms of the amendment carried out to the Act of 2002 by inserting Sections 20A to 20J, a statutory framework for fee fixation was constituted. The FFRC, a statutory body headed by a retired Judge of the High Court as its Chairperson, was entrusted with the overseeing duty of fixation. It is, thus, argued that the primary and fundamental object of carrying out the amendments impugned in this petition was to give effect to the directions passed by the Supreme Court, with a view to preventing commercialisation and profiteering in education. The FFRC is a statutory body tasked to fulfil the mandate of the directions of the Supreme Court and to ensure that private educational institutions

do not indulge in commercialisation and profiteering in education. Placing reliance upon the decision in **Modern Education** (supra), it is contended that the principles laid down in **T.M.A. Pai Foundation's** case and **Islamic Academy Education's** case (supra) were enunciated in the absence of any statute operating in the field. Since the Act of 2002, as amended, and the rules framed thereunder operate in the field, this Court may not impose any other or further instructions by travelling beyond the scope, object and purport thereof, as is sought to be impressed upon by the petitioners. It is thus argued that although private educational institutions may have autonomy to propose their fee structure, keeping in view the relevant factors enumerated in the Rules, the same cannot be given effect to unless it is approved by the FFRC, which is a statutory body constituted to oversee the fee fixation of private schools so as to prevent commercialisation and profiteering in education.

28. To the similar effect is the counter affidavit filed on behalf of the FFRC. Referring to paragraph 213 of the judgment passed by the Supreme Court in **Islamic Academy of Education**, it is argued on behalf of the FFRC that it is the statutory duty of every educational institution to place before it, well in advance of the academic year, its proposed fee structure along with all relevant documents and books of accounts for scrutiny. It is for the FFRC to determine whether the fee proposed by a particular institution is fair and justified and does not amount to profiteering or commercialisation of education. The FFRC has further been empowered to approve the fee structure as proposed by the institution or to propose some other fee which can be charged by

the institution. The fee so fixed by the FFRC shall be binding upon the institution for a period of three years. There is, of course, a provision providing liberty to the educational institution to apply for revision after the end of three years. The orders passed by the FFRC have been justified on the ground that the same have been issued in exercise of powers conferred by Section 20E (1) of the Act of 2002 (as amended) read with the Rules framed thereunder and, therefore, cannot be put to challenge, particularly on the grounds urged on behalf of the petitioners. It is further submitted that the FFRC, vide order dated 09.03.2022, allowed private schools a 20% hike on the fee of October 2019 in the winter zone and February 2020 in the summer zone as an interim relief. The said order was challenged by the Private Schools Association in WP(C) No. 555/2022 titled *Private Schools Association Jammu and Kashmir v. Union Territory of Jammu and Kashmir and others* and by the J&K Unaided Private Schools Coordination Committee in WP(C) No. 531/2022 titled *J&K Unaided Private Schools Coordination Committee v. Union Territory of Jammu and Kashmir and others*. A Division Bench of this Court, vide orders dated 28.03.2022 and 21.05.2022, disposed of both the writ petitions with a direction to the FFRC to consider the matter and take a final decision thereon most expeditiously after affording an opportunity of being heard to the petitioners. All the stakeholders were heard and their feedback and suggestions were considered by the FFRC in detail and, accordingly, vide order dated 06.10.2022, the transportation fee was fixed. Instead of complying with the orders of the FFRC regarding transportation fee, the petitioners are now before this Court to challenge

the FFRC order dated 06.10.2022, supra, without any good ground or justification. While concluding, it is submitted on behalf of the FFRC that pursuant to the order of this Court dated 04.10.2023, the petitioners have approached the FFRC and have been heard in detail. It is submitted that the matter is under consideration with the FFRC and needs to be decided after involving the Transport Department in the matter. The Transport Department has already been approached seeking guidance so that the issues are determined to the satisfaction of all concerned.

29 Having regard to the rival stands of the parties, and in order to appreciate the controversy in the right perspective, it is necessary to advert to the statutory framework in place in the Union Territory of Jammu and Kashmir for fixation, determination and regulation of school fees of private educational institutions.

The J&K School Education Act 2002:

30. The Act of 2002 was enacted by the erstwhile State of Jammu and Kashmir in the year 2002 to provide for achieving the goal of universalisation of elementary education and to provide for better organisation and development of school education in the State of Jammu and Kashmir. In terms of S.O. 3466(E) dated 05.10.2020, the Act has been adopted by the Union Territory of Jammu and Kashmir with certain modifications, as detailed in Item No. 3 of the Schedule appended to the aforesaid S.O. The Act of 2002, as it stood prior to the amendments made in terms of S.O. 3466(E) of 2020, dealt, inter alia, with the establishment and running of private schools. It provided for

recognition of private schools; management of private schools; permission for starting new classes and their recognition in private schools; de-recognition of private schools; and the conditions of service of staff in private schools etc. There was, however, no provision made for the constitution of any statutory or non-statutory body to oversee the fixation and regulation of fees of private schools. The direction to constitute such Committees for determination, fixation and regulation of fees by private educational institutions was issued by the Supreme Court on 14.08.2003 in its judgment passed in *Islamic Academy of Education*.

31 With a view to giving effect to the judgment passed by the Supreme Court, the erstwhile State of Jammu and Kashmir regulated the fees of private educational institutions permitted to be established and recognised by the Government by constituting a non-statutory committee by way of an executive order. However, with the promulgation of the Jammu and Kashmir Reorganisation Act, 2019, and the formation of the Union Territory of Jammu and Kashmir, the Act of 2002 was amended and Sections 20A to 20J were inserted so as to lay down a complete statutory structure for determination and regulation of fees by private schools. Sections 20A to 20J, the vires whereof have been challenged by the petitioners, read thus:

“20A. Constitution of Fee Fixation and Regulation Committee of private schools. —(1) The Government shall constitute a Committee to be known as the Committee for Fixation and Regulation of Fee of Private Schools for the purposes of regulating and determining the fee in private schools in the Union territory.

(2) The Committee shall be headed by a Chairperson who has been a Judge of a High Court or a Government Officer who has been a Financial Commissioner of the Union territory or above.

(3) The members of the Committee shall be such as may be prescribed by the Government.

(4) The Chairperson may co-opt any other independent person of repute or a representative of a recognised School Association as an expert member, but the total number of members of the Committee shall not exceed five.

20B. Term of office and other conditions of service of Chairperson.— The term of office and other conditions of service of the Chairperson of the Committee for Fixation and Regulation of Fee of Private Schools shall be such as may be prescribed by the Government.

20C. Powers and functions of committee. —(1) Subject to the provisions of this Act or any other law for the time being in force, the Committee for Fixation and Regulation of Fee of Private Schools shall exercise such powers and perform such functions as may be prescribed by the Government to ensure that the private schools are not indulging in commercialisation of education and undue profiteering.

(2) The Government may by notification, delegate any of the powers vested in the Committee for Fixation and Regulation of Fee of Private Schools to the Chairperson of the said Committee, to the extent as may be prescribed.

(3) Orders passed by the Committee for Fixation and Regulation of Fee of Private Schools shall be deemed to have been duly passed by a public servant and its violation or non-compliance shall amount to disobedience under the provisions of section 188 of Indian Penal Code (45 of 1860).

20D. Determination of fee. —(1)The Committee for Fixation and Regulation of Fee of Private Schools shall while determining the fee to be charged by the private schools established after August, 2014 take into account inter alia the location, available infrastructure, expenditure on administration, aid, assistance and support in any form received by the private school

from the Government or any other person or agency or any other factors as may be prescribed.

(2) The Committee for Fixation and Regulation of Fee of Private Schools may from time to time issue notification for fixing maximum ceiling of the fee to be charged under various categories.

20E. Fee to be charged by private schools.— The private schools shall not charge any fee from the students or guardians, except tuition fee, annual fee, transport fee and voluntary special purpose fee such as the picnic, tour and excursions, etc. completely voluntary in nature or any other fee as may be approved by the Committee for Fixation and Regulation of Fee of Private Schools after following the procedure prescribed :

Provided that private schools shall not charge in any manner, any other fee including admission fee or any amount, by whatever name called than the fee mentioned above.

20F. Power to call for records.— The Committee for Fixation and Regulation of Fee of Private Schools may at any stage call the record of any school for scrutiny if it comes to the conclusion that the private school has violated or is not adhering to its directions.

20G. Staff of Committee. —(1) The Committee for Fixation and Regulation of Fee of Private Schools shall, for the purpose of assisting it in the discharge of its functions, be provided by the Government, such officers and employees as may be determined from time to time by the Government, in consultation with the Chairperson of the Committee.

(2) All establishment charges of the Committee for Fixation and Regulation of Fee of Private Schools shall be borne by the Government.

(3) The terms and conditions of service of the officers and employees referred to in sub-section (1) shall be such as may be determined by the Government, from time to time.

(4) In the discharge of their functions under this Act, the officers and employees referred to in sub-section (1) shall be subject to the exclusive administrative control and direction of the Committee.

20H. Sub-committees.— The Government may constitute such other subcommittees at Divisional or Districts level with such powers and functions as it may deem fit to effectively regulate the fee in private schools.

20-I. Power to make regulations.— The Committee for Fixation and Regulation of Fee of Private Schools may, by notification, make such regulations as it may deem necessary for carrying out the purpose of the said Committee.

20J. Power of Civil court.— The Committee for Fixation and Regulation of Fee of Private Schools shall for the purposes of making any inquiry or initiating any proceedings under this Act, have the same powers as are vested in a Civil Court, under the Code of Civil Procedure, 1908(5 of 1908).]”

32. Section 20A deals with the constitution of the FFRC. The Government has been empowered to constitute the FFRC for the Union Territory of Jammu and Kashmir, headed by a Chairperson who has been a Judge of a High Court or a Government Officer who has been a Financial Commissioner of the Union Territory or above. It is this provision which has been seriously assailed by the petitioners on the ground that not only does the provision for appointment of a Government Officer of the rank of Financial Commissioner or above as Chairperson of the Committee militate against the mandate of the judgments rendered in *Islamic Academy of Education and Modern School*, but it also confers powers of a quasi-judicial nature on the executive.

33. Section 20B relates to the term of office and other conditions of service of the Chairperson. Section 20C defines the powers and functions of the FFRC and provides that the FFRC shall exercise such powers and perform such functions as may be prescribed

by the Government to ensure that private schools are not indulging in commercialisation of education and undue profiteering. The powers to be exercised and functions to be performed by the FFRC are delineated elaborately in the Private Schools (Fixation, Determination and Regulation of Fee) Rules, 2022, to which we shall advert a little later. Section 20D pertains to determination of fee and lays down certain factors to be taken into account while determining the fixation of school fees, viz., location, available infrastructure, expenditure on administration, aid, assistance and support in any form received by the private school from the Government or any other person or agency, or any other factors as may be prescribed. The FFRC has also been conferred the power to fix the maximum ceiling of the fee to be charged by private schools under various categories by issuing a notification. The factors indicated in Section 20D are only illustrative and there could be many more that may be prescribed by the Government. The Fee Fixation Rules of 2022 enumerate various factors to be taken into consideration by the FFRC for determining the fair fixation of school fees. Section 20E indicates the nature of fees that can be charged by private schools from their students or guardians. It provides that no private school shall charge any fee except tuition fee, annual fee, transport fee and voluntary special purpose fees such as for picnics, tours and excursions, etc., which are completely voluntary in nature, or any other fee as may be approved by the FFRC. Private schools are completely debarred from charging, in any manner, any other fee, including admission fee or any amount, by whatever name called, other than the aforementioned fees.

34 Section 20F deals with the power to call for records from private schools whose fee structure is under scrutiny. Section 20G deals with the staff of the FFRC. Section 20H deals with the constitution of Sub-Committees. Section 20-I pertains to the power of the FFRC to make regulations for regulating its own working and for carrying out the purposes of the FFRC. Section 20J pertains to the powers of a Civil Court and provides that, for the purposes of making any inquiry or initiating any proceedings under the Act, the FFRC shall have the requisite powers as are vested in a Civil Court under the Code of Civil Procedure, 1908.

The Private Schools (Fixation, Determination and Regulation of fee) Rules, 2022.

35. As noticed hereinabove, the Government, in exercise of the powers conferred by Section 29 read with Sections 20A, 20B and 20C of the Act of 2002, has issued the Fee Fixation Rules, 2022. Rule 3 thereof deals with the composition of the Committee and reads as under:

“Composition of the Committee.

- (1) The Committee constituted under Section 20A of the Act, shall consist of:-
 - (a) a Chairperson who has been a Judge of a High Court or a Government Officer who has been a Financial Commissioner of the Union Territory of Jammu and Kashmir or above;
 - (b) Administrative Secretary to Government School Education Department-Member Secretary;
 - (c) A representative of the Jammu and Kashmir Board of School Education not below the rank of Secretary-Member;

- (d) Director of School Education Kashmir/Jammu- Member by rotation as per the Headquarter of the Committee;
- (e) The Chairperson may co-opt any other independent person of repute or a representative of a recognized School Association as an expert member, but the total number of members of committee shall not exceed five.
- (f) If any vacancy accrues due to non availability of a member, it will be filled by the Government.
- (g) Any member who has been co-opted/nominated shall draw such remuneration and allowance such as TA/DA as is admissible to the Government Servants of the rank of Class-I Officers, under the prevalent rules;
- (h) No act or proceeding of the committee shall be invalid by reason only of the existence of any vacancy in, or any defect in, the constitution of the Committee”.

36. Apart from the Chairperson, who could be either a retired Judge of the High Court or a Government Officer who has held the rank of Financial Commissioner or above in the Union Territory of Jammu and Kashmir, the Administrative Secretary to the Government, School Education Department, and the Director, School Education, Kashmir/Jammu, are the Members of the Committee. The Chairperson, as provided in Section 20A, has been authorised to co-opt any other independent person of repute or a representative of a recognised School Association as an expert member, with the further stipulation that the total number of members of the Committee shall not exceed five. Rule 4 of the Fee Fixation Rules of 2022 deals with the term of office and other conditions of service of the Chairperson, which may not be relevant for our present purpose. Rule 5 defines the powers and functions of the FFRC and is, therefore, important in the context of the controversy raised in this petition. It reads as under:

“Rule - 5. Powers and functions of the Committee.

- (1) The Powers of the Committee shall be;
 - (a) To fix, determine and regulate the fee to be charged and collected by a private school;
 - (b) To hear complaints with regard to the charging and collection of fee in excess of the fee determined by it. If the Committee, after obtaining the material comes to the conclusion that the Private School has charged and collected fee in excess of the fee fixed, determined and regulated by the Committee, it shall recommend to the appropriate authority for the cancellation of the recognition or registration of the Private School or for any other course of action as it deems fit in respect of the Private School. Any such recommendation made by the Committee shall be implemented by the appropriate authority within a reasonable time as per procedure laid down;
 - (c) Require each Private School to place before the Committee the proposed fee structure of such school with all relevant documents and books of accounts for scrutiny within such date as may be specified by the Committee;
 - (d) Obtain from the Private School any such information as may be required by it for the examination of the fee structure of the Institution;
 - (e) Verify whether the fee proposed by the Private School is justified and it does not amount to profiteering or commercialisation of education;
 - (f) Approve the fee structure or fix and determine some other fee that can be charged by the Private School;
 - (g) Verify whether the fee collected by the Private School affiliated to the affiliating body commensurate with the standard of education and other related facilities provided by the Private School;
 - (h) To recommend the appropriate authority for disaffiliation of the Private School, if it comes to a conclusion that the private school has charged and collected highly excessive fee;
 - (i) The Committee shall have the power to regulate its own procedure in all matters arising out of the discharge of its functions, and shall for the purpose of making any inquiry under these rules, have all the powers of a Civil Court under the Code of Civil

Procedure, 1977 while trying a suit, in general, and in particular in respect of the following matters, namely:

- (a) Summoning and enforcing the attendance of any witness and examining him on oath;
- (b) The discovery and production of any document;
- (c) The receipt of evidence on affidavits;
- (d) The issuing of any commission for the examination of a witness.
- (j) The Committee shall, on fixing and determining the fee leviable by a Private School, communicate its decision to the Private School concerned.
- (k) The Committee shall indicate the different heads under which the fees shall be levied".

37. As is evident, the power conferred upon the FFRC is to fix, determine and regulate the fee to be charged and collected by private schools, and the fee means any fee as defined in Section 20E. Interestingly, the transport fee is part of the fee as defined in Section 20E. As is evident from clause (e) of sub-rule (1) of Rule 5, the task of the FFRC is to determine whether the fee proposed by a private school is justified and does not amount to profiteering or commercialisation of education. The FFRC has been conferred the power to regulate its own procedure in all matters arising out of the discharge of its functions and, besides, it shall have the powers under the Code of Civil Procedure for the purpose of making any inquiry under the Rules. Rule 6 deals with fixation, determination and regulation of fee, and Rule 7 details the factors to be taken into consideration for determining such fee. Rules 6 and 7 are also important for our purpose and are, therefore, set out hereinbelow:

Rule - 6. Fixation, Determination and regulation of Fee.

- (a) The Committee shall fix and determine the fee for each Private School separately as per the procedure mentioned in these rules.
- (b) The fee fixed and determined by the Committee having regard to relevant factors shall be binding on the Private School;
- (c) The fee fixed and determined by the Committee shall be valid for a period of three (03) years. However, in case a school seeks any modification in the fee structure fixed and determined by the Committee within the prescribed time period, it shall apply to the Committee for the same.

Rule - 7. Factors for determination of Fee.

The Committee, shall, while determining the fee leviable by a Private School, in addition to the factors specified in Sub-Section (1) of Section 20D of the Act, also take into account, the following factors, namely :

- (i) The location of the Private School;
- (ii) The available infrastructure;
- (iii) The expenditure on administration and maintenance;
- (iv) The reasonable surplus required for the growth and development of the Private School;
- (v) Performance of the Private School;
- (vi) Grant-in-aid received by the Private School;
- (vii) Availability of modern technology and appliance thereof;
- (viii) Any other fact as may be prescribed by the Committee.
- (ix) The locality of the Private School, namely, Rural area, Town Panchayat, Municipality, District Headquarters, Corporation.
- (x) Strength of the students;
- (xi) Classes of study;
- (xii) results of students achieved;
- (xiii) Status of the Private School, as indicated below :
 - (a) Private Schools having minimum infrastructure facilities as prescribed by the Government from time to time;

- (b) Private Schools having infrastructure facilities more than that prescribed
 - (i) Private Schools having more than the minimum requirement of the lab, a greater number of library books, classroom facilities, and other sanitary and drinking water facilities or any other facility;
 - (ii) Private School having more than adequate classroom facilities, lab facilities, library area, number of books, very good sanitation facilities, highly protected drinking water facilities, and other sanitary facilities together with a high percentage of results;
 - (iii) Private Schools are fully equipped with modern facilities like Air Conditioner/Centrally heating, smart classes or any other facility".

38 Rule 6 mandates that the Committee shall have regard to the relevant factors for determination and fixation of school fee, and these factors are enumerated in Rule 7. There are other allied Rules which are framed to ensure the smooth exercise of powers and performance of functions by the FFRC and are not of much relevance for our present purpose and, therefore, are not reproduced hereunder. This is the entire statutory structure in place in the Union Territory of Jammu and Kashmir which regulates the charging of fees of various types by private schools.

39. From a conjoint reading of Sections 20A to 20J of the Act of 2002, as amended vide S.O. 3466(E) of 2020, and the Fee Fixation Rules, 2022, one thing that emerges from the core of the entire statutory structure is that the primary and fundamental object of creation of a statutory body like the FFRC is to ensure that private schools do not indulge in profiteering and commercialisation of

education. As held by the Supreme Court in *Unni Krishnan's* case (supra), the citizens of this country have a fundamental right to education. The said right, though flowing from Article 21 of the Constitution, is not an absolute right. Its parameters have to be determined in the light of Articles 41 and 45 of the Constitution. In other words, every child/citizen has a right to free education until he completes 14 years. Thereafter, his right to education is subject to the limits of the economic capacity and development of the State. The obligations created by Articles 41, 45 and 21 of the Constitution can be discharged by the State by establishing institutions of its own or by recognising and/or granting affiliation to private educational institutions. A citizen of this country may have a right to establish an educational institution, but no citizen or educational institution has a right, much less a fundamental right, to seek recognition or grant-in-aid from the Government. Such recognition and affiliation shall be granted by the State subject only to the conditions laid down by the Government. It is in this background that it can be said that though the right to establish a private educational institution is a fundamental right guaranteed under Article 19(1)(g), yet such right is subject to reasonable restrictions and can be regulated by the State by an Act of the Legislature. It is only with a view to providing such regulation that the Act of 2002 was enacted by the erstwhile State of Jammu and Kashmir, which has been adopted by the Union Territory with the modifications discussed hereinabove.

40. We have already discussed the judgments of the Supreme Court rendered from time to time, wherein it is now well settled that the

establishment of a private educational institution is not a trade or business but an occupation within the meaning of Article 19(1)(g) of the Constitution. It would not be appropriate to say that the establishment of a private educational institution is purely and entirely a charitable activity. We cannot ignore ground realities and live in a hallucination. The establishment of a private educational institution is undoubtedly an occupation pursued by citizens by investing their money, time and labour, and it would be like living in a fool's paradise to think that such citizens, who have invested their life and property to raise an educational institution, are doing so only for the sake of charity.

41. There could be some societies or trusts engaged in the charitable activity of imparting education to the poor and have-nots who can ill afford to receive good education from private educational institutions. We also cannot remain oblivious of the fact that the public education system in the Union Territory has virtually collapsed and, in any case, is not coming up to the expectations of the citizens. Even the poorest of the poor longs to send his children to private schools with the hope that they would get better education which may help them come out of poverty. There may be some sincere efforts made by the Government to revamp the public education system, but such efforts are not showing any visible results on the ground. We must, therefore, live in reality, and the reality is that the private education system, which was envisaged to supplement the educational needs of the citizens, has virtually come to supplant the public education system. It is thus high time that the Government should change its mindset and

promote and strengthen private schools by forbearing from interfering or causing unnecessary interference in their functioning. The Supreme Court has already permitted educational institutions to collect fees in a manner that generates sufficient surplus annually to expand infrastructure and provide better facilities. It is high time the Government also recognises the right of a person who has made huge investments in terms of money and time to raise a private educational institution without any support from the Government to derive reasonable profits. After all, the establishment of these private educational institutions, particularly in rural areas, has become a source of employment for unemployed educated youth. In this background, we wish to say that the Government needs to have a fresh look at the working of private schools and, of course, concentrate through the FFRC to ensure that there is no undue profiteering and commercialisation of education. We appreciate the terminology used in Section 20C(1), namely, “commercialisation of education” and “undue profiteering”.

42 Having regard to the nature of the activity, the imparting of education is, we believe that undue profiteering and fleecing of students in the name of different kinds of fees should not be permitted. The term “profiteering” does not mean that educational institutions must be run on a no-profit, no-loss basis. Profiteering is a practice of making or seeking to make an excessive or unfair profit. The term “profiteering”, as defined in the Cambridge Dictionary, means the act of taking advantage of a situation in order to make a profit, usually by charging high prices for things people need. Merriam-Webster defines

‘profiteering’ as an act or activity of making an unreasonable profit on the sale of essential goods, especially during an emergency. ‘Commercialisation’ refers to managing an activity on a business basis for profit. The terms “commercialisation” and “profiteering”, as used by the Supreme Court, need to be read together. What is prohibited by law, as laid down by the Supreme Court, is treating the activity of imparting education as a business conducted only with a view to making profits. The expression “profiteering” used by the Supreme Court is intended to ensure that students seeking admission in private schools for better education are not fleeced or exploited by charging excessive and exorbitant fees under different nomenclatures. Read together, commercialisation and profiteering do not completely rule out the element of creating surplus for future activities or earning reasonable returns on the investments made by an individual or educational agency permitted by the State to establish an educational institution. It is in this background that we need to understand the powers and functions of the FFRC.

43. From an understanding of the law laid down by the Supreme Court and the statutory framework put in place by the respondents, we have no hesitation in holding that the FFRC, though empowered to ensure that private educational institutions do not indulge in commercialisation and profiteering of school education, should not enter into extensive scrutiny of the fee structure proposed by every educational institution. There are more than 5,000 private educational institutions, and it would be difficult, if not impossible, to get into the details of the fee structure proposed by each one of them.

The FFRC needs to devise some rational mode to pick up only a few cases, particularly pertaining to big educational institutions established in urban areas, for in-depth scrutiny to determine whether such schools are indulging in commercialisation and profiteering of education. The other schools could be those where the FFRC receives specific complaints from parents' bodies or individuals with regard to profiteering and unacceptable practices by them. The Act of 2002 and the Fee Fixation Rules framed thereunder provide sufficient guidelines for the FFRC to determine whether a particular fee structure proposed by a school amounts to commercialisation and undue profiteering of education.

44 Apart from the factors detailed in Rule 5, the FFRC can also classify schools into village schools, sub-urban schools, semi-urban schools and urban schools. One of the key factors to be taken into consideration by the FFRC is the location of the school. Although we do not find any clear guidelines or yardstick put in place in the statutory framework which would enable the FFRC to come to a just conclusion as to whether a particular fee structure proposed by a private educational institution amounts to commercialisation and profiteering of education, yet a leeway must be given to private educational institutions in the matter of proposing their fee structure. In the absence of proper guidelines and a uniform or adequate yardstick, it would be just and fair for the FFRC to examine the fee structure proposed by a private school under scrutiny in the light of the infrastructure and other facilities provided by such institution, as also the factors enumerated in Rule 5 of the Fee Rules, 2022. It is only where the conscience of the

FFRC is shocked by the nature and magnitude of the fee proposed that it should interfere; otherwise, it should ordinarily accept the fee structure.

45 We cannot forget that even the activity of establishing a private educational institution, which has been termed by the Supreme Court as an occupation, has become highly competitive in nature, and citizens have a choice to go to a school of their choice, subject, of course, to their paying capacity. They are not necessarily compelled to seek education from private educational institutions and are well within their right to go to Government schools. The compulsion of citizens to go to private schools is not created by private schools but is the doing of the Government, which has failed to deliver through its public education system.

46 Understood in the manner explained above, Sections 20A to 20J cannot be said to render the amendments carried out to the Act of 2002 vide S.O. 3466(E) of 2020 unconstitutional or contrary to the mandate of law laid down by the Supreme Court in its judgments from time to time, including *T.M.A. Pai Foundation and Islamic Academy of Education*. We, however, find that Section 20A, insofar as it provides that the Chairperson of the FFRC shall be a retired Judge of the High Court or a retired Government Officer of the rank of Financial Commissioner or above in the Union Territory of Jammu and Kashmir, is against the mandate of the judgment rendered by the Supreme Court in *Islamic Academy of Education and Modern School* (supra). It cannot be disputed by the respondents that the amendments carried out to the Act of 2002 by insertion of Sections 20A to 20J in terms of S.O.

3466(E) of 2020 are with a view to giving effect to the law laid down by the Supreme Court and to put in place a statutory mechanism for ensuring prevention of commercialisation and profiteering of education. The Supreme Court, having regard to the nature of the controversy and the type of functions to be performed by the FFRC, clearly laid down that the FFRC shall be headed by a retired Judge of the High Court to be nominated by the Chief Justice. This direction could not have been tweaked, much less twisted, to carve out a role for a retired person who has held the office of Financial Commissioner or above in the Union Territory. Sub-section (2) of Section 20A is admittedly not in consonance with the judgment passed by the Supreme Court and, therefore, cannot be allowed to remain on the statute book. Learned counsel for respondents Nos. 1 and 2 has virtually conceded this position during the course of arguments and, therefore, they shall do well to substitute sub-section (2) of Section 20A by providing as under:

“The Committee shall be headed by a Chairperson who has been a Judge of the High Court, to be nominated by the Chief Justice of the High Court of Jammu and Kashmir and Ladakh.”

This precisely answers the questions framed in paragraph 7 of the judgment hereinabove.

47. This brings us to the challenge laid by the petitioners to the order of the FFRC dated 06.10.2022, which provides for a hike of transport fee only by 14%. The FFRC, in its reply affidavit, has clearly stated that it is already seized of the matter and that a decision on the grievance of the petitioners with regard to fixation of transport fee shall

be taken after taking the Transport Department on board and providing adequate opportunity of hearing to all stakeholders. In view of the aforesaid statement made by the FFRC in its counter affidavit, there is hardly any need to go into this question raised by learned counsel for the petitioners. Suffice it to say that providing transport facilities to students is not a mandatory requirement for the establishment of a private educational institution. Neither recognition nor affiliation of an institution is linked to the requirement of providing transport by private institutions to their students. Transportation is an additional facility provided by schools for the convenience of students and their parents/guardians. It is always optional for students either to avail of school transport or to reach the school on their own. In the absence of any mandatory requirement to use school transport, in our considered opinion, transport charges levied by private schools from students who avail of school transport should not ordinarily form part of the fee charged by private schools from their students. Nonetheless, the fee as defined in Section 20E includes transport fee as well. Without entering into the debate as to whether transport charges should be treated as a fee to be regulated by the FFRC, we hasten to observe that, to begin with, the FFRC shall constitute a Committee which must, inter alia, comprise the Commissioner/Secretary to the Government, Transport Department, and the Commissioner/Secretary to the Government, Consumer Affairs and Public Distribution, to examine the issue and make recommendations for laying down broad guidelines for fixation of transport fees to be charged by private educational institutions. Such fees, once fixed for each school in terms of the aforesaid guidelines,

can be periodically revised as and when public transport fares are increased by the Government, keeping in view the rise in fuel prices and other relevant factors.

48. We hope and trust that the FFRC shall immediately constitute a Committee in the manner aforesaid for the purpose described above and proceed with fixation of transport fees to be charged by each school as per the guidelines proposed by such Committee and accepted, with or without modification, by the FFRC. Till this exercise is undertaken and transport fee is fixed in the manner aforesaid, the decision of the FFRC taken in consultation with the representatives of the Private Schools Association, J&K, and the J&K Unaided Private Schools Coordination Committee and translated into action vide order No. 09 of the FFRC dated 06.10.2022 shall regulate the transport fee/charges to be levied by private educational institutions in the Union Territory of Jammu and Kashmir.

49. The conclusions referred to in paragraphs 22 and 23 shall be kept in view by the FFRC while approving, disapproving, or suggesting the fee structure for a particular educational institution.

50. Before parting, we wish to implore the Government of the Union Territory of Jammu and Kashmir to give a fresh look to the Fee Fixation Regulations, 2022 so as to bring them in tune with the observations made in this judgment. It would be highly appreciated if proper parameters and adequate guidelines are laid down to ensure that a uniform yardstick is applied by the FFRC to determine the school fee of private schools, undue profiteering is put on a bridle, and at the same

time genuine private schools, particularly those established by uneducated youth in rural areas, are not stifled by undue and uncalled-for interference on the pretext of fee determination. It is high time to hold and clarify that the jurisdiction of all authorities of the State/UT with respect to matters which squarely fall within the jurisdiction of the FFRC is completely excluded. Complaints of overcharging of school fee, including transport fee, etc., should be left to be taken cognizance of by the FFRC, and this is the mandate of law as well.

51. The writ petition is, accordingly, disposed of in the above terms.

(SANJAY PARIHAR) (SANJEEV KUMAR)
JUDGE JUDGE

Whether the order is speaking: Yes
Whether the order is reportable: Yes

Jammu
Sanjeev
28.01.2026