

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.M. SHAFFIQUE

&

THE HONOURABLE MR. JUSTICE GOPINATH P.

THURSDAY, THE 04TH DAY OF FEBRUARY 2021 / 15TH MAGHA, 1942

WA.No.1237 OF 2020

AGAINST THE JUDGMENT IN WP(C) 4753/2020(T) OF HIGH COURT OF
KERALA DATED 26/8/2020

APPELLANT/3DRD RESPONDENT:

SECRETARY, NSS COLLEGE CENTRAL COMMITTEE,
NSS HEAD OFFICE, PERUNNAL P.O., CHANGANACHERRY,
KOTTAYAM DISTRICT-686 102.

BY ADVS.
SRI.R.T.PRADEEP
SRI.V.VIJULAL
SMT.M.BINDUDAS
SRI.K.C.HARISH

RESPONDENTS/PETITIONER & RESPONDENTS 1 & 2:

- 1 RENJITH J.V.
AGED 35 YEARS
S/O.VIJAYAKUMAR.G., NAMPUMADOM, VAYALA P.O.,
ARUKALIKKAL EAST, EZHAMKULAM, PARAKODE,
PATHANAMTHITTA DISTRICT-691 554.
- 2 STATE OF KERALA,
REPRESENTED BY SECRETARY, SOCIAL WELFARE
DEPARTMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM-695 001.

WA No.1237/2020 & conn.cases

-:2:-

3 THE DIRECTOR, DEPARTMENT OF HIGHER EDUCATION,
GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM-695 001.

OTHER PRESENT:

R2 & R3 SRI. A.J. VARGHESE-SR. G.P.
R1 BY SRI.K.S.HARIHARAPUTHRAN

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 28-01-2021, ALONG WITH WA.1238/2020, WA.1239/2020, WA.1242/2020, WA.131/2021, THE COURT ON 04-02-2021 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.M. SHAFFIQUE

&

THE HONOURABLE MR. JUSTICE GOPINATH P.

THURSDAY, THE 04TH DAY OF FEBRUARY 2021 / 15TH MAGHA, 1942

WA.No.1238 OF 2020

AGAINST THE JUDGMENT IN WP(C) 2800/2019(Y) OF HIGH COURT
OF KERALA DATED 26/8/2020

APPELLANTS/PETITIONERS :

- 1 THE SECRETARY
NSS COLLEGE CENTRAL COMMITTEE,
NSS HEAD OFFICE, CHANGANACHERRY,
KOTTAYAM DISTRICT-686 102

- 2 THE GENERAL MANAGER AND
INSPECTOR OF NSS SCHOOLS
PERUNNA P.O. , CHAGANACHERRY,
KOTTAYAM DISTRICT-686 102

BY ADVS.
SRI.R.T.PRADEEP
SRI.V.VIJULAL
SMT.M.BINDUDAS
SRI.K.C.HARISH

RESPONDENTS/RESPONDENTS :

- 1 THE STATE OF KERALA,
REP. BY CHIEF SECRETARY, GOVERNMENT OF KERALA,
SECRETARIAT, THIRUVANANTHAPURAM-695 001

WA No.1237/2020 & conn.cases

-:4:-

2 SPECIAL SECRETARY
 SOCIAL JUSTICE DEPARTMENT, SECRETARIAT,
 THIRUVANANTHAPURAM-695 001

BY SRI.A.J.VARGHESE, SR.GOV.T.PLEADER

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 28-01-2021, ALONG WITH WA.1237/2020, WA.1239/2020, WA.1242/2020, WA.131/2021, THE COURT ON 04-02-2021 DELIVERED THE FOLLOWING:

WA No.1237/2020 & conn.cases

-:5:-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.M. SHAFFIQUE

&

THE HONOURABLE MR. JUSTICE GOPINATH P.

THURSDAY, THE 04TH DAY OF FEBRUARY 2021 / 15TH MAGHA, 1942

WA.No.1239 OF 2020

AGAINST THE JUDGMENT IN WP(C) 224/2019(C) OF HIGH COURT OF
KERALA DATED 26/8/2020

APPELLANT/4TH RESPONDENT:

THE SECRETARY
NSS COLLEGE CENTRAL COMMITTEE,
NSS HEAD OFFICE, PERUNNAI.P.O,
CHENGANACHERRY, KOTTAYAM DISTRICT-686102.

BY ADVS.
SRI.R.T.PRADEEP
SRI.V.VIJULAL
SMT.M.BINDUDAS
SRI.K.C.HARISH

RESPONDENTS/PETITIONERS & RESPONDENTS 1 TO 3:

- 1 VISHNUPRASAD C.B.
AGED 26 YEARS
VYSHNAVAM, AROOR.P.O, CHERTHALA,
ALAPPUZHA, PIN-688538.
- 2 STATE OF KERALA,
REPRESENTED BY ITS SECRETARY,
SOCIAL WELFARE DEPARTMENT,
SECRETARIAT, THIRUVANANTHAPURAM-695001.

3 THE DIRECTOR,
DEPARTMENT OF EDUCATION, SECRETARIAT,
THIRUVANANTHAPURAM-695001.

4 GURUVAYUR DEVASWOM,
REPRESENTED BY ITS CHAIRMAN,
GURUVAYUR.P.O, THRISSUR-680101.

R1 BY ADV. SRI.R.K.MURALEEDHARAN
R1 BY ADV. SRI.E.NARAYANAN
SR.GOV.T.PLEADER SRI.A.J.VARGHESE

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 28-01-2021, ALONG WITH WA.1237/2020, WA.1238/2020, WA.1242/2020, WA.131/2021, THE COURT ON 04-02-2021 DELIVERED THE FOLLOWING:

-:7:-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

&

THE HONOURABLE MR. JUSTICE GOPINATH P.

THURSDAY, THE 04TH DAY OF FEBRUARY 2021 / 15TH MAGHA,1942

WA.No.1242 OF 2020

AGAINST THE JUDGMENT IN WP(C) 1806/2019(A) OF HIGH COURT OF
KERALA DATED 26/8/2020

APPELLANTS/PETITIONERS :

- 1 THE CONSORTIUM OF CATHOLIC SCHOOL
MANAGEMENT IN KERALA,
REPRESENTED BY ITS CHAIR PERSON, FR.JACOB
GEORGE PALAKKAPPILLY, PASTORAL ORIENTATION
CENTRE (POC), COCHIN-682025.
- 2 THE CONSORTIUM OF CATHOLIC INSTITUTIONS OF
HIGHER EDUCATION IN KERALA,
REPRESENTED BY ITS CHAIR PERSON, FR.JACOB
GEORGE PALAKKAPPILLY, PASTORAL ORIENTATION
CENTRE (POC), COCHIN-682025.
- 3 THE MANAGER,
FR.JACOB GEORGE PALAKKAPPILLY, BHARATH MATHA
COLLEGE, THRIKKAKARA P.O., COCHIN-682021.
- 4 THE CORPORATE MANAGER,
SR. ROSE MARGARET CSST, TERESIAN CARMELITE
SISTERS OF ERNAKULAM, ST.TERESA'S CONVENT
C.G.H.S., COCHIN-682011.

BY ADVS.

SRI.KURIAN GEORGE KANNANTHANAM (SR.)

SRI.THOMAS GEORGE

SRI.ALEX GEORGE (CHAMAPPARAYIL)
SRI.TONY GEORGE KANNANTHANAM

RESPONDENTS/RESPONDENTS :

- 1 STATE OF KERALA
REPRESENTED BY THE SPECIAL SECRETARY TO
GOVERNMENT, SOCIAL JUSTICE (D) DEPARTMENT,
GOVERNMENT SECRETARIAT, TRIVANDRUM-695001.
- 2 K.J.VARGHESE,
S/O. K.L.JOSEPH, KOLLAMPARAMBIL HOUSE,
KANGARAPPADY P.O., THRIKKAKARA, PRESIDENT
KERALA FEDERATION OF THE BLIND, VANCHIYUR P.O.,
THIRUVANANTHAPURAM-695035.
- 3 ALL KERALA PARENTS ASSOCIATION OF HEARING
IMPAIRED (AKPAHI)
REPRESENTED BY GENERAL SECRETARY,
M.MAIDEENKANNU, REG.NO.168/1996, PRASANTH NAGAR
JN., ULLOOR, AKKULAM ROAD, MEDICAL COLLEGE
P.O., THIRUVANANTHAPURAM-695011.

R1 BY SRI.A.J.VARGHESE SR.GOV'T.PLEADER
R2 BY ADV. SMT.P.K.NANDINI
R2 BY ADV. SRI.A.P.JAYARAJ (ANJILIKKAL)
R3 BY SRI.ABRAHAM VAKKANAL (SR)
R3 BY ADV.VINEETHA SUSAN THOMAS

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 28-01-
2021, ALONG WITH WA.1237/2020, WA.1238/2020, WA.1239/2020,
WA.131/2021, THE COURT ON 04-02-2021 DELIVERED THE
FOLLOWING:

WA No.1237/2020 & conn.cases

-:9:-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.M. SHAFFIQUE

&

THE HONOURABLE MR. JUSTICE GOPINATH P.

THURSDAY, THE 04TH DAY OF FEBRUARY 2021 / 15TH MAGHA, 1942

WA.No.131 OF 2021

AGAINST THE JUDGMENT IN WP(C) 224/2019(C) OF HIGH COURT OF
KERALA DATED 26/8/2020

APPELLANT/3RD RESPONDENT:

GURUVAYUR DEVASWOM,
REPRESENTED BY ITS CHAIRMAN,
GURUVAYUR P.O, PIN- 680 101

BY ADV. SRI.T.K.VIPINDAS

RESPONDENTS/PETITIONERS & RESPONDENTS 1 TO 2 & 4:

- 1 VISHNUPRASAD C.B.
AGED 26 YEARS
VYSHNAVAM, AROOR P.O.,
CHERTHALA, PIN-688 538
- 2 STATE OF KERALA
REPRESENTED BY ITS SECRETARY, SOCIAL WELFARE
DEPARTMENT, SECRETARIAT,
THIRUVANANTHAPURAM-695 001
- 3 THE DIRECTOR
DEPARTMENT OF EDUCATION, SECRETARIAT,
TRIVANANTHAPURAM-695 001

-:10:-

4 THE SECRETARY
NSS COLLEGE CENTRAL COMMITTEE,
NSS HEAD OFFICE, PERUNNAI P.O,
CHANGANACHERY, KOTTAYAM DISTRICT -686 102

5 *ADDL.R5 IMPEADED

UNIVERSITY OF CALICUT,
REPRESENTED BY ITS REGISTRAR,
CALICUT UNIVERSITY P.O,
THENHIPALAM,
MALAPPURAM 673 635

*IS IMPEADED AS ADDITIONAL 5TH RESPONDENT AS
PER ORDER DATED 28/1/2021 IN IA NO.1/2021 IN WA
NO.131/2021.

R1 BY ADV. SRI.R.K.MURALEEDHARAN

R1 BY ADV. SRI.E.NARAYANAN

R2-3 BY SR GOVERNMENT PLEADER SRI.A.J.VARGHESE

R4 BY SRI.R.T.PRADEEP

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 28-01-
2021, ALONG WITH WA.1237/2020, WA.1238/2020, WA.1239/2020,
WA.1242/2020, THE COURT ON 04-02-2021 DELIVERED THE
FOLLOWING:

J U D G M E N T

(WA Nos.1237, 1238, 1239, 1242/2020 & 131/2021)

Dated this the 4th day of February, 2021

Shaffique, J.

These appeals have been filed against the common judgment dated 26/8/2020 in WP(C) Nos. 224, 1806, 2800/2019 and 4753/2020.

2. The Government of Kerala by GO(P)No.18/2018/SJD dated 18/11/2018 issued instructions to all appointing authorities of aided institutions to ensure 3% and 4% reservation with reference to the total number of vacancies in the cadre strength by making appointments in aided schools and aided colleges including professional colleges to the posts which are identified as suitable for persons with disabilities. By virtue of the aforesaid order, backlog vacancies were directed to be filled up from 7/2/1996 to 18/4/2017 as per the provisions of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as the 1995 Act)

and 4% of the vacancies in such institutions w.e.f. 19/4/2017 as per the provisions of Rights of Persons with Disabilities Act, 2016 (hereinafter referred to as the 2016 Act). The Consortium of Catholic School Managements in Kerala filed WP(C) No. 1806/2019 and the NSS Colleges Central Committee filed WP(C) No. 2800/2019 challenging the Government Order dated 18/11/2018 (hereinafter referred to as Ext.P8), (as referred in WP(C) No. 1806/2019).

3. Two other writ petitions were filed. A differently abled person has filed WP(C) No. 4753/2020 seeking for a direction to the NSS Colleges Central Committee to implement Ext.P8 Government Order. WP(C) No. 224/2019 has been filed by yet another differently abled person seeking for a direction to implement Ext.P8 Government Order in the institutions run by Guruvayoor Devaswom and NSS College.

4. The learned Single Judge after considering the respective contentions dismissed WP(C) Nos. 1806/2019 and 2800/2019. WP(C) Nos. 224/2019 and 4753/2020 were disposed of directing the respective managements to conduct the selection and appointment in tune with Ext.P8 Government Order by

implementing the 1995 and 2016 Act.

5. We heard learned Senior counsel Sri.Kurian George Kannanthanam appearing on behalf of the appellants in WA No. 1242/2020, Sri.R.T.Pradeep, learned counsel appearing on behalf of the appellants in WA Nos. 1237, 1238 and 1239/2020 and Sri.T.K.Vipin Das, learned counsel appearing on behalf of the appellant Guruvayoor Devaswom in WA No. 131/2021. We also heard Sri.Abraham Vakkanal, Senior Counsel for All Kerala Parents Association of Hearing Impaired, Sri.A.J.Varghese, Senior Government Pleader and Smt.P.K.Nandini, learned counsel appearing on behalf of the 2nd respondent in WA No.1242/2020.

6. The main contention urged on behalf of the Consortium of Catholic School Managements in Kerala is that Ext.P8 order cannot be enforced since no posts had been identified to be filled up in terms of Sections 32 and 33 of the 1995 Act and Sections 33 and 34 of the 2016 Act. It is pointed out that in Ext.P8 order, the Government while directing backlog vacancies from 7/2/1996 to be filled up, the posts which are identified are in terms of Government Orders GO(P) No.61/2012/SWD dated 17/10/2012, GO(P) No.1/2013/SJD dated

3/1/2013, GO(P) No.30/2013/SJD dated 4/4/2013, GO(P) No.1/2015/SJD dated 5/1/2015 and GO(P) No.18/2017/SJD dated 14/9/2017. These Government Orders have been produced as Exts.P3 to P7 in WP(C) No. 1806/2019. The contention urged by the learned counsel is that the posts which had been notified are relating to Government departments, Government schools and colleges and do not have any relation to the creation of posts with reference to aided schools and colleges. It is therefore argued that unless the posts in such aided schools and colleges are notified in terms of the statutory provision, incorporating Exts.P3 to P7 Government Orders will not suffice. It is also argued based on Section 102 of the 2016 Act that when the 1995 Act has been repealed, sub-section (2) will not save the Government Orders Exts.P3 to P7.

7. Sri.R.T.Pradeep, learned counsel appearing for the appellants especially the NSS Colleges Central Committee argued that Private Aided Educational Institutions will not come under the purview of S.34 of the 2016 Act. It is also contended that S.2(k) of the 1995 Act and 2016 Act cannot be extended by the Government by an executive order especially when 1995 Act had

been repealed. It is the further argument that non minority educational agencies are protected under Art.19(g) of the constitution of India. As per the law laid down in **T.M.A. Pai Foundation v. State of Karnataka** (AIR 2003 SC 351), such institutions can be regulated by the Government only with reference to the terms and conditions of employment of the teaching staff and non teaching staff and therefore the Government is precluded from bringing reservation to the appointment of teaching and non teaching staff. It is argued that though Clause 5 was inserted in Art.15 of the Constitution of India to implement reservation in private educational institutions, Clauses 4 and 5 in Art.15 operates in different fields. Clause 4 permits reservation in the matter of admission in private educational institutions other than aided or unaided. It is argued that Art.15(4) is in pari materia with Art.16(4) and unless there is an enabling provision under Art.16 to implement reservation in appointment of teaching and non teaching staff in private educational institutions in pari materia with Art.15(5), Government cannot bring in reservation for teaching and non teaching staff in private educational institutions.

8. Almost similar arguments were made by the counsel appearing in WA No. 131/2021. On the other hand, Sri.Abraham Vakkanal, learned senior counsel submitted that these writ petitions itself are not maintainable especially in the light of the judgment of the Apex Court in ***Justice Sunanda Bhandare Foundation v. Union of India and Another*** [(2017) 14 SCC 1] wherein the Apex Court had occasion to consider the purport of the 1995 and 2016 Act and had issued appropriate directions to the respective State Governments to ensure compliance of the provisions of the 2016 Act within a specified time. It is submitted that when the Apex Court had come to notice that most of the State Governments have not identified the posts or made arrangements to provide reservation to disabled persons, the Apex Court had while deprecating such practice in not complying with the statutory provisions issued necessary directions. Therefore, the contention is that none of the managements can shirk out of the statutory obligation created under the Act and the learned Single Judge was justified in arriving at the impugned finding.

9. Smt.P.K.Nandini, learned counsel while supporting the

judgment of the learned Single Judge placed reliance on the judgment of the Apex Court in ***Government of India through Secretary and Another v.Ravi Prakash Gupta*** [(2010) 7 SCC 626] wherein direction had been given by the Apex Court to ensure filling up of backlog vacancies which had accumulated due to delay in identification of posts under S.32 of the 1995 Act. Counsel argued that the Apex Court is keen to ensure that the aforesaid Act is implemented in letter and spirit and therefore several such directions had been issued. It is pointed out that even if the posts which had been stated by the State Government initially was made applicable only to Government institutions, that did not preclude the aided institutions in applying the very same principle. Once the provisions of the Statute had come into force, every institution which comes within the parameters of Government establishment under the Act is bound to comply with the same. Ext.P8 order came to be passed only when it was noticed that the aided institutions were not complying with the statutory provisions. Learned counsel therefore supports the view taken by the learned Single Judge. Learned Government Pleader Sri.A.J.Varghese appearing on behalf of the State also supported

Ext.P8 order. He also submitted that the Apex Court had issued several directions in the aforesaid matter. He made reference to two judgments of the Apex Court in ***Dalco Engineering Private Ltd and Others*** [(2010) 4 SCC 378] and ***Union of India v. National Federation of the Blind and Others*** [(2013) 10 SCC 772]. Another judgment relied upon is that of this Court in which one of us (myself) had rendered a judgment in ***Manager L.M.S. Special Schools, Trivandrum v. State of Kerala*** (2012 (3) KHC 163). The said judgment was confirmed by the Division Bench in ***Manager LMS Special Schools v. V.M.Omana and Others*** (2012 (3) KLT 507).

10. The primary argument which requires to be considered is whether the provisions of the 1995 Act and 2016 Act will apply to aided colleges. Under Section 32 of the 1995 Act, it is incumbent on the part of the appropriate Government to identify posts in the establishments, which can be reserved for persons with disability. Definition of S.2(k) "establishment" includes, an authority or a body owned or controlled or aided by the Government. Now coming to S.33 of the 2016 Act, here again the appropriate Government has to identify posts in the

establishments which can be held by respective category of persons with benchmark disabilities in respect of the vacancies reserved in accordance with the provisions of S.34. As per S.34, the appropriate Government shall appoint in every Government establishment, not less than 4% of the total number of vacancies in the cadre strength. 'Establishment' is defined u/s 2(i) of the 2016 Act, as including Government establishment and private establishment. 'Government establishment' is defined u/s 2(k) which includes an authority or a body owned or controlled or aided by the Government. Apparently the appellant institutions are aided by the Government insofar as the salary of the teachers and other payments are made by the Government under a direct payment system and therefore they come within the definition of 'establishment' under the 1995 Act and 'Government establishment' under the 2016 Act. Once the Act applies, they are bound to comply with the relevant provisions.

11. The contention urged by learned counsel Sri.R.T.Pradeep is that unless there is an enabling provision under Art.16 to implement reservation in appointment of teaching and non teaching staff in private educational institutions, Government

lacks power to bring in reservation for teaching and non teaching staff in private educational institutions, either aided or unaided.

12. In **Rajeev Kumar Gupta v. Union of India and Others** [(2016) 13 SCC 153], the Apex Court was considering a claim made by differently abled person challenging office memorandum issued by the Department of Personnel and Training, Government of India, insofar as it deprived the differently abled persons of the statutory benefit of reservation under the 1995 Act. One of the contentions urged by the State is that in the light of the judgment of the Apex Court in **Indra Sawhney v. Union of India** [1992Suppl (3) SCC 217], it is constitutionally impermissible to grant reservation in promotions for differently abled persons. After a detailed analysis of the law laid down in **Indra Sawhney** (supra) and the policy of the State for providing reservation to persons belonging to any constitutionally disabled class of persons, it was held at paragraphs 17 to 22 as under:-

“17. Backward classes contemplated under Article 16(4) are the socially and educationally backward classes of citizens. In Devadasan [T. Devadasan v. Union of India, AIR 1964 SC 179] , it was held by this Court that Article 16(4) is an

exception to the principle contained in Article 16(1). However, Subba Rao, J., in his dissent opined that Article 16(4) is not an exception to Article 16(1) but an emphatic way of expressing the principle inherent in Article 16(1). This dissenting opinion later found approval in the majority decision in State of Kerala v. N.M. Thomas [State of Kerala v. N.M. Thomas, (1976) 2 SCC 310 : 1976 SCC (L&S) 227] . Finally, in Indra Sawhney [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] , a nine-Judge Bench by majority (speaking through Jeevan Reddy, J.) confirmed that Article 16(4) is not an exception to the Rule in Article 16(1) but it is an “instance of (such) classification”

18. *The principle is that the State shall not discriminate (which normally includes preference) on the basis of any one of the factors mentioned in Article 16(1). Though under the doctrine of “reasonable classification”, it has always been held that the State can identify classes of people who have distinct characteristics or disadvantages and treat them separately under law. Having regard to the history, the social and demographic context of our nation, the Constitution Framers thought it appropriate to enable the State under Article 16(4) to identify citizens for preferential treatment for the purpose of employment under the State.*

19. *This Court in Indra Sawhney [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] was dealing with the action of the State in providing reservation in employment under the State to various classes of citizens, identified by the State to be backward classes. The process of such identification and the nature and extent of reservations that could be provided under Article 16(4) were the main issues before this Court. It is in this*

context, this Court held that reservation in the context of promotions to higher posts under the State are constitutionally impermissible.

20. *To remove the basis of the rule propounded in Indra Sawhney case [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] , Parliament enacted the Constitution (Seventy-seventh Amendment) Act, 1995. By inserting Article 16(4-A), an exception is created in favour of citizens belonging to the Scheduled Castes and the Scheduled Tribes, from the rule laid down in Indra Sawhney [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385]*

21. *The principle laid down in Indra Sawhney [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] is applicable only when the State seeks to give preferential treatment in the matter of employment under the State to certain classes of citizens identified to be a backward class. Article 16(4) does not disable the State from providing differential treatment (reservations) to other classes of citizens under Article 16(1) [As per Indra Sawhney case, 1992 Supp (3) SCC 217, Article 16(4) is a subset of Article 16(1).] if they otherwise deserve such treatment. However, for creating such preferential treatment under law, consistent with the mandate of Article 16(1), the State cannot choose any one of the factors such as caste, religion, etc. mentioned in Article 16(1) as the basis. The basis for providing reservation for PWD is physical disability and not any of the criteria forbidden under Article 16(1). Therefore, the rule of no reservation in promotions as laid down in Indra Sawhney [Indra Sawhney v. Union of India,*

1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] has clearly and normatively no application to PWD.

(emphasis supplied)

22. *The 1995 Act was enacted to fulfil India's obligations under the "Proclamation on the Full Participation and Equality of the People with Disabilities in the Asia and Pacific Region". The objective behind the 1995 Act is to integrate PWD into the society and to ensure their economic progress. [See Paras 3, 4 and 5 of the Proclamation of the Full Participation and Equality of the People with Disabilities in the Asia and Pacific Region.] The intent is to turn PWD into "agents of their own destiny". [Id, para 2.] PWD are not and cannot be equated with backward classes contemplated under Article 16(4). May be, certain factors are common to both backward classes and PWD such as social attitudes and historical neglect, etc."*

Further on the facts of the case, it was held at paragraphs 23 to 25 as under:-

23. *It is disheartening to note that (admittedly) low numbers of PWD (much below three per cent) are in government employment long years after the 1995 Act. Barriers to their entry must, therefore, be scrutinised by rigorous standards within the legal framework of the 1995 Act.*

24. *A combined reading of Sections 32 and 33 of the 1995 Act explicates a fine and designed balance between requirements of administration and the imperative to provide greater opportunities to PWD. Therefore, as detailed in the first part of our analysis, the identification exercise under Section 32 is crucial. Once a post is identified, it means that a PWD is fully capable of discharging the functions associated with the identified post. Once found to be so capable,*

-:24:-

reservation under Section 33 to an extent of not less than three per cent must follow. Once the post is identified, it must be reserved for PWD irrespective of the mode of recruitment adopted by the State for filling up of the said post.

25. *In the light of the preceding analysis, we declare the impugned memoranda as illegal and inconsistent with the 1995 Act. We further direct the Government to extend three per cent reservation to PWD in all identified posts in Group A and Group B, irrespective of the mode of filling up of such posts. This writ petition is accordingly allowed."*

An analysis of the aforesaid judgment indicates that the very purpose of the enactment is authorizing the appropriate Government to identify the post suitable to be filled up by differently abled persons which apparently is the policy of the State. It is the State policy that is reflected under the 1995 Act and the 2016 Act. Once the posts are identified, there is obligation cast on all the employers coming within the scheme of the Act to comply with the same. Though the learned counsel Sri.R.T.Pradeep had placed reliance on several judgments of the Apex Court, we do not think it necessary to place much emphasis on the earlier judgments especially in the light of the law laid down in **Rajeev Kumar Gupta** (supra) when it is clearly held that the basis for providing reservation for differently abled is

physical disability and not any criteria forbidden under Art.16(1) of the Constitution of India and the rule of 'no reservation' in **Indra Sawhney** (supra) has no application to differently abled persons. That apart, no challenge is made to the provisions of the Act, but to the order of the Government in creating the posts in schools and other establishments. Such a contention cannot be justified at all.

13. The only factor to be considered is whether the provisions of the Act could be made applicable to educational institutions. As already stated, the meaning of the word 'establishment' or 'government establishment' under both the enactments takes care of all institutions aided by the Government. This is further clear from S.39 of the 1995 Act and S.32 of the 2016 Act, which reads as under:

“39. All educational institutions to reserve seats for persons with disabilities - All Government educational institutions and other educational institutions receiving aid from the Government, shall reserve not less than three per cent seats for persons with disabilities.”

“32. Reservation in higher educational institutions - (1) All Government institutions of higher education and other higher education institutions receiving aid from the Government shall

reserve not less than five per cent. seats for persons with benchmark disabilities.

(2) The persons with benchmark disabilities shall be given an upper age relaxation of five years for admission in institutions of higher education.”

When specific provision is made for reserving seats for differently abled persons in educational institutions, the same analogy applies in respect of the teachers or staff to be employed in educational institutions.

14. A reading of Exts.P3 to P7 would indicate that at all stages, the Government had considered teachers of educational institutions for the purpose of providing reservation. Further, on a bare perusal of judgment in ***Justice Sunanda Bhandare Foundation*** (supra), it is rather clear that the provisions of the Act had been made applicable to educational institutions. In the said case, an interlocutory application was filed to issue directions to the Central Government to comply with the judgment in ***Justice Sunanda Bhandare Foundation v. Union of India*** [(2014) 14 SCC 383]. The prayer was to implement the provisions of the 1995 Act and for a declaration that denial of employment to visually disabled persons in the faculties and

colleges of various Universities in the identified posts is violative of fundamental rights guaranteed under Articles 14 and 15 r/w Art.41 of the Constitution of India. After referring to various other judgments on the point and having found that most of the State Governments were lagging behind in complying with the provisions of the Act, the following directions are issued at paragraphs 24, 25 and 26:-

***“24.** We have referred to certain provisions only to highlight that the 2016 Act has been enacted and it has many salient features. As we find, more rights have been conferred on the disabled persons and more categories have been added. That apart, access to justice, free education, role of local authorities, National fund and the State fund for persons with disabilities have been created. The 2016 Act is noticeably a sea change in the perception and requires a march forward look with regard to the persons with disabilities and the role of the States, local authorities, educational institutions and the companies. The statute operates in a broad spectrum and the stress is laid to protect the rights and provide punishment for their violation.*

***25.** Regard being had to the change in core aspects, we think it apposite to direct all the States and the Union Territories to file compliance report keeping in view the provisions of the 2016 Act within twelve weeks hence. The States and the Union Territories must realise that under the 2016 Act their responsibilities have grown and they are required to actualise the purpose of the Act, for there is an accent on many a sphere with regard to the rights of those with disabilities. When the*

-:28:-

law is so concerned for the disabled persons and makes provision, it is the obligation of the law executing authorities to give effect to the same in quite promptitude. The steps taken in this regard shall be concretely stated in the compliance report within the time stipulated. When we are directing the States, a duty is cast also on the States and its authorities to see that the statutory provisions that are enshrined and applicable to the cooperative societies, companies, firms, associations and establishments, institutions, are scrupulously followed. The State Governments shall take immediate steps to comply with the requirements of the 2016 Act and file the compliance report so that this Court can appreciate the progress made.

26. *The compliance report to be filed by the States shall be supplied to the learned counsel for the petitioner, the learned counsel for the Union of India as well as to the learned counsel for the applicant/intervenor so that they can assist the Court."*

Probably it is pursuant to the aforesaid directions that the State Government had come forward with Ext.P8 order dated 18/11/2018 in order to fill up the backlog vacancies in aided educational institutions.

15. The next contention urged is that when the posts were not identified, the posts had already been identified in different establishments including educational institutions run by the Government. But the Government did not chose to direct the aided institutions to comply with the provisions of the Act. In fact,

-:29:-

when posts in schools and colleges were notified, it equally applies to aided institutions as well. But they did not comply with the provisions of the Act. Ext.P8 is only intended to ensure that the identification of posts which has already been done under the provisions of the 1995 Act, would apply to aided educational institutions as well, and they have been directed to fill up the backlog vacancies.

We have also perused the judgment of the learned Single Judge. The entire matter had been considered in detail and for the reasons stated by us, we do not find any ground to interfere with the judgment of the learned Single Judge. Appeals are therefore dismissed.

Sd/-

A . M . SHAFFIQUE

JUDGE

Sd/-

GOPINATH P .

JUDGE

Rp