CJ & NRJ: W.P. No.8168/2020 and connected matters

08.07.2020
(Through Video Conferencing)

ORDER

We have extensively heard the learned counsel appearing for the parties.

2. We issue Rule.

3. The learned Government Advocate takes notice.

4. Now we proceed to consider the prayers made in this group of writ petitions for grant of interim relief. Before we record the submissions in brief, few factual aspects will have to be noted. In substance, the challenge in these writ petitions is to the decision of the Government of Karnataka to impose a ban/restriction of online education imparted by the schools to the children of various age groups.

5. From the factual aspects and the documents placed on record, it appears that all this started from the letter

dated 19th May, 2020 addressed by the Director and Senior Professor of Psychiatry of the National Institute of Mental Health and Neurosciences (for short "NIMHANS") to the Commissioner of Department of Public Instructions. The said letter was addressed by the Director as his opinion was sought by the Commissioner of the Department of Public Instructions by his letter of 18th May, 2020. In the said letter, the Director of NIMHANS firstly stated that there is a need to implement formal education in the schools through online mode due to the lockdown situation. Secondly, he observed that there should be an awareness of the ill effects of the system, in particular, on the children in the age group of 3 to 6 years. It records an opinion that usage of the electronic screen should be less in case of the children of this age group and according to World Health Organization, children below the age of 6 years should use the screens only for a period which is less than 1 to 1½ hours. Thirdly, it is mentioned that the usage of electronic gadgets may lead to adverse effects and many children do not know the proper usage of such gadgets. It is observed that the

overall school education of the children should be started in the age group of 3 to 6 years, after the lockdown is completely lifted and online education should not be used as an alternative for formal education.

6. The second development which is relevant for our consideration is a meeting convened on 2nd June, 2020 under the Chairmanship of the Commissioner, Department of Public Instructions which was attended by some of the Government Officers, representatives of NIMHANS, Principal of a school and the representatives of some of the Organizations. Certain decisions were taken in the meeting which are recorded in the minutes.

7. The third development which is relevant is a note dated 11th June, 2020 signed by the Hon'ble Minister for Primary and Secondary Education of Karnataka Government. The note refers to a meeting held on 10th June 2020 and records that it is directed to initiate reformative measures for adopting online teaching for primary and secondary education

system in the State. It records that the schools following any syllabus shall not conduct online classes from LKG to Class V and the guidelines should be framed for adapting online classes for Classes VI to X.

8. We may note here that during the course of submissions made yesterday, the learned Advocate General on a query made by the Court stated that the note dated 11th June, 2020, is not an order made by the Hon'ble Minister.

9. As far as the meeting dated 10th June 2020 is concerned, it was chaired by the same Hon'ble Minister. The minutes of the meeting record that the meeting was held to discuss the issue of starting online classes for the students in the wake of COVID-19 situation in the State. In the minutes of the meeting which are placed on record by the learned Additional Government Advocate on 6th July 2020, the names of the persons participating in the meeting have not been specifically mentioned. However, the minutes record that the senior officials of the Department, experts in the field of

education and representatives of NIMHANS were present. Certain decisions taken in the meeting have been recorded. Ultimately, it is stated that it was decided to form a Committee of ten members headed by Dr.M.K.Sridhar, a member of a Committee constituted for formulating National Education Policy and an expert in the field of education.

10. In some of the petitions as originally filed, the challenge was only to the note dated 11th June, 2020 signed by the Hon'ble Minister on the footing that it was an order made by the Hon'ble Minister. However, the State Government placed on record a copy of the order dated 15th June, 2020 which became a subject matter of challenge in these petitions.

11. The order of the State Government dated 15th June, 2020 refers to two documents. The first is the proceedings of the meeting convened by the Commissioner of the Department of Public Instructions on 2nd June, 2020. The second document is the note signed by the Hon'ble Minister on 11th June, 2020. The gist of the order can be summarized as under:

(a) In exercise of the powers under Section 7 of the Karnataka Education Act, 1983 (for short "the said Act, 1983"), it is directed that the schools following the State syllabus as well as the syllabus of Indian Council of Secondary Education (ICSE) or the Central Board of Secondary Education (CBSE) or the National syllabus shall not conduct online/offline teaching courses/classes for the students of LKG to Class V till further guidelines are issued by the Government;

(b) The schools which have already commenced online teaching for LKG to Class V shall suspend the online teaching with immediate effect;

(c) All Government/Aided/Unaided institutions are directed not to collect any fee in the guise of online teaching;

(d) A Committee has been constituted for framing guidelines on scientific and age specific adaptation of online education from Classes VI to X headed by Dr.M.K.Sridhar, a Member of the Committee for formulating National Education Policy. We may note here that the constitution of the Committee is the same as what is mentioned in the minutes of the meeting dated 10th June 2020; and

(e) The Committee shall formulate guidelines for the conduct of scientific online classes from Classes VI to X.

12. Thus, the order dated 15th June, 2020 passed by the Government of Karnataka had the effect of directing discontinuation of online education conducted by the schools for LKG to Class V. In fact, a direction was issued to stop the conduct online/offline teaching for the said age group till the guidelines are issued by the Government. However, the

Committee which was appointed under the said order for framing guidelines was not empowered to deal with the online education for LKG to Class V and the scope of the Committee was confined to online education for Classes VI to X.

13. We may note here that on 26th June, 2020, when this group of petitions came up before the Court, this Court observed that the Court expected the State Government to come up with an interim solution immediately. Thereafter, there were two orders issued on 27th June, 2020 by the State Government.

14. The first order of 27th June, 2020 is material and therefore, we reproduce the English translation of the same, which reads thus:

> "Government Order No.EP 139 PGC 2020,
> Bengaluru, Dated: 27.06.2020
>
> In view of the points elaborated in the proposal, guidelines issued regarding digital education by the Ministry of Human Resource Development, Government of India, **it is ordered that all the schools from LKG to 10th standard following the state syllabus and any other such as**

ICSE/CBSE/International syllabi have to follow the below mentioned approaches during online education.

Pre-Primary	**On any one day of the week, for interacting solely with parents and guiding them, not more than 30 minutes**
1 to 5	**Online synchronous learning may be undertaken for not more than 2 sessions of 30-45 minutes (maximum 3 days in a week) on alternative days.**
6 to 8	**Online synchronous learning may be undertaken for not more than 2 sessions of 30-45 minutes for 5 days in a week**
9 to 10	**Online synchronous learning may be undertaken for not more than 4 sessions of 30-45 minutes for 5 days in a week**

This system will be in place until the issue of the final guidelines from the State Government based on the report submitted by the expert committee appointed by the Government to develop an approach to online education. **The guidelines of Digital Education as in PRAGYATA issued by the Ministry of Human Resource Development, Government of India should be followed.** As there is a need to provide online education as supplementary to formal education in view of Covid 19 pandemic, no extra fees can be charged. The cost for this has to be borne from the regular annual tuition fee."

(emphasis added)

15. The guidelines issued by the Ministry of Human Resources Development of the Government of India under the name and style of "*Pragya Guidelines"* have been placed on record. Thus, the order dated 27th June, 2020 totally prevents

the conduct of online education for pre-primary section and imposes an embargo on conducting online learning for Classes I to X. Though the order dated 15th June, 2020 did not impose any restrictions at all on conducting online education for Classes VI to X, the order dated 27th June, 2020 imposes a restriction on conduct of online classes for Classes VI to X as well. The second order of the same date is for amending the order dated 15th June, 2020 for the purposes of empowering the Committee already appointed to make recommendations even as regards Classes LKG to V.

16. Essentially there are three challenges in this group of writ petitions. The first one is to the note dated 11th June, 2020 signed by the Hon'ble Minister, the second is to the order dated 15th June, 2020 passed by the State Government and the third is to the first order of 27th June, 2020 imposing an embargo on the conduct of online classes.

17. As we are not deciding the petitions finally but considering the prayers for interim relief, we may only briefly

summarize the submissions made by the learned counsel for the parties.

18. The first submission is that the order dated 15th June, 2020 has been passed in purported exercise of powers under Section 7 of the said Act of 1983 and that Section 7 does not confer any such power to put an embargo on the conduct of online classes on the State Government. The second submission is that in view of clause (iii-a) of sub-section (3) of Section 1 of the said Act of 1983, except for Sections 5-A, 48, 112-A and 124-A, the other provisions of the said Act of 1983 will not apply to educational institutions affiliated to or recognized by ICSE or CBSE. Therefore, the submission was that these two categories of schools are completely excluded from the purview of the applicability of the said Act of 1983 and the four sections which are applicable to the said category of schools do not confer power on the State Government to do what the State Government has done. It was also submitted that even assuming that the State Government has any power

to take the action which it has taken, the same can be done only by taking recourse to the rule making power under clause (xxxiv) of sub-section (2) of Section 145 of the said Act of 1983. It was also pointed out that any such rules framed by the State Government must be in accordance with sub-sections (3) and (4) of Section 145. It was submitted that there is a complete absence of the statutory power vesting in the State Government to restrict or to ban online education in the schools.

19. Another limb of the argument canvassed on behalf of the petitioners is based on the fundamental rights conferred by Articles 21 and 21A of the Constitution of India. It was submitted that the right to education is an essential part of the right to life conferred under Article 21 and in any event, Article 21A confers a right to education on the children belonging to the age group of 6 to 14 years. Another argument canvassed was that the impugned action infringes the fundamental rights guaranteed under Article 19 of the Constitution of India, particularly clause 1(a) thereof.

20. It was pointed out that in other parts of the nation, online education has been permitted. It was pointed out that as far as the schools governed by CBSE syllabus are concerned, in other states, online education has been permitted and therefore, the action of putting restrictions or embargo on online education conducted by CBSE schools in the State amounts to violation of the fundamental rights conferred by Article 14 of the Constitution of India.

21. Our attention was invited to the order dated 29th June, 2020 passed by the Chairman of the National Executive Committee in exercise of the powers under clause (l) of sub-section (2) of Section 10 of the Disaster Management Act, 2005 (for short, "the said Act of 2005") and in particular, the guidelines forming a part of the said order which are styled as *GUIDELINES FOR PHASED REOPENING (UNLOCK 2.0)*. Relying upon clause (1), it was submitted that al the schools will remain closed till 31st July, 2020 and in fact, sub-clause (i) of clause (1) specifically lays down that online/distance learning

shall continue to be permitted and shall be encouraged. It was submitted that the guidelines constitute the directions of the National Executive Committee under the provisions of the said Act of 2005 and therefore, the said directives continue to bind all the concerned including the State Government.

22. Our attention was invited to several documents on record, some of which have been annexed to W.P. No.8463 of 2020, such as Uninterrupted Learning (Online) post COVID-19. Our attention was invited to World Bank Education Global Practice on Remote Learning in the context of COVID-19. Our attention was invited to UNESCO's COVID-19 Education Response as well as the guidelines issued by UNESCO (United Nations Educational, Social and Cultural Organization). Our attention was invited to various other documents including the guidelines which are followed world over in IB schools (International Baccalaureate schools) for conducting online education.

23. We may note here that out of the petitions which were heard yesterday, W.P. No.8419 of 2020, 8422 of 2020 and 8463 of 2020 have been filed by the schools in which parents/parents'-teachers' associations are also petitioners. The rest of the petitions have been filed by the parents themselves and in some cases, on behalf of their wards. When we made a query to the learned senior counsel for the petitioners in W.P. Nos.8419 of 2020 and 8421 of 2020 whether the petitioners (school authorities) are charging any extra fees for conducting online classes or whether online classes have been made compulsory to all the students enrolled in the schools, his response was that extra amount is not being charged to the students for providing the facility of online education and that online education is not made compulsory. He further submitted that the managements of the schools will ensure that in case of students who do not opt to undergo online training, proper coaching will be imparted after the commencement of regular classes to ensure that they do not suffer in academics.

24. There are various decisions relied upon by the learned counsel for the parties. We are referring to the relevant decisions in the subsequent part of our order.

25. The learned Advocate General firstly submitted that no one should be under the impression that the State Government is interested in opposing online education. He submitted that the orders dated 15th June, 2020 and 27th June, 2020 are in the nature of interim measures, as the Committee of experts appointed by the State Government under the order dated 15th June, 2020 is in the process of submitting its recommendations. He submitted that the State Government will take an appropriate decision after the Committee submits its recommendations.

26. The learned Advocate General submitted that both the impugned orders have been passed taking into consideration the safety of the children in the light of the opinion expressed by the experts from NIMHANS. He submitted that Sections 5-A, 48 and 112-A of the said Act of 1983 are

applicable to all the categories of schools. He submitted by relying on Section 5A, that every educational institution is under an obligation to take such measures as to ensure the safety and security of the students. He placed reliance on a decision of the Apex Court in the case of **AVINASH MEHROTRA .v. UNION OF INDIA AND OTHERS[1].** Relying on the said decision, he submitted that the safety of the students is also a very important aspect which will have to be borne in mind while the Court considers the fundamental rights guaranteed under Article 21 of the Constitution of India. He submitted that the State Government cannot compromise on the safety of students, especially when the experts in the field have given opinion about the harmful effects caused to children due to exposure to the screens.

27. The learned Advocate General pointed out that these petitions relate to elite category of schools. In fact, he pointed out that there are 44 lakh students enrolled in the Government

[1] (2009) 6 SCC 398

schools and about 13.50 lakh students in private aided schools. He submitted that when the issue of the rights of the students under Articles 21 and 21A of the Constitution are considered, the same will have to be considered in the light of the fact that this Court is not dealing with the issue of majority of the students who are studying in Government schools and private aided schools.

28. The learned Advocate General urged that assuming that both the impugned orders cannot be supported by the said Act of 1983, the same are executive orders passed in exercise of the powers under Article 162 of the Constitution concerning subjects of education and public health in respect of which the State Government has a power to legislate. He would submit that the action of the State Government will have to be tested on the touchstone of reasonableness and proportionality. He placed reliance on a well-known decision of the Apex Court in the case of **STATE OF MADRAS .v. V.G.ROW[2].** He invited

[2] AIR 1952 SC 196

our attention to the order dated 27th June, 2020 and submitted that this order permits online education to be conducted for Classes I to X and this order imposes restrictions which are very reasonable by exercising the powers under Article 162 of the Constitution of India. He submitted that the report of the expert committee is awaited and shortly, a decision will be taken by the State Government based on the report of the expert committee. He pointed out various other factual aspects which are on record.

29. The submissions of the learned Advocate General are countered by the learned counsel for the parties by relying on the factual aspects and decisions of the Apex Court. It was submitted that the impugned orders do not stand the test of Article 162 of the Constitution and in any case, by executive orders, the fundamental rights cannot be taken away.

30. We have considered the submissions canvassed across the Bar. Firstly, we will deal with the submissions made regarding the fundamental rights guaranteed by Articles 21 and

21A of the Constitution of India. Article 21A was inserted by the Constitution (86th Amendment) Act, 2002 with effect from 1st April, 2010. However, way back in the year 1984, in a well-known decision of the Apex Court in the case of **BANDHUA MUKTI MORCHA v. UNION OF INDIA AND OTHERS**[3], the Apex Court recognized the right to education and the right to educational facilities as a facet of the fundamental right conferred by Article 21 of the Constitution.

31. In the case of **UNNIKRISHNAN, J.P. AND OTHERS v. STATE OF ANDHRA PRADESH AND OTHERS**[4], in paragraph 166, the Apex Court held thus:

> *"166. In Bandhua Mukti Morcha[27] this court held that the right to life guaranteed by Article 21 does take in "educational facilities". (The relevant portion has been quoted hereinbefore).* ***Having regard to the fundamental significance of education to the life of an individual and the nation, and adopting the reasoning and logic adopted in the earlier decisions of this Court referred to hereinbefore, we hold, agreeing with the statement in Bandhua Mukti Morcha[27] that right to education is implicit in and flows***

[3] (1984) 3 SCC 161
[4] (1993) 1 SCC 645

from the right to life guaranteed by Article 21. *That the right to education has been treated as one of transcendental importance in the life of an individual has recognised not only in this country since thousands of years, but all over the world. In Mohini Jain[1] the importance of education has been duly and rightly stressed. The relevant observations have already been set out in para 7 hereinbefore.* ***In particular, we agree with the observation that without education being provided to the citizens of this country, the objectives set forth in the Preamble to the Constitution cannot be achieved. The Constitution would fail.*** *We do not think that the importance of education could have been better emphasised than in the above words. The importance of education was emphasised in the 'Neethishatakam' by Bhartruhari (First Century B.C.) in the following words:*

"Translation:

Education is the special manifestation of man;

Education is the treasure which can be preserved without the fear of loss;

Education secures material pleasure, happiness and fame;

Education is the teacher of the teacher;

Education is God incarnate;

Education secures honour at the hands of the State, not money.

A man without education is equal to animal."

(emphasis added)

Thus, in no uncertain terms, the Apex Court held that the right to education is implicit in and it flows from the rights guaranteed under Article 21 of the Constitution. On this aspect, we may also make a reference to a decision relied upon by the learned Advocate General. That is in the case of AVINASH MEHROTRA (supra). Even in the said decision, the Apex Court has referred to the decision in the case of UNNIKRISHNAN AND OTHERS (supra). Paragraphs 28 to 32 of the said decision read thus:

> *"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 Unnikrishnan J.P. & Others v. State of Andhra Pradesh & 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 (SCC p.664, para 8)*
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> > *"8. The immortal Poet Valluvar whose Tirukkural will surpass all ages and transcend all religious said of education:*

'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. & 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 & 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, (Bandha Mukti Morcha v. Union of

> *India (1997) 10 SCC 549). These conclusions all follow from our opinion in Unni Krishnan.*
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> *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."***
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> (emphasis added)

In the subsequent paragraphs, and in particular, paragraph 34, the Apex Court has reiterated the existence of the said fundamental right. Apart from Article 21, now we have Article 21A of the Constitution, which confers a fundamental right on the children belonging to the age group of 6 to 14 years to have free and compulsory education.

32. A similar statutory right is created under the Right of Children to Free and Compulsory Education Act, 2009 (for short, "the said Act of 2009"). The right created by the said Act of 2009 is found in sub-section (1) of Section 3. In fact, it is expressly stated in sub-section (1) that free and compulsory education must be provided in a neighborhood school till the completion of his/her elementary education.

33. Before we go into the question whether the power under Section 7 of the said Act of 1983 could have been exercised by the State Government for passing the impugned orders, we must deal with the submission made by the learned Advocate General that the orders dated 15th June, 2020 and 27th June, 2020 are executive orders governing the field of education and public health in the State in exercise of the powers under Article 162 of the Constitution of India. Now, the question is whether the fundamental rights conferred under Articles 21 and 21A of the Constitution can be curtailed by an executive order. At this stage, we are not entering into the question whether both the orders can be said to be executive orders under Article 162 of the Constitution. One of the reasons why even the said position is doubtful is that it is not clear whether the executive orders have been issued after the approval of the Council of Ministers.

34. In the case of **BISHAMBHAR DAYAL CHANDRA MOHAN AND OTHERS v. STATE OF UTTAR PRADESH**

AND OTHERS[5], the Apex Court was dealing with an issue whether the State Government by taking recourse to the executive powers of the State under Article 162 of the Constitution can deprive a person of his property. This issue was considered in the context of the constitutional right available under Article 300A of the Constitution. In paragraph 41, the Apex Court has dealt with the said issue. The said paragraph 41 reads thus:

> *"41.* ***There still remains the question whether the seizure of wheat amounts to deprivation of property without the authority of law. Article 300A provides that no person shall be deprived of his property save by authority of law. The State Government cannot while taking recourse to the executive power of the State under Article 162, deprive a person of his property. Such power can be exercised only by authority of law and not by a mere executive fiat or order. Article 162, as is clear from the opening words, is subject to other provisions of the Constitution. It is, therefore, necessarily subject to Article 300A. The word 'law' in the context of Article 300A must mean an Act of Parliament or of a State Legislature, a rule, or a statutory order; having the force of law, that is positive or State made law.*** *The decisions in Wazir Chand v.*

[5] (1982) 1 SCC 39

> *The State of Himachal Pradesh and Bishan Das and others v. The State of Punjab and others are an authority for the proposition that an illegal seizure amounts to deprivation of property without the authority of law. In Wazir Chand's case (supra), the police in India seized goods in possession of the petitioner in India at the instance of the police of the State of Jammu and Kashmir. The seizure was admittedly not under the authority of law, inasmuch as it was not under the orders of any Magistrate; nor was it under sections 51, 96, 98 and 165 of the Code of Criminal Procedure, 1898, since no report of any offence committed by the petitioner was made to the police in India, and the Indian police were not authorised to make any investigation. In those circumstances, the Court held that the seizure was not with the authority of law and amounted to an infringement of the fundamental right under Article 31(1). This view was reaffirmed in Bishan Das's case[7]."*
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> (emphasis added)

35. Thus, even the constitutional right under Article 300A cannot be taken away by executive orders. As far as the executive orders are concerned, there is another relevant decision in the case of **P.H.PAUL MANOJ PANDIAN VS. P.VELDURAI**[6]. The Apex Court in the said decision has laid down that an executive order passed in exercise of the powers

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[6] (2011) 5 SCC 214

under Article 162 of the Constitution should not be repugnant to any enactment and the provisions of the Constitution of India. Paragraph 47 lays down the law on this aspect which reads thus:

> *"47. Once a law occupies the field, it will not be open to the State Government in exercise of its executive power under Article 162 of the Constitution to prescribe in the same field by an executive order. However, it is well recognized that in matters relating to a particular subject in absence of any parliamentary legislation on the said subject, the State Government has the jurisdiction to act and to make executive orders. The executive power of the State would, in the absence of legislation, extend to making rules or orders regulating the action of the executive.* ***But, such orders cannot offend enactment of the appropriate legislature.*** *Subject to these limitations, such rules or orders may relate to matters of policy, may make classification and may determine the conditions of eligibility for receiving any advantage, privilege or aid from the State."*

36. When we are on this issue, useful reference will have to be made to the decision of the Apex Court in the case of **GULF GOANS HOTELS COMPANY LIMITED AND**

ANOTHER .v. UNION OF INDIA AND OTHERS[7]. The Apex Court has dealt with the issue in what manner the executive order under Article 162 of the Constitution can be issued. In paragraph 24, the Apex Court held thus:

> *"24. It will not be necessary to notice the long line of decisions reiterating the aforesaid view. So far as the mode of publication is concerned, it has been consistently held by this Court that such mode must be as prescribed by the statute. In the event the statute does not contain any prescription and even under the subordinate legislation there is silence in the matter, the legislation will take effect only when it is published through the customarily recognized official channel, namely, the official gazette (B.K. Srinivasan vs. State of Karnataka) [(1987) 1 SCC 658]. Admittedly, the "guidelines" were not gazetted."*

37. In this case, both the aforesaid impugned orders have not been gazetted. Now we turn to the effect of the orders dated 15th June, 2020 and 27th June, 2020. The effect of the order dated 15th June, 2020 is that it completely prohibits the conduct of online teaching for LKG to Class V till further guidelines are issued by the Government. Though the said

[7] (2014) 10 SCC 673

order completely seeks to prohibit online teaching for LKG to Class V, the Committee appointed under the said order was for framing guidelines for the conduct of online education only for Classes VI to X. Perhaps, the petitions proceed on the footing that the note of the Hon'ble Minister of 11th June, 2020 is an order which completely prohibits the conduct of online classes in the schools. However, now the learned Advocate General has clarified that it is only a note drawn by the Hon'ble Minister and it is not an order.

38. Now coming to the order dated 27th June, 2020 issued during the pendency of these petitions, it is based on the observations made by this Court in the order dated 26th June, 2020. When the said order of this was passed, an impression was created that the note dated 11th June, 2020 signed by the Hon'ble Minister is an order. Therefore, the order dated 26th June, 2020 refers to the decision of the Government as a blanket decision and records that the Court expects the State Government to come out with an interim solution immediately.

What was expected of the Government was to consider and take a decision of permitting online education which may be limited to a few hours. Now the admitted position which emerges is that till 27th June, 2020, there was no embargo imposed by the State Government to conduct online education for Classes VI to X. Surprisingly, that embargo came for the first time during the pendency of these petitions, by the order dated 27th June, 2020. The order provides that for Classes VI to VIII, online learning may be undertaken for not more than two sessions of 30-45 minutes for five days in a week, and for Classes IX and X, it provides that online learning may be undertaken for not more than four sessions of 30-45 minutes for five days in a week. The order permits online education for Classes I to V for not more than two sessions of 30-45 minutes for only three days in a week.

39. It is very difficult to understand what prompted the State Government to impose the restrictions or to put restraints on conducting online education for Classes VI to X, when no

such curbs or restrictions were in force even under the order dated 15th June, 2020. Under the order dated 27th June, 2020, a complete prohibition was imposed on any kind of online education for pre-primary sections by providing that on any one day in a week, there could be an interaction only with the parents for not more than 30 minutes.

40. In the order dated 27th June, 2020, there is a specific reference to the order of this Court dated 26th June, 2020 and the Government Order dated 15th June, 2020. *Prima facie*, it appears to be very strange to us as to why the State Government came out with the embargo in terms of time limit of 30 minutes even on the interaction with the parents of children in the pre-primary section. The order says that on any one of the week days, there can be interaction solely with the parents for guiding them for not more than 30 minutes. The order dated 27th June, 2020 permits limited online learning for Classes I to V for not more than two sessions of 30 to 45 minutes (maximum of three days in a week) on alternate days.

41. The conclusion which can be drawn from the above discussion is that the right to have online education for pre-primary section was completely taken away and several restrictions were imposed for online learning for Classes I to V and Classes VI to X. Therefore, there is no difficulty in recording a *prima facie* finding that both the orders encroach upon the fundamental rights conferred on the students by Articles 21 and 21A of the Constitution of India. We must note here that under the order dated 29th June, 2020 issued by the Chairman, National Executive Committee in exercise of the powers under clause (l) of sub-section (2) of Section 10 of the said Act of 2005, there is a complete prohibition on the running of schools till 31st July, 2020. The same order provides that online education should not only be continued but should be encouraged. This order, *prima facie,* binds the State Government in view of Section 72 of the said Act of 2005.

42. There cannot be any dispute that the normal academic term of all the schools has already commenced. But

the schools cannot be opened. Therefore, the only way available for imparting education to the school children is providing the facility of online coaching or online training and that is how, *prima facie*, we are of the view that both the said orders violate the fundamental rights conferred by Articles 21 and 21A of the Constitution. The fundamental rights cannot be taken away or curtailed by issuing executive orders. For example, in view of the order dated 27th June, 2020, online education of the children in Classes I to V will remain confined to a maximum of 90 minutes in a day, that too, for a maximum of three days in a week. Online education of children belonging to Classes VI to VIII will be of a maximum of one-and-a-half hours for five days in a week. This has to be appreciated in the context of sub-clause (1) of clause (i) of the guidelines dated 29th June, 2020 issued under the order of the same date which direct that the schools shall remain closed till 31st July, 2020 and therefore, online/distance learning shall be permitted to be continued and shall be encouraged.

43. *Prima facie*, it appears to us that both the orders do not encourage online training during the period when the schools are ordered to be kept closed. The State Government derived support for passing the order dated 27th June, 2020 from *Pragyata Guidelines For Digital Education* (for short, "the said Guidelines") issued by the Department of School Education and Literacy, Ministry of Human Resources Development, Government of India. The learned Additional Government Advocate, on our query, clarified that these guidelines were issued on 23rd June, 2020. In fact, we find from the order dated 27th June, 2020 that the embargo/restrictions are copied and pasted from clause 3.1.3 of the said Guidelines. We may also note that the said Guidelines were issued on 23rd June, 2020 and thereafter, there is an order made on 29th June, 2020 under the said Act of 2005 which requires that online learning shall be encouraged.

44. We have perused the said Guidelines. As can be seen from the name, the same are Guidelines. The same do not have force of law so that it could take away or put curbs on

the fundamental rights under Articles 21 and 21A. We are not reproducing what is stated in clause 3.1.3 as the same finds place *verbatim* in the impugned order dated 27th June 2020. However, if some other parts of the Guidelines are perused, *prima facie,* it becomes apparent that the intention of the framers of the Guidelines was not to prohibit online education for pre-schools. On the contrary, clause 3.1.5 having heading "Specific Guidelines Related to Preschool, Grades 1 and 2" provides that joyful learning experiences for digital/online learning as is done for face-to-face learning should be planned. It also provides that occasionally brief and casual meetings with the parents and children through video conferencing should be arranged. Clause 5.3 of the Guidelines has heading "Scheduling". It lays down that time schedules for digital programmes may be planned keeping in mind that there may be more than one child in the family and availability of digital gadgets may be limited. It provides that live/ broadcasting and screen time must be level specific with regard to the physical and mental health of the learner. However, each session

should not exceed 45 minutes. Further, it provides that live classes will be scheduled on the weekdays only. If the said Guidelines are read as a whole, the same are not intended to put any curbs or any embargo on imparting online training for pre-schools especially when there is a complete ban on running all schools till 31st July 2020.

45. Going back to the order dated 27th June 2020, we find that it seeks to rely upon three documents. First is the order dated 15th June 2020 which does not impose any embargo on conducting online classes for Classes VI to X. The second document relied upon is the order of this Court dated 26th June 2020 and the third document is *PRAGYATA GUIDELINES*. The State Government cannot derive support from any of the three documents for passing the order of 27th June 2020. For the sake of completion, we may note that there was a second order passed on 27th June 2020 which corrects the order dated 15th June 2020 which has the effect of adding LKG to Class V in the scope of the Committee appointed under

the order dated 15th June 2020. Apart from the fact that *prima facie* there is no rational basis pointed out to the Court for passing the orders on 15th June 2020 and 27th June 2020 in so far as the same imposes curbs/ban on online education, we are of the view that assuming that both the orders are issued in exercise of the powers under Article 162 of the Constitution of India, the same cannot curtail the fundamental rights conferred by Articles 21 and 21A of the Constitution of India.

46. As the order dated 15th June 2020 is purportedly passed in exercise of the powers under Section 7 of the said Act of 1983 and as the order dated 27th June 2020 is passed in furtherance of the order dated 15th June 2020, it is necessary to make a reference to the provisions of the said Act of 1983. As noted earlier, except for Sections 5-A, 48, 112-A and 124-A, no other provisions of the said Act of 1983 is applicable to the educational institutions affiliated to or recognized by ICSE or CBSE. As far as Section 5-A is concerned, it is enacted to ensure that every educational institution shall take such

measures to ensure safety and security of students including protection from sexual offences, in the manner as may be prescribed.

47. The learned Advocate General relied upon a decision of the Apex Court in the case of AVINASH MEHROTRA (supra) which lays down that the right to education also includes the right to safe education. Even assuming for the sake of argument that Section 5-A can be invoked, there is no material available on record to show that online education has caused any harm to the children. Perhaps, the State Government has placed reliance on the letter dated 19th May 2020 of the Director of NIMHANS. We have already made a reference to what is stated in the said letter. We may note here that in the first paragraph of the said letter, reliance is placed on what is suggested by the World Health Organization. It is stated that the children under the age of 3 should have education on screen for less than 1 to 1½ hours. Even the said opinion does not say that online

education in a limited form to students in the age group of 3 to 6 years is harmful. Therefore, it is difficult for the State to derive support from the said letter.

48. It is true that in the meeting convened on 2nd June 2020 by the Commissioner, representatives of NIMHANS were present. However, there is no categorical considered opinion placed before us which can support the action of the State Government of completely banning online education up to Class I. It is true that a Committee has been appointed under order dated 15th June 2020 and the said Committee may look into this aspect. However, the decision to appoint a Committee to look into this aspect is no ground to impose ban or curbs**.** Assuming that the State Government has a power to impose restrictions, the action of imposing the same before receiving the report of the Committee is *prima facie* arbitrary**.** Section 5-A of the said Act of 1983 will not help the State Government in any manner. Section 5-A does not confer a power on the State to issue a general direction for imposing embargo or ban. The

violation of Section 5-A will result in initiating penal action under Section 112-A. Section 48 which is applicable to all categories of schools has nothing to do with online education. It deals with fees. The other two sections which are applicable to all category of schools are penal provisions for violation of Sections 5-A and 48 of the said Act of 1983. Now, we come to Section 7 which confers a power on the Government to prescribe curricula subject to such Rules as may be prescribed. Thus, the exercise of the said power to prescribe curricula is subject to the Rules which may be framed in exercise of the powers under Section 145. At highest, the State could have taken recourse to the rule making power by invoking clause (xxxiv) of sub-section (2) of Section 145 providing for putting restrictions on online education, but admittedly the such rule making power has not been exercised by the State. But we must add here that we are not concluding the issue whether the power under clause (xxxiv) can be used to frame rules for restricting online education. On a plain reading of Section 7, it is impossible to accept that the impugned orders could have

been validly Issued by exercising power under the said provision which confers a limited power to prescribe curricula. In fact, apart from Section 5-A and Section 7, no other provision of the said Act of 1983 is relied upon to support the correctness or legality of both the impugned orders. Therefore, *prima facie* we are of the view that the impugned orders are not issued in exercise of any statutory power. By enacting a law, reasonable restrictions could have been imposed on exercise of fundamental rights under Articles 21 and 21A of the Constitution, but the said Act of 1983 cannot be a law which permits the State Government to do that.

49. An argument was canvassed on behalf of the State that the schools which are before the Court belong to the category of 'Elite' schools and that the parents who have approached the Court also belong to a particular class, in the sense that their wards are the enrolled students of alleged 'Elite' schools.

50. As per the order dated 29th June 2020, all the schools whether Government or fully aided or otherwise in the State are closed till 31st July 2020. Considering the situation created by the pandemic which exist today, there is not even a reasonable expectation that after 31st July 2020, there will be immediate resumption of normal functioning of the schools. In fact, going by the rights conferred by Articles 21 and 21A of the Constitution of India, the State will be under an obligation to ensure that the students who are not enrolled in the so called 'Elite' schools and especially the schools run by the Government are not deprived of their right to education. In fact, the State Government will have to take appropriate steps to create an infrastructure by which the facility of online education can be extended even to students in rural areas. The State may consider of using the medium of television for that purpose so that the students at grass root level are not deprived of their right to education. The fact that the State Government is not able to extend the facility of online education to certain

categories of schools is no ground to say that even the so called 'Elite' schools should not provide online education.

51. Several arguments have been canvassed in support of the petitions on facts that even private institutions, for a fee, are extending online education. It is also argued that in different states, CBSE schools are allowed to impart education. At this stage, we are not concerned with all these factual aspects as the only issue before us is whether *prima facie,* the impugned orders dated 15th June 2020 and 27th June 2020 are lawful. It is not for the writ Court to decide in what manner online education should be imparted to the students. The schools will have to take a call with the help of experts. Suffice it to say that *prima facie,* both the orders do not stand the test of legality.

52. The State Government has appointed a Committee of Experts under the order dated 15th June 2020 and the terms of reference of the said Committee have been expanded by the second order dated 27th June 2020. It is not necessary for us

to interfere with that part of the order as there is nothing wrong if the Government constitutes a Committee of experts so that the opinion of the experts is available to the State Government for the decision making process.

53. For the reasons which we have recorded above, we pass the following interim order:

(i) As it is clarified that the note dated 11th June 2020 signed by the Hon`ble Minister is not an order, it is not necessary for us to pass any interim relief as regards the said note;

(ii) As regards the orders dated 15th June 2020 and 27th June 2020, that part of the said orders which impose a ban/embargo/restriction on the conduct of online classes/online coaching by the schools for the students of LKG to Class X will remain stayed;

(iii) While we pass this interim order, we make it clear that this order shall not be construed to mean that

the authorities of the school have a right to make online education compulsory or have a right to charge extra fee for conducting online classes. Our order should not be construed to mean that the students who do not opt for online training or online classes conducted by the schools should be deprived of their normal education. As and when the schools are in a position to start the normal academic session, the schools will have to ensure that the students who have not opted for online education do not suffer:

(iv) We clarify that till the disposal of the petitions, the directions issued in the order dated 15th June 2020 of imposing complete prohibition on online teaching for LKG to Class V will remain stayed;

(v) The order dated 27th June 2020 in so far as it prohibits conducting of online coaching/classes for pre-primary section will remain stayed. The said order in so far as it imposes restrictions/curbs on

conducting online learning classes from Class I to Class X will remain stayed;

(vi) We grant time of four weeks to the respondents to file statement of objections.

Sd/-
CHIEF JUSTICE

Sd/-
JUDGE

vgh*/GH/sma