IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE SMT. JUSTICE P.V.ASHA

WEDNESDAY, THE 26TH DAY OF AUGUST 2020 / 4TH BHADRA, 1942

WP(C).No.4753 OF 2020(T)

PETITIONER:

RENJITH J.V.
AGED 35 YEARS
S/O.VIJAYAKUMAR G., NAMPUMADOM, VAYALA P.O.,
ARUKALIKKAL EAST, EZHAMKULAM, PARAKODE,
PATHANAMTHITTA DISTRICT-691554.

BY ADVS.
SRI.K.S.HARIHARAPUTHRAN
SMT.BHANU THILAK

RESPONDENTS:

1 STATE OF KERALA
REPRESENTED BY SECRETARY, SOCIAL WELFARE
DEPARTMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM-695001.

2 THE DIRECTOR, DEPARTMENT OF HIGHER EDUCATION,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM-695001.

3 SECRETARY, NSS COLLEGEs CENTRAL COMMITTEE,
NSS HEAD OFFICE, PERUNNAI P.O., CHANGANASSERY,
KERALA-686102.

R1 BY GOVERNMENT PLEADER
R3 BY ADV. SRI.R.T.PRADEEP
R3 BY ADV. SMT.M.BINDUDAS
R3 BY ADV. SRI.K.C.HARISH

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 22.07.2020, ALONG WITH WP(C).224/2019(C), WP(C).1806/2019(A), WP(C).2800/2019(Y), THE COURT ON 26.08.2020 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE SMT. JUSTICE P.V.ASHA

WEDNESDAY, THE 26TH DAY OF AUGUST 2020 / 4TH BHADRA, 1942

WP(C).No.224 OF 2019(C)

PETITIONER:

VISHNUPRASAD C.B.
AGED 26 YEARS
VYSHNAVAM, AROOR P.O., CHERTHALA, PIN-688 538

BY ADVS.
SRI.E.NARAYANAN
SRI.R.K.MURALEEDHARAN

RESPONDENTS:

1 STATE OF KERALA
REPRESENTED BY ITS SECRETARY, SOCIAL WELFARE
DEPARTMENT, SECRETARIAT, TRIVANDRUM-695 001

2 THE DIRECTOR, DEPARTMENT OF EDUCATION, SECRETARIAT,
TRIVANDRUM-695 001

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

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

BY ADV. SRI.T.K.VIPINDAS
BY ADV. SRI.R.T.PRADEEP

SPL.GP.SRI.V.MANU

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 22-07-2020, ALONG WITH WP(C).1806/2019(A), WP(C).2800/2019(Y), WP(C).4753/2020(T), THE COURT ON 26-08-2020 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE SMT. JUSTICE P.V.ASHA

WEDNESDAY, THE 26TH DAY OF AUGUST 2020 / 4TH BHADRA, 1942

WP(C).No.2800 OF 2019(Y)

PETITIONER/S:

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

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

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

RESPONDENTS:

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

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

BY SRI.V.MANU, SENIOR GOVT. PLEADER

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 22.08.2020, ALONG WITH WP(C).224/2019(C), WP(C).1806/2019(A), WP(C).4753/2020(T), THE COURT ON 26.08.2020 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE SMT. JUSTICE P.V.ASHA

WEDNESDAY, THE 26TH DAY OF AUGUST 2020 / 4TH BHADRA, 1942

WP(C).No.1806 OF 2019(A)

PETITIONERS:

1 THE CONSORTIUM OF CATHOLIC SCHOOL, MANAGEMENTS 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, PASTORIAL 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.S, COCHIN- 682011.

BY ADVS.
SRI.KURIAN GEORGE KANNANTHANAM (SR.)
SRI.TONY GEORGE KANNANTHANAM
SRI.THOMAS GEORGE
SRI.ALEX GEORGE

RESPONDENTS:

1 STATE OF KERALA, REPRESENTED BY THE SPECIAL SECRETARY TO GOVERNMENT, SOCIAL JUSTICE (D) DEPARTMENT, GOVERNMENT SECRETARIAT, TRIVANDRUM- 695001.

2 K.J.VARGHESE, AGED 60 YEARS S/O.K.L.JOSEPH, KOLLAMPARAMBIL HOUSE, KANGARAPPADY P.O., THRIKKAKARA PRESIDENT KERALA FEDERATION OF THE BLIND, VANCHIYUR P.O., THIRUVANANTHAPURAM - 695

035. (ADDL.R2 IMPLEADED AS PER ORDER DATED 05/02/2019 IN IA.NO.01/2019)

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-695 011.

(ADDL.R3 IMPLEADED AS PER ORDER DT.19.3.2019 IN I.A.NO.2/2019)

R1 BY SPL.GOVERNMENT PLEADER SRI V.MANU
R2 BY ADV. P.K.NANDINI
R2 BY ADV. SRI.A.P.JAYARAJ (ANJILIKKAL)
R2 BY ADV. SMT.JISHAMOL CLEETUS
R2 BY ADV. SRI.JUBYRAJ.A.P
R3 BY SR.ADVOCATE SRI ABRAHAM VAKKANAL
R3 BY ADV. VINEETHA SUSAN THOMAS
R3 BY ADV. SRI.SAMPATH V. TOMS
R3 BY ADV. SRI.CHRISTY THOMAS

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 22.07.2020, ALONG WITH WP(C).224/2019(C), WP(C).2800/2019(Y), WP(C).4753/2020(T), THE COURT ON 26.08.2020 DELIVERED THE FOLLOWING:

P.V.ASHA, J.

W.P(C) Nos.224, 1806 & 2800 of 2019
and 4753 of 2020

Dated this the 26th day of August, 2020

J U D G M E N T

The issue arising in these Writ Petitions is whether 3%/4% vacancies in the aided educational institutions in the State of Kerala should be filled up by appointing differently abled persons in accordance with the provisions contained in Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ('the 1995 Act' for short)/Right of Persons with Disability Act, 2016 ('the 2016 Act' for short). Government issued an order on 18.11.2018 extending the provisions of Section 2(k) of the 1995 Act and 2016 Act to all aided educational institutions getting Government aid such as staff salary and other allowances, maintenance grant, etc, with effect from 07.02.1996 and directed that the concerned administrative departments shall instruct all the appointing authorities of such aided institutions to ensure 3% reservation on appointments in aided schools and aided colleges for the period from 7.2.1996 and to provide 4% reservation on appointments in such schools and colleges for the period from 19.4.2017 for the differently abled. The corporate managements have challenged the order. The aspirants for employment eligible for appointment availing the said reservation have sought implementation of that order. Brief facts and contentions

in each of the cases are the following.

WP(C) No.1806 of 2019

2. According to them the State Government has no authority to extend the provisions contained in the 1995 Act or in the 2016 Act which are central enactments and at any rate to extent the same to the educational institutions run by minorities, as it will be in violation of their right for free choice of qualified teachers guaranteed under Article 30(1) of the Constitution of India. It is their contention that under Section 32 of the 1995 Act, the Government is to identify posts in the establishments, which can be reserved for persons with Disabilities and under Section 33 it is for the Government to appoint physically challenged persons in the establishments and those provisions did not contemplate a private institution or an aided institution to make such appointments; Section 33 cannot be pressed into service except where the appointing authority is the Government. Pointing out that in Exts.P3 to P6 orders issued on 17.10.2012, 04.01.2013 and 04.04.2013, Government has identified the posts in Government schools or Government colleges/Government institutions alone it is stated that applicability of the provisions in the Act to private/aided educational institutions was never in contemplation. It is their further contention that once the 1995 Act stood repealed by Section 102 of the 2016 Act, there is no basis for the direction to fill up 3% vacancies from 07.02.1996. It is stated that Government cannot revive an Act which is superseded by the new Act. It is also pointed out that the provisions in

both the Acts are different. According to them, a private aided educational institution is not an authority or a body coming under the definition of `establishment' as per Section 2(k). Similarly, aided school or college is not included in the definition of `institution'. At the same time, Section 32 of the 2016 Act contemplates reservation of seats in educational institutions, both Government and aided. Similarly, regarding the reservation and identification of posts also, the expressions used in 1995 Act and 2016 Act are different. When the 1995 Act provides for reservation for persons with disability, the 2016 Act provides for identification and reservation of persons with benchmark disability. Under 2016 Act also it is for the Government to appoint in every Government establishment at least 4% of the vacancies in the cadre strength in each of the posts meant to be filled up with persons of benchmark disability. According to them, even the provisions under Section 34 of the 2016 Act can be implemented and invoked only after the Government identified the posts which can be held by respective categories of persons with the specified disability as provided in Section 33 and that identification of posts in Ext.P7 order dated 14.9.2017 was done without taking note of the repeal of 1995 Act. Their contention is that it is beyond the authority of a state government to amend a central Act by issuing an executive order. The provisions contained in the Act can be pressed into service only in cases where the Government is the appointing authority; whereas the appointing authority in aided colleges and schools is the manager.

3. The President of the Kerala Federation of Blind as well as All Kerala

Parents Association of Hearing Impaired have got impleaded as additional respondents 2 and 3 respectively. Their contention is that even in the absence of an order like Ext.P8 the managers of the educational institutions are bound to see that the provisions contained in the 1995 Act and 2016 Act are implemented.

4. The Government has filed a counter affidavit. It is stated that the entire expense towards the salary, allowances and pension of teaching and non teaching staff of aided schools and colleges in Kerala is met by the Government on par with those in the Government schools and colleges. In addition to that, the aided schools receive maintenance grants and therefore the aided schools and colleges come under the definition of `Government establishment' within the purview of Section 2(k). It is stated that reservation of vacancies for persons with disabilities is not dependent on identification of posts as held by the Apex Court in several judgments. As per Section 34 of 2016 Act, the Government establishment includes Government aided schools and colleges, which are mandatorily required to reserve minimum 4% of the total number of the vacancies in the cadre strength in each group of posts with persons with benchmark disability. It is stated that despite the enactment in 1995 the aided educational institutions have not implemented the same; whereas the Government has implemented the same by conducting special recruitment in order to clear backlog vacancies. It is stated that the provisions contained in the Act or Ext.P8 order cannot be said to be in violation of the fundamental right under Article 30(1) of the Constitution of India. It only provides for opportunity to persons with disabilities. It is stated that this

Court has already considered the applicability of the 1995 Act to the Government Aided Educational Institutions.

5. In the counter affidavit of the additional 3rd respondent, it is stated that the contentions raised in the Writ Petition are contrary to the doctrine of the petitioner – the Consortium of Catholic Schools and Managements as evident from Ext.R3(a) – a publication by the Pontifical Council for Justice and Peace published by the Pastoral Orientation Centre. According to the additional 3rd respondent, the provisions contained in the Act are in tune with their own social doctrine. It is stated that minority institutions do not have any superior right to be exempted from the provisions contained in the Act, which are enacted for the purpose of ensuring security of the disabled in order to bring them to the mainstream of the society. It is further stated that 2016 Act does not nullify the action taken and done under the previous Act and the orders issued by the Government are in tune with the provisions contained in the respective Acts. It is stated that any appointment in aided educational institutions becomes effective only on approval by the Government and therefore, the petitioner institution cannot be left out from the purview of the provisions contained in either of the Acts.

WP(C) No.2800 of 2019

6. This |Writ Petition is filed by the Corporate Manager of the educational agency of Nair Service Society along with another, challenging Ext.P1 order issued by the Government on 18.11.2018. According to the petitioner, a private educational institution receiving aid from Government for payment of

salary to the teaching and non teaching staff will not come under the purview of an establishment or a Government establishment in order to attract the provisions under the 1995 Act or 2016 Act, to make appointments providing reservation. The contention is that Private aided educational institution is recognised as a different genre and the aid provided by the Government for payment of salary will not bring it under the definition of State under Article 12 of the Constitution of India. It is the case of the petitioner that Article 16(4) and 16(4)(A) which provides for reservation in the matter of appointment to OBC and SC/ST is not applicable to the private aided institutions. It is stated that on introduction of Article 15(5) in the Constitution of India, UGC had directed observance of reservation while making appointment in private aided educational institutions. The Division Bench of this Court in the judgment in W.A.No.1664 of 2015 has held that communal reservation cannot be made applicable to the aided institutions. Petitioner's case is that unless private aided educational institution is specifically brought in under the definition of establishment/Government establishment, no direction can be issued to apply the provisions contained in the 1995 Act or 2016 Act. It is also their contention that posts in aided Colleges are not identified for reservation in any of the orders. It is also their case that the provisions under a repealed Act cannot be enforced, after the 2016 Act has come into force in the place of 1995 Act, that too, with vast change; Aided colleges run by non minority educational agency have got the protection of Articles 19(g) and 26(a) of the Constitution. Government can bring out regulations only in respect of the conditions of service of the teaching

and non teaching staff and not with respect to reservation in appointment of teaching and non teaching staff.

W.P.(c).Nos.224/2019 and 4753/2020

7. These Writ Petitions are filed by the physically challenged persons who submitted applications for appointment as Asst. Professors in aided colleges seeking implementation of the order passed by the Government on 18.11.2018 which are under challenge in WP(C) Nos.1806/2019 and 2800/2019.

8. Sri.Kurian George Kannanthanam relying on the judgments in ***St. Xaviers College v. State of Gujarat***: (1974)1 SCC 717, ***Benedict Mar Gregorius Benedict Mar Gregorios v. State of Kerala & others*** : **1976 KLT 458 (F.B.)**, ***Joseph Kachappilly v. State of Kerala*** : 1997(2) KLT 740, ***TMA Pai V State of Karnataka***: (2002)8SCC 481 etc. argued that the right of the minorities to select and appoint teachers cannot be diluted and interest of the minority cannot be superseded and the only power vested in the Government is to introduce regulatory measures to ensure maintenance of proper academic standard.

9. Sri. R.T.Pradeep, learned counsel for the non-minority managements, relied on the judgments in ***TMA Foundation's case (supra), P.A.Inamdar vs. State of Maharastra:*** (2005) 6 SCC 537 para 125, ***Brahma Samaj Educational Soceity & others vs. State of West Bengal & Others*** : (2004) 6 SCC 224, ***Ashoka Kumar Thakur vs. Union of India*** : (2008) 6 SCC 1, ***Sidhi Education Soceity vs. Government (NCT of Delhi)*** : (2010) 8 SCC 49, ***Pramati Educational &Cultural Trust vs. Union of India*** :(2014) 8 SCC page 1, etc. and argued that the

1995 Act or 2016 Act would not apply to aided educational institutions which do not come under the definition of State under Article 12 of the Constitution of India.

10. According to the learned Counsel for the managements, the right to appoint teaching and non teaching staff in private aided educational institutions is guaranteed under Article 19(1)(g) as held by the Apex Court in ***TMA Pai Foundation's case (supra).*** According to Sri. R.T.Pradeep, the right of appointment in aided non minority institutions cannot also be taken away in view of the judgment in ***Brahma Samaj Educational Society & others vs. State of West Bengal & Others*** 2004 (6) SCC 224. Both the counsel for the managements, after making a comparative analysis of various provisions contained in 1995 Act and 2016 Act argued that under 1995 Act, establishment under Section 2(k) alone was available; whereas 2016 Act provides for Government establishment or private establishment. The nature of persons with disability is also not the same under both the Acts, as 1995 Act includes anybody with 40% disability; whereas only persons with benchmark disability alone are eligible for reservation under 2016 Act. According to them only the agencies owned, controlled and aided by Government referred to in the definition of establishment would also come within the definition of State under Article 12 of the Constitution. Private aided schools do not come under the definition of State; directive principles cannot be the source of legislation. While the 1995 Act provides for 3% reservation, the 2016 Act for 4% reservation, under Section 34. In both the Acts, there are separate provisions for educational institutions and institutions for higher education. Apart from that,

even though Section 32 of the 2016 Act provides that all institutions receiving aid from the Government shall reserve not less than 5% seats for persons with benchmark disabilities, there is no such provisions in respect of appointment. The 2016 Act recognises private as well as Government separately. The schedule under the 2016 Act which explains the disability of various kind was not available in the 1995 Act. However, both the Acts provide for appointment by the Government. Moreover, while repealing the 1995 Act, there is no saving provision. Therefore, there cannot be any direction to fill up vacancies in the light of the provisions contained in the 1995 Act after it is repealed. Relying on ***State of Kerala vs. Arun George*** : (2015) 11 SCC 334 and the judgment dated 21.12.2017 in W.A.No.1664 of 2015 it was argued that the provisions in the 1995 or 2016 Act would not apply to the aided Schools or colleges and the aided colleges are governed by direct payment agreement.

11. According to the learned Government Pleader, an interpretation which is beneficial to the physically challenged persons has to be adopted having regard to the purpose of the Act as it is a social welfare legislation. Relying on the judgment of the Apex Court in ***Vanguard Fire and General Insurance Co. Ltd. Madras v. M/s. Fraser and Ross & Anr****:1960 SC 971,* ***State of Punjab v. Mohar Singh Pratap Singh*** *: (2008) 6 SCC 732,* ***Tata Power Co Ltd V Reliance energy Ltd****:* (2009) 16 SCC 659, ***Indian Medical Assn. v. Union of India: (2011) 7 SCC 179,*** it was argued that when the definition clause starts with "unless the context otherwise requires" the provisions in the Act have to be interpreted accordingly,

having regard to the context and legislative intent. Section 2(k) brings the institutions owned, controlled and aided by the Government within the definition of establishment. It is necessary for the aided institutions to implement the provisions regarding reservation, in the light of the judgment in ***Dalco Engineering Private Ltd. & Ors. v. Satish Prabhakar Padhye & Ors.*** [(2010) 4 SCC], the judgment dated 14.3.2013 in ***Shankerbhai Ganeshbhai Chaudhary v. Principal, Shree N.K.T. Jalaram Vidyalaya & Ors.*** [(2013) 3 GLR 2122] of the Gujarat High Court, etc. Relying on the judgment of this Court in ***Manager, LMS Special Schools, Palayam & Anr. v. V.M.Omana & Ors.*** [2012 KHC 578, etc. it was argued that Section 2(k) of the 1995 Act would apply to aided Schools including minority Schools also. The judgments in ***Govt. of India through Secretary & anr. v. Ravi Prakash Gupta & anr:*** (2010) 7 SCC 626, ***Union of India & anr. v. National Federation of the Blind & Ors. (***2013) 10 SCC 772, **Justice Sunanda Bhandare Foundation v. Union of India, (2014) 14 SCC 383,** ***Dineshan E. v. State of Kerala & Ors.*** 2014 (4) KHC 898, ***Kerala Public Service Commission & Anr. v. E.Dineshan & Ors:*** 2016 (2) KHC 910, ***Kavitha Balakrishnan v. Prasanna Kumari E.S & Ors:*** 2015 (5) KHC 655, ***Rajeev Kumar Gupta & Ors. v. Union of India & Ors:*** (2016) 13 SCC 153, ***Justice Sunanda Bhandare Foundation vs. Union of India*** : (2017) 14 SCC 1 were relied on and it was argued that the appointment of the differently abled under the 3%/4% quota is a requirement under the Act 1995 as well as 2016 Act. It was also argued that a liberal interpretation has to be adopted in the matter as the

appointment is envisaged under the Act as both the Acts are social welfare legislations. According to him, the provisions contained in the 1995 Act and those in the 2016 Act are substantially the same. 2016 Act is more elaborate. Relying on the judgment in ***State of Punjab v. Mohar Singh***: AIR 1955 SC 84, ***Gajaraj Singh vs. State Transport Appellate Tribunal*** *: (1997) 1 SCC 650, etc.,* it was argued that whatever obligations were available under the 1995 Act have been carried forward to the 2016 Act and there was no intention to destroy the right by introduction of the new Act. It was argued that both the Acts are in *pari materia* and in tune with Article 41 of the Constitution and there can be reasonable restrictions against the fundamental rights. Relying on the judgment in ***Papnasam Labour Union v. Madura Coats Ltd. & Anr.:*** 1995 KHC 758 it was argued that any restriction imposed for effectuating directive principle of the State policy shall be presumed to be a reasonable restriction. Relying on the judgments in ***Nair Service Society, Ktym& Ors. v. Government of Kerala & Ors. :***2015 (2) KHC 725, ***Manager, A.M Higher Secondary School, Vengoor & Ors. v. State of Kerala & Ors.*** :2017 KHC 945, ***Abdulla K.N V State of Kerala & others***: 2018(4)KHC 420, etc. it was argued that the provisions contained in both the Acts would apply to minority as well as non-minority educational institutions.

12. According to the learned Counsel for the managements, the judgments of the Apex Court relating to implementation of the provisions in the 1995 Act and 2016 Act, did not involve appointments in any aided educational institutions. It was argued that the observations in the judgment in ***Dalco***

Engineering Private Ltd's case *(supra) relied on by the learned Government Pleader, is* ***obiter dicta*** to the extent it is contrary to the judgment in ***TMA Pai***'s case *(supra)*. Relying on the judgment in ***Justice Sunanda Bhandare Foundation****'s case (supra)* it was argued that when a new Act having sea change is enacted, the repealed Act cannot be operated or implemented. Judgment in ***Gajaraj Singh's case*** would only support their contention that the 1995 Act is no longer in operation after its repeal.

13. Smt. Nandini, learned counsel appearing for the additional 3rd respondent, relying on the judgment of this Court in ***Radhakrishnan P v. Cochin Devaswom Board*****: 2015 (4) KLT 523** where this Court held that Cochin Devaswom Board is an establishment as defined under the 1995 Act, argued that aided Schools and Colleges aided by the Government have to abide by the provisions in both the Acts. Sri. Abraham Vakkanal, learned Senior Counsel, who appeared for the additional 4th respondent, argued that in view of the pendency of the directions in para.25 of the judgment in ***Justice Sunanda Bhandare Foundation vs. Union of India*** : (2017) 14 SCC 1 where action taken reports are called for from time to time regarding the implementation of the provisions in the 2016 Act, the petitioners have to approach the Hon'ble Supreme Court. The learned Counsel also relied on the judgments of this Court in ***Rajesh v. Secretary to Government***:2007(3)KLT 376, ***Manager, Eravannoor AUP School v. State of Kerala***: ILR (2011) 2 Kerala 301, ***NSS Case, Sobha George Adolfus V State of Kerala & another***: 2016 (3) KLT 271, etc. it was argued that the Managers are

bound to obey the instructions issued by the educational authorities and also that minority schools are also bound to act in tune with the provisions in the 1995 and 2016 Acts. The judgment of the Apex Court in ***Union of India vs. National Federation of the Blind***: (2013) 10 SCC 772, of this Court in ***E.Dineshan's case*** *(supra)*, ***Sunanda Bhandare's*** **case** *(supra)* etc. were also relied on where it was explained how to work out reservation.

14. The issue to be decided in these cases is whether the provisions relating to reservation in employment for physically challenged persons would apply to aided Schools and Colleges and if it applies whether it would apply to minority institutions. On the basis of a decision on that issue, it would be required to examine whether the backlog vacancies envisaged under the 1995 Act should be filled up after 2016 Act came into force.

15. The preamble of 1995 Act would show that the same is enacted to effectuate the proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region adopted in the meeting held in December 1992. The objective behind the 1995 Act is to integrate PWD into the society and to ensure their economic progress. From the preamble of the 2016 Act it is seen that it was enacted to effectuate the Convention of United Nations adopted by the General Assembly on 13.12.2006 for empowerment of the Persons with Disabilities, which was ratified by India, being a signatory to the convention, on 01.10.2007.

16. A comparison of relevant provisions in both the Acts is necessary in

this context:

Identification of posts and reservation is given in Sections 32 and 33 of 1995 Act and it is under Sections 33 and 34 in 2016 Act. Sections 32 and 33 of 1995 Act read as follows:

> "**32. Identification of posts which can be reserved for persons with disabilities.**—Appropriate Government shall—
> (*a*) identify posts, in the establishments, which can be reserved for the persons with disability;
> (*b*) at periodical intervals not exceeding three years, review the list of posts identified and up-date the list taking into consideration the developments in technology.
>
> **33. Reservation of posts.**—Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from—
> (*i*) blindness or low vision;
> (*ii*) hearing impairment;
> (*iii*) locomotor disability or cerebral palsy,
> in the posts identified for each disability:
> Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

Corresponding provisions in 2016 are the following:

> *"**33. Identification of posts for reservation.**— The appropriate Government shall—*
> *(i) 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 section 34;*
> *(ii) constitute an expert committee with representation of persons with benchmark disabilities for identification of such posts; and*
> *(iii) undertake periodic review of the identified posts at an interval not exceeding three years.*
>
> ***34. Reservation.**— (1) Every appropriate Government shall appoint in every Government establishment, not less than*

four per cent of the total number of vacancies in the cadre strength in each group of posts meant to be filled with persons with benchmark disabilities of which, one per cent each shall be reserved for persons with benchmark disabilities under clauses (a), (b) and (c) and one per cent for persons with benchmark disabilities under clauses (d) and (e), namely:—

(a) blindness and low vision;

(b) deaf and hard of hearing;

(c) locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy;

(d) autism, intellectual disability, specific learning disability and mental illness;

(e) multiple disabilities from amongst persons under clauses (a) to (d) including deaf-blindness in the posts identified for each disabilities:

Provided that the reservation in promotion shall be in accordance with such instructions as are issued by the appropriate Government from time to time:

Provided further that the appropriate Government, in consultation with the Chief Commissioner or the State Commissioner, as the case may be, may, having regard to the type of work carried out in any Government establishment, by notification and subject to such conditions, if any, as may be specified in such notifications exempt any Government establishment from the provisions of this section.

(2) Where in any recruitment year any vacancy cannot be filled up due to nonavailability of a suitable person with benchmark disability or for any other sufficient reasons, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with benchmark disability is not available, it may first be filled by interchange among the five categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability:

Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the five categories with the prior approval of the appropriate Government.

• The appropriate Government may, by notification, provide for such relaxation of upper age limit for employment of persons with benchmark disability, as it thinks fit."

Section 41 under the 1995 Act read as follows:

41. ***Incentives to employers to ensure five per cent of the work force is composed of persons with disabilities.—****The appropriate*

Governments and the local authorities shall, within the limits of their economic capacity and development, provide incentives to employers both in public and private sectors to ensure that at least five per cent of their work force is composed of persons with disabilities.

Corresponding provision in 2016 Act is:

35. Incentives to employers in private sector.— *The appropriate Government and the local authorities shall, within the limit of their economic capacity and development, provide incentives to employer in private sector to ensure that at least five per cent of their work force is composed of persons with benchmark disability.*

Section 47 of the 1995 Act read as follows:

"47. Non-discrimination in Government employment.—*(1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:*

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall be denied to a person merely on the ground of his disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

In 2016 Act non-discrimination in employment is given in Section 20.

"20. Non-discrimination in employment.— *(1) No Government establishment shall discriminate against any person with disability in any matter relating to employment:*

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, exempt any establishment from the provisions of this section.

(2) Every Government establishment shall provide reasonable accommodation and appropriate barrier free and conducive environment to employees with disability.

(3) No promotion shall be denied to a person merely on

the ground of disability.

(4) No Government establishment shall dispense with or reduce in rank, an employee who acquires a disability during his or her service:

Provided that, if an employee after acquiring disability is not suitable for the post he was holding, shall be shifted to some other post with the same pay scale and service benefits:

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

- *The appropriate Government may frame policies for posting and transfer of employees with disabilities.*

Under the 1995 Act reservation of vacancies was envisaged in establishments; whereas in 2016 Act it is in Government establishments. Similarly, the percentage of reservation in 1995 Act was 3% of the vacancies for appointment of persons with disability; whereas under 2016 Act it is 4% of the vacancies in the cadre strength in each group of post for appointment of persons with benchmark disability. Therefore, it is necessary to examine the definition of establishment in both the Acts and that of establishment, Government establishment and private establishment in Sections 2(i), 2(k) and 2(v). Section 2(k) of the 1995 Act reads as follows:

"Section 2. Definitions

- *In this Act, unless the context otherwise requires,—*

xxxx

(k) "establishment" means a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a local authority or a Government company as defined in Section 617 of the Companies Act, 1956 (1 of 1956) and includes Departments of a Government."

In 2016 Act establishment, government establishment and private establishment

are defined as given below:

> **"2. Definitions.**— In this Act, unless the context otherwise requires,—
>
> xxxx xx
>
> ***(i):*** *"establishment" includes a Government establishment and private establishment;*
>
> ***Section 2*** *(k) "Government establishment" means a corporation established by or under a Central Act or State Act or an authority or a body owned or controlled or aided by the Government or a local authority or a Government company as defined in section 2 of the Companies Act, 2013 (18 of 2013) and includes a Department of the Government;*
>
> ***Section 2.*** *(v) "private establishment" means a company, firm, cooperative or other society, associations, trust, agency, institution, organisation, union, factory or such other establishment as the appropriate Government may, by notification, specify;*

Disability was defined under 1995 Act as follows:

> ***Section 2. Definitions***
>
> (*i*) "disability" means—
>
> (*i*) blindness;
>
> (*ii*) low vision;
>
> (*iii*) leprosy-cured;
>
> (*iv*) hearing impairment;
>
> (*v*) locomotor disability;
>
> (vii)mental retardation;
>
> (vii)mental illness;
>
> ***Section 2. xxx***
>
> (*t*) "person with disability" means a person suffering from not less than forty per cent of any disability as certified by a medical authority;
>
> (*u*) "person with low vision" means a person with impairment of visual functioning even after treatment or standard refractive correction but who uses or is potentially capable of using vision for the planning or execution of a task with appropriate assistive device."

In 2016 Act definition of persons with disability, persons with benchmark disability etc. is given as follows:

> *"2(r) "person with benchmark disability" means a person with not less than forty per cent of a specified disability*

where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority;

(s) "person with disability" means a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others;

(t) "person with disability having high support needs" means a person with benchmark disability certified under clause (a) of sub-section (2) of section 58 who needs high support."

According to the petitioner, managements, aided Schools and aided Colleges do not come under the definition of establishments or Government establishment, though the schools and colleges under them are aided by the Government as evident from the very classification and nomenclature of the institutions.

17. Petitioners cannot dispute that the aided Schools are governed by the Kerala Education Act and Rules. Section 2(1) of the Kerala Education Act defines `aided Schools' as "aided School means a private school which is recognized by and is receiving aid from the Government'; but shall not include educational institutions entitled to receive grants under Article 377 of the Constitution of India except in so far as they are receiving aid in excess of the grants to which they are so entitled. Though the appointing authority of the staff of the School is not Government, Section 11 of the Act provides that teachers of aided school shall be appointed by the Managers of the Schools, subject to the rules and conditions laid down by the Government, from among persons who possess the qualifications prescribed under Section 10. Therefore, the authority of the managers of aided Schools to appoint teachers is not absolute; it can only be in accordance with the rules and conditions laid down by the Government, that too, only from among

candidates possessing qualification as prescribed by the Government. It is also pertinent to note that the Managers are bound to abide by the provisions in the Act, rules, orders and instructions issued by the educational authorities, as provided in the rules and as held in the judgments of this Court in ***NSS'*** case *(supra)*, ***Rajesh'***s case *(supra)*, ***Manager, Eravannoor Up. School's*** case *(supra)*, ***Sobha George Adolf*** (*supra*) etc.

18. Aided Colleges in the State come under various Universities. Even though there is no definition of aided college, Section 2(28A) of the Calicut University Act as well as that of Kerala University Act and Section 2 (30A) of M.G University Act and Section 2(xxixA) of the Kannur University Act define an unaided college as a private college which is not entitled to any financial assistance from the Government or University. In colleges also appointment can be made only from among candidates having the qualifications prescribed in UGC Regulations as well as University statutes/ordinance; posts should be sanctioned by the Government and require approval from the University. Salary is paid by the Government. Aided Colleges have entered into direct payment agreement with the Government in the year 1972. Selection committee should consist of nominees of University and Government.

19. The contention of the petitioner Managements is that the right of appointment conferred on the Management of aided Colleges cannot be interfered with or diluted in view of the direct payment agreement entered into between the petitioner managements and the State Government. According to them, their

fundamental right under Article 19(1)(g) to make appointment and the right of minorities under Article 30(1) of the Constitution cannot be interfered with by directing appointments under the 1995 Act or 2016 Act. In the judgment in ***Ahmedabad St. Xavier's College Society v. State of Gujarat*** : (1974) 1 SCC 717, relied on by the learned Senior Counsel it was held that the selection and appointment of teachers for an educational institution is one of the essential ingredients of the right to manage an educational institution and the minorities cannot be denied such right of selection and appointment infringing Article 30(1). So long as the persons chosen have the qualifications prescribed by the University, the choice must be left to the management. The fundamental right of a minority to administer educational institutions of its choice comprises within it the elementary right to conduct teaching, training and instruction in courses of studies in the institutions so established by teachers appointed by the minority. It was held that in the right of administration, checks and balances in the shape of regulatory measures are required to ensure the appointment of good teachers and their conditions of service. At the same time, it was also held that the right to administer educational institutions can plainly not include the right to maladminister. The State can prescribe regulations to ensure the excellence of the institution. In the Full Bench judgment of this Court in ***Benedict Mar Gregorius v. State of Kerala & others*** : 1976 KLT 458 (F.B.), relied on by Sri. Kurian George Kannanthanam, this Court while considering the validity of the provisions in M.G University Act, held that even while making an appointment by promotion, the minority institution

is entitled to choose the one best fitted to serve the interests of the minorities, subject to the person satisfying the standards prescribed by the University to keep up the excellence of education, discipline in the institution and the like. In ***Joseph Kachappilly v. State of Kerala*** : 1997(2) KLT 740, it was held that constitution of a Screening Committee by the Government for the purpose of placement of Lecturers would be clearly against the fundamental rights of management guaranteed under Art. 30(1) of the Constitution of India.

20. As contended by the learned Senior Counsel Sri Kurian George Kannanthanam and Sri.Pradeep, the right to establish an educational institution is a fundamental right under Article 19(1)(g) of the Constitution as held in the judgments in ***T.M.A. Pai V State of Karanaka****:* (2002) 8 SCC 481, ***P.A. Inamdar V State of Maharashtra & others***: (2005)6 SCC 537, etc. In the judgment in ***TMA Pai's*** *case* the Apex court held that the right to establish an educational institution can be regulated; but such regulatory measures must be to ensure the maintenance of proper academic standards, atmosphere and infrastructure including qualified staff and the prevention of maladministration by those in charge of management. The fixing of a rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions. In para.107 it was held that any regulation framed in the national interest must necessarily be applied to all educational institutions, whether run by the majority or the minority. The right under Article 30(1) cannot be such as to

override the national interest or to prevent the Government from framing regulations in that behalf. Government regulations cannot destroy the minority character of the institution or make the right to establish and administer a mere illusion; but the right under Article 30 is not so absolute as to be above the law. The right to establish an educational institution can be regulated; but such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of maladministration by those in charge of management. The fixing of a rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions. In the judgment in ***Manger, Eravannoor AUP School'***s case (*supra*) as well as ***Nair Service Society, Ktym & Ors. v. Government of Kerala & Ors.*** [2015 (2) KHC 725, after discussing all these judgments, while considering the validity of an order requiring absorption of protected teachers as a condition for approval of appointment, repelled the contentions raised on behalf of the minority institutions. The Division Bench held that the provisions under the Kerala Education Act or Rules which provide for absorption of teachers on retrenchment or sub-rule (1) of R.1 of Chapter XIVA of KER, which requires the Managers of aided Schools to scrupulously follow the directions issued by the Government from time to time, for ascertaining the availability of qualified hand and also for filling up vacancy; and provisions providing for preference to thrown out teachers for appointment to

future vacancies in the very same Educational Agency as well as under other Educational Agencies, do not make any distinction between non- minority institutions and minority institutions, and apply with equal force to minority institutions claiming protection under Art.30(1) of the Constitution of India. It was held that the right conferred on the religious and linguistic minorities to administer educational institutions of their choice is not an absolute right.

21. In the judgment in ***Manager, A.M Higher Secondary School, Vengoor's case*** *(supra)* while considering the validity of the amendment rules which required appointment of protected teachers, it was held that the provisions for appointment of protected teachers have been inserted in the rules, as a measure of social obligation in the interest of teachers, who are facing retrenchment due to division fall from the aided educational institutions, whether it is run by minority or non-minority communities; minority institutions are given the opportunity to opt from the list of protected teachers, which is not available to others; the Teachers' bank would be having teachers from all communities and from all types of institutions; the Teachers' bank envisages inclusion of all teachers coming under its parameters, irrespective of the Schools from which they were retrenched. No privileges can be granted to them by fastening liabilities on non-minority institutions. There is no difference in financial burden of Government on minority as well as non-minority schools. The eligibility for protection to the teachers, who are retrenched from minority as well as non-minority schools, is the same. Therefore, liability to accommodate them has to be thrust upon minority as well as

non-minority schools, without causing undue advantages or disadvantages to any of such institutions.

22. In the judgment in ***Sobha George Adolfus v. State of Kerala & another***: 2016 (3) KLT 271 relied on by Sri.Abraham Vakanal, the learned Senior Counsel, this Court held that the right of minority under Article 30(1) would not be abrogated by promoting a student to the next class. In order to protect their right, the right of others cannot be trampled upon. Protection is to retain their identity and denial of such rights of others does not have any nexus with the object behind the protection. As far as the implementation of the provisions contained in the 1995 Act or 2016 Act is concerned, once it is found applicable to aided educational institutions, it cannot be said that it cannot apply to minority institutions. In the absence of any provision in the Act, it is not within the ambit of the State Government to exempt the minority institutions. As the opportunity for selection is not interfered with and also when it is possible to have differently abled persons from any community, the social obligation to integrate them with the mainstream can be taken up by the minority managements also.

23. In the judgment in ***Abdulla N v. State of Kerala & others*** : 2018(4) KHC 420, this Court was considering a Writ Petition filed by a Manager challenging the proposal for his disqualification for not carrying out the directions of the educational authority and hence refusing to re-appoint a teacher who was on deployment as Cluster co-ordinator, despite order of the Deputy Director of Education. This Court held that Article 30(1) of the Constitution which protects

the right of all minorities to establish and administer educational institutions of their choice is to instill confidence in minorities, any executive or legislative encroachment on their right to establish. But such an institution would not be immune from any regulatory measures, as the right to administer does not include any right to maladminister and hence to deny re-appointment to a teacher who was retrenched from that school.

24. In the judgment in ***State of Kerala v. Arun George***: (2015) 11 SCC 334, relied on by the managements, the Apex court was considering the liability of the Government to pay the salary due to the college teachers. Government denied them salary on the ground that they were appointed when additional courses were sanctioned on condition that there would not be any financial commitment. The Apex Court accepted the contention of Managements that when they have discharged their obligation under the provisions of Direct Payment Agreement, in terms of admission of students, collection of fees, reservation of seats as prescribed by the Government and remitted the same in the Government treasury, the State is also obliged to perform its mutual obligation under the Articles of Direct Payment Agreement. But that judgment does not have any relevance in the matter of a Government order which was issued realizing the fact that reservation under both the Central Acts were implemented in aided institutions while implementing the same in Government institutions in the light of the directions of the Apex Court in various judgments. It would be beyond the authority of the State Government to exempt the educational agencies which entered into direct

payment agreement, from implementing the provisions in any central enactments.

25. In the judgment in ***Brahma Samaj Educational Society v. State of West Bengal and others***: (2004)6 SCC 224 relied on by the managements, the Apex court was considering the challenge raised by the college against the provision insisting it to make the entire selection and appointment of teachers through the College service Commission under College Service Commission Act for making appointment of teachers through the College Service Commission. In the light of the law laid down in ***T.M.A Pai's*** case, it was held that merely because the petitioners are receiving aid, their autonomy of administration cannot be totally restricted and institutions cannot be treated as Government-owned one and that the State can impose only such conditions as are necessary for the proper maintenance of standards of education and to check maladministration. The impugned order only directs the managements themselves to select and appoint a small percentage of vacancies in accordance with the central Act .

26. Reliance was placed on the judgment in ***Sindhi Education Society v. Govt. (NCT of Delhi)*****:** (2010) 8 SCC 49, in support of the contention that aided institutions do not come under Article 12 and hence those are not establishment. In that case, all the Schools including minority Schools were directed to give an undertaking that it would make reservation for Scheduled Castes and Scheduled Tribes as a condition for availing grant in aid. It was held that power under Article 16 to make provision/law/reservation in relation to a particular class or classes of persons is only on the 'State' and that power is to be exercised only in relation to

the 'service under the State'. It was held that 'service under the State' would be only those which are directly under the State or the instrumentalities which can be termed as State within the meaning of Article 12 of the Constitution. There it was held that merely receiving grant-in-aid alone would not make such school or institution "State" within the meaning of Article 12 of the Constitution of India. That requirement under Rule 64(1) of the Delhi School Education Rules to give undertaking was found to be in violation of the fundamental right of the Trust under Article 30 of the Constitution of India. However, it was also found that the right under Article 30 is not absolute and that it is subject to reasonable restrictions by the Government in public interest or national interest. It is seen that Apex Court was considering the provisions made by the State Government to follow reservation. In the present case the State Government has only issued an order directing implementation of the provisions of Central Acts enacted for the integration of persons with disability with the mainstream irrespective of the community to which they belong and without interfering with the right of choice. The Apex Court has in a series of decisions directed the Government to implement the provisions in the 1995 Act as well as 2016 Act and to report the matter to the Court. The provisions under the Act are not under challenge in these Writ Petitions. Therefore, the contention of the petitioner managements that the provisions under the Act are applicable only to instrumentalities of State cannot be accepted.

27. In the judgment in W.A.No.1664 of 2015 relied on by Sri. Pradeep,

this Court was considering whether the UGC Regulations have extended the policy of reservation of scheduled caste/scheduled Tribe and OBC to private aided Schools. The Regulation was stated to be issued by the UGC in compliance with the direction of Central Government. This Court found that the policy of the Central Government was to implement reservation policy in Central Universities which are established under central enactment and institutions which are deemed to be Universities which are receiving grant in aid from public exchequer and that the colleges mentioned therein also are only those colleges under those universities. It was accordingly held that the order issued by the Central Government as well as the guidelines issued by the UGC based on that do not apply to private aided educational institutions. It was also held that the guidelines do not enjoy the character of rules or regulations which can be enforced. Following the judgment in ***Sindhi Educational Trust***'s case, it was held that the power of State Government to make provisions for reservation is confined to the services under the State within the purview of Article 12. Following the judgment in ***TMA Pai***'s case and ***P.A. Inamdar***'s case it was held that Government control over teaching and non-teaching staff of private schools is confined to framing of rules/regulations that promote good administration and that the power to appoint staff in private institutions is vested in management and governing body thereof; imposition of a control requiring the private educational institution to follow reservation policy would be a serious inroad into its autonomy. But the said judgment in respect of communal reservation in aided Colleges would not apply,

in a case where the requirement is under a central enactment and when the right vested in the managements to make appointment is not abrogated in any manner. The power to select and appoint the 3% or the 4% would continue to be vested in the respective educational agencies.

28. A Constitution Bench of the Apex Court in ***Ashoka Kumar Thakur* v. *Union of India: (2006)8 SCC 1*** upheld the constitutional validity of Article 15 (5) of the Constitution of India. In ***Pramati Educational & Cultural Trust v. Union of India*** (2014) 8 SCC 1, the Apex court considered the constitutional validity of Article 21A which provides that the State shall provide, free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. The Right of Children for (Free and Compulsory) Education Act, 2009 enacted under Article 21A, as per Section 12(1) (*c*) provides that private unaided schools shall admit in Class I, at least twenty-five per cent of the strength of the class from amongst weaker sections of the society and from disadvantaged groups and provide free and compulsory education. These contentions were raised to the effect that applying the functional test to private educational institutions are also `State' within the meaning of Article 12 of the Constitution. Though it was found that the word "State" in Article 21A can only mean the "State" which can make the law, it was held that a new power was vested in the State to enable the State to discharge this constitutional obligation by making a law. It was held that the power under Article 21A in the State is independent of the power of the State under clause (6) of Article 19 of the

Constitution and by exercising this additional power, the State can by law impose admissions on private unaided schools for the purpose of providing free and compulsory education to the children of the age of 6 to 14 years belonging to poorer, weaker and backward sections of the society, to a small percentage of the seats in private educational institutions, in order to achieve the constitutional goals of equality of opportunity and social justice and that such a law would not be destructive of the right of the private unaided educational institutions under Article 19(1)(*g*) of the Constitution. However, it was found that such a provision cannot be imposed on minority institutions.

29. The decision in ***State of Bihar v. Project Uchcha Vidya, Sikshak Sangh*** (2006) 2 SCC 545, where it was held that regulation or restriction under clause (6) of Article 19 of the Constitution can only be by a legislation and not by a circular or a policy decision in terms of Article 162 of the Constitution would not apply in the present case as the State Government has only directed implementation of the provisions in the central enactment.

30. As pointed out by Sri. Manu, the learned Senior Government Pleader, this Court has in the judgment in ***Manager, LMS Special Schools, Thiruvananthapuram Vs State of Kerala & others*****:** 2012(3)KHC 163, held that the provisions of the Act apply to an establishment aided by the Government and the minority educational institution which denied promotion to the petitioner therein, which was receiving aid from the Government, was bound by the provisions of the 1995 Act and held that the denial of promotion to the petitioner

therein as Headmaster on the ground of blindness was violative of Section 47(2) of the 1995 Act. The applicability of the 1995 Act was affirmed by the Division Bench.

31. In ***Dalco Engg. (P) Ltd. v. Satish Prabhakar Padhye***: (2010) 4 SCC 378 relied on by both sides, the Apex court while considering the question whether Section 47 of the 1995 Act would apply to a private Ltd Company, held that legislative intent was to apply Section 47 of the Act only to the establishments as defined under Section 2(*k*) of the Act and that the legislative intent was to define "establishment" so as to be synonymous with the definition of "State" under Article 12 of the Constitution of India and therefore Private employers, or companies other than government companies are clearly excluded from the establishments. However it was also held by the Apex Court in paragraph 33 of the judgment as follows:

> *"33.xxxxThough, the marginal note of Section 29 uses the words "all educational institutions" with reference to reservation of seats for persons with disabilities, the section makes it clear that only government educational institutions and educational institutions receiving aid from the Government shall reserve not less than three per cent seats for persons with disabilities. It is well recognised that an aided private school would be included within the definition of "State" in regard to its acts and functions as an instrumentality of the State. Therefore, care is taken to apply the provisions of the Act only to educational institutions belonging to the Government or receiving aid from the Government and not to unaided private educational institutions."*

Following the aforesaid judgment the Gujarath High Court in ***Shankerbhai Ganeshbhai Chaudhary's case (supra)*** directed appointment of differently abled

candidate in an aided School. At the same time, this Court in ***LMS School's*** case considered the same and found that the school or college aided by the Government would come within the definition of 2(k) and hence Section 47 would be applicable in that case. The said finding was affirmed in the writ appeal also.

32. In the judgment in ***Kavitha Balakrishnan v. Prasanna Kumari E.S:*** 2015(5) KHC 655, the Division Bench of this Court, while considering the eligibility of a visually impaired candidate for age relaxation for appointment as Assistant Professor in Kannur University, held that the University which receives aid from State Government is an establishment under Section 2(k) of the Act and that appropriate Government in that context is State Government. The objection raised in that case on the ground that the University adopted the particular Government order only on 29.01.2009 and therefore it cannot apply to the recruitment prior to that was repelled. It was held that the Act being a social welfare legislation it has to be interpreted liberally so as to achieve the purpose in full. It was ordered that every establishment which is bound by the Act should imbibe the true spirit of the Act and implement the same.

33. There is no specific exclusion of educational institutions from the purview of establishments. At the same time institutions aided by the Government are specifically included. It is true that there is a separate provision which specifically provides for reservation for admission to aided educational institutions. I find that the specific provisions relating to admission can only be in educational institutions; whereas provision for employment would be available in

all establishments under the State and also the Centre. The provision regarding incentive for reservation in private sector also would show that the legislature intended to bring about reservation even in favour of those working in the private sector. On that ground it cannot be said that aided Schools are in private sector or that reservation need be implemented only if incentives as provided in Section 41 are given to them by the Government, when these institutions are already aided by Government.

34. In the above context, I am of the view that aided educational institution would come within the meaning of establishment as defined in Section 2(k) of 1995 Act and that of Government establishment under section 2(i) of the 2016 Act. It cannot be said that Government introduced any new provision or amended the Central Act by an executive order. The extension is of what was already intended by the Act and included in the Act. It is also pertinent to note that the almost all the conditions of service of government colleges mutatis mutandis apply to the teachers of aided colleges and schools.

35. Now the question is just because the provisions contained in Sections 32 and 33 of 1995 Act and Sections 33 and 34 of 2016 Act provide that "appropriate authority" shall appoint and appropriate authority is defined as Central/State Government as the case may be, the educational agencies are not required to fill up the vacancies. Sri. Kurian George Kannanthanam, the learned Senior Counsel for the management consortium vehemently argued that the Act only obligates the appropriate authority to identify, reserve as well as to make

appointment of persons with disability. As rightly pointed out by Sri. V.Manu, the Learned Senior Government Pleader, Section 2 of the 1995 Act as well as that of 2016 Act start with "***In this Act, unless the context otherwise requires,"*** and therefore the definition has to be interpreted considering the legislative intent as both the Acts are beneficial legislations, enacted in order to effectuate the proclamations made in the Asia Pacific meet and effectuate UN convention on the Rights of Persons with Disabilities in tune with Article 51(c) of the Constitution of India .

36. It is relevant to note that in the judgment of the Apex Court in ***Bharat Coking Coal Ltd. v. Annapurna Construction***: (2008) 6 SCC 732 while construing the definition of the term "court" in the Arbitration and Conciliation Act, 1996, which also started with "*unless the context otherwise requires*" it was held as follows:

> ***"8.*** *It is now a trite law that whenever a term has been defined under a statute, the same should ordinarily be given effect to. There cannot, however, be any doubt whatsoever that the interpretation clause being prefaced by the words "unless there is anything repugnant in the subject and context" may in given situations lead this Court to opine that the legislature intended a different meaning. (See State of Maharashtra v. Indian Medical Assn:(2002) 1 SCC 589 and Pandey & Co. Builders (P) Ltd. v. State of Bihar :(2007) 1 SCC 467.)*

The aforesaid proposition was approved by a larger bench of the Apex Court in ***State of Jharkhand v. Hindustan Construction Co. Ltd.: (2018) 2 SCC 602.***

37. In the judgment in ***Tata Power Co. Ltd. v. Reliance Energy Ltd.: (2009) 16 SCC 659*** also the Apex Court construed the definition clause in Section 2 of the Electricity Act, 2003, which prefixed the words "unless the context otherwise requires". It was held that the meaning should be assigned "subject to the context".

In para 97 of the judgment it was held as follows:

> ***"97.*** *However, when the question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in its context. The legal principle is that all statutory definitions have to be read subject to the qualification variously expressed in the definition clause which created them and it may be that even where the definition is exhaustive in as much as the word defined is said to mean a certain thing, it is possible for the word to have some what different meaning in different sections of the Act depending upon the subject or context. That is why all definitions in statutes generally begin with the qualifying words "unless there is anything repugnant to the subject or context". (See : Whirlpool Corpn. v. Registrar of Trade Marks: (1998) 8 SCC 1, Garhwal Mandal Vikas Nigam Ltd. v. Krishna Travel Agency: (2008) 6 SCC 741 and National Insurance Co. Ltd. v. Deepa V devi (2008) 1 SCC414)*
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> *xx"*

38. In the judgment in ***Vanguard Fire and General Insurance Co. Ltd. Madras v. M/s. Fraser and Ross & Anr.*** :AIR 1960 SC 971 it was held that meaning of a provision shall be construed from the Statute as a whole. When there is a non obstante clause or when it starts with unless the context otherwise required or unless there is anything to the contrary, the provisions in the Act have to be construed in the light of the intent behind the legislation.

39. Therefore, the expressions "appropriate Government" occurring in Sections 32 and 33/33 and 34 of both the Acts as well as the definition of

establishment/government establishment therein have to be construed liberally and in accordance with the legislative intent behind the Act. There cannot be any dispute over the fact that the 1995 Act as well as 2016 Act are social welfare legislation and that such legislation are to be interpreted liberally. The legislative intent is to integrate the differently abled with the main stream. The Apex Court in the judgment in ***(1985) 4 SCC 71*****,** while considering the question whether Sundays and other paid holidays should be treated as days on which the employee "actually worked under the employer" for the purposes of Section 25-F read with Section 25-B of the Industrial Disputes Act, observed as follows:

> ***"4.*** *The principles of statutory construction are well settled. Words occurring in statutes of liberal import such as social welfare legislation and human rights' legislation are not to be put in Procrustean beds or shrunk to Liliputian dimensions. In construing these legislation the imposture of literal construction must be avoided and the prodigality of its misapplication must be recognized and reduced. Judges ought to be more concerned with the "colour", the "content" and the "context" of such statutes (we have borrowed the words from Lord Wilberforce's opinion in Prenn v. Simmonds). In the same opinion Lord Wilberforce pointed out that law is not to be left behind in some island of literal interpretation but is to enquire beyond the language, unisolated from the matrix of facts in which they are set; the law is not to be interpreted purely on internal linguistic considerations. In one of the cases cited before us, that is, Surendra Kumar Verma v. Central Government Industrial Tribunal-cum-Labour Court, we had occasion to say,*
>
> *"Semantic luxuries are misplaced in the interpretation of 'bread and butter' statutes. Welfare statutes must, of necessity, receive a broad interpretation. Where legislation is designed to give relief against certain kinds of mischief, the Court is not to make inroads by making etymological excursions."*

In the judgment in ***Ravi Prakash Gupta*****'s** case (*supra*) the Apex court observed as follows:

> *"We have examined the matter with great care having regard to the*

> *nature of the issues involved in relation to the intention of the legislature to provide for integration of persons with disabilities into the social mainstream and to lay down a strategy for comprehensive development and programmes and services and equalization of opportunities for persons with disabilities and for their education, training, employment and rehabilitation amongst other responsibilities. We have considered the matter from the said angle to ensure that the object of the Disabilities Act, 1995, which is to give effect to the proclamation on the full participation and equality of the people with disabilities in the Asian and Pacific regions, is fulfilled."*

In the judgment in ***Union of India v. National Federation of the Blind***: (2013) 10 SCC 772 observing that the 1995 Act is a social legislation enacted for the benefit of persons with disabilities it was observed that provisions must be interpreted in order to fulfill its objective. Referring to the provisions contained in Sections 38 and 39 of the Draft Rights of Persons with Disabilities Bill, 2012, which turned out as Sections 33 and 34 of the 2016 Act, in the place of Sections 32 and 33 of the 1995 Act, the Apex Court held that the intention of the legislature is clearly to reserve in every establishment under the appropriate Government, not less than 3% of the vacancies for the persons or class of persons with disability. In para.55 it was held as follows:

> • *"9. xxxxx In the matters of providing relief to those who are differently abled, the approach and attitude of the executive must be liberal and relief-oriented and not obstructive or lethargic. A little concern for this class who are differently abled can do wonders in their life and help them stand on their own and not remain on mercy of others. A welfare State that India is, must accord its best and special attention to a section of our society which comprises of differently abled citizens. This is true equality and effective conferment of equal opportunity."*

Therefore, on a liberal and contextual interpretation of the provisions contained in Sections 32 and 33 of 1995 Act and 33 and 34 of of the Act, as well as the definition of establishment, it cannot be said that appointment against identified posts against the 3%/4% can be made only by Government or that it can be made only in establishments having the characteristics of State under Article 12. By the mere fact that the Government of Kerala has identified posts in Government Schools or Government Departments only for appointment under the Act, it cannot be said that the intention of the central Act was confined to only Government Schools or that aided educational institutions are excluded from the applicability of the Act. It is also relevant to note that under Article 41 of the Constitution State shall make effective provisions for securing right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement. The Acts 1995 and 2016 are in tune with that also apart from effectuating the proclamations. Therefore, in the venture to integrate the disabled with the mainstream, the aided educational institutions are also to contribute.

40. In the judgment in ***Krishnan v. State*** : 1996 KHC 81, relied on by the learned Government Pleader, the Division Bench of this Court was considering a dispute in connection with the condition fixed while granting loan to agriculturists that they should purchase pump-sets and rubber sheeting rollers from a particular co-operative societies. Thus Court held that the fundamental right of petitioners under Article 19 of the Constitution is always subject to reasonable restriction. It was found that the condition was to purchase from 2 Co-operative Societies and

under Article 43, State should endeavour to promote the activities of co-operative societies. The Apex court in ***Papanasanam Labour Union's*** case while considering the validity of Section 25M of the Industrial Disputes Act, requiring prior permission for lay off, held that any restriction imposed on fundamental right to promote or effectuate directive principles can be presumed to be reasonable.

41. The minority right or direct payment agreement entered into between the Government also would not stand in the way of implementation of the provisions contained in the Act. The appointment under the Act is also to be done by the educational agencies. State Government is not interfering with the right of managements to choose persons. Only thing is that while undertaking such selection the requisite percentage shall be from among the persons with disability. The State Government has only directed the Colleges to implement the provisions in the Act, that too, when the Hon'ble Supreme Court had been consistently issuing various directions for its implementation for the last several years. As pointed out by the additional respondents and the petitioners, who represent the beneficiaries of the Act, even without directions from the State Government, it is the duty of the managements of aided educational institutions, to see that the differently abled persons are also given appointment under them against the 3%/4% of the vacancies.

42. The next question is whether appointments should be done on the basis of the provisions in a repealed 1995 Act, when 2016 Act does not have a saving clause and whether there can be any direction to fill up backlog vacancies.

Section 102 of the 2016 Act, which repealed the 1995 Act read as follows:

> *"**102. Repeal and savings**.— (1) The Persons with Disabilities (Equal Opportunity Protection of Rights and Full Participation) Act, 1995 (1 of 1996) is hereby repealed.*
>
> *• Notwithstanding the repeal of the said Act, anything done or any action taken under the said Act, shall be deemed to have been done or taken under the corresponding provisions of this Act."*

In this context it is also necessary to have a look at Section 6 of the General Clauses Act,1897 which reads as follows:

> *"**6. Effect of repeal**.—Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—*
>
> *(a) revive anything not in force or existing at the time at which the repeal takes effect; or*
>
> *(b) affect the previous operation of any enactment so repealed or any thing duly done or suffered thereunder; or*
>
> ***(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or***
>
> *(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or*
>
> *(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;*
>
> *and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."*

43. The effect of repeal was considered by a 3 Judge Bench of the Apex Court in the judgment in ***State of Punjab v. Mohar Singh***: AIR 1955 SC 84, while considering the validity of the prosecution under an Ordinance, which ceased to

have any effect on the enactment of the Punjab Refugees (Registration of Land Claims) Act. The new Act had come into force before prosecution commenced. There the respondent submitted a claim under the Ordinance on 17.03.1948 and the Act repealing the Ordinance came into force on 01.04.1948. Prosecution under Section 7 of the Act as against the claim found to be false, was initiated in 1950. The Apex Court considered the question whether it was possible to prosecute him under S.7 of the ordinance after it was repealed. In para.8 of the judgment it was held as follows:

> *"8. xxxxxWhenever there is a repeal of an enactment, the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore subscribe to the broad proposition that Section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material."*

It was held that unless a contrary intention can be gathered from the Act, provisions of Section 6 of the General Clauses Act would apply to a case of repeal even if there is a simultaneous enactment. In the present case also, there is no contrary intention. The 2016 Act provides for more benefits.

44. The effect of repeal was considered again by a 3 Judge Bench in ***Gajraj Singh v. STAT: (1997) 1 SCC 650*** while considering the validity of a permit granted under 1988 Act and renewed under the 1994 Act. After an elaborate discussion of the issue with reference to the "law of interpretation by

various authors like Crawford, G.P.Singh, Jagdish Swarup, Maxwell, Horack, Fancis Bennion, Randall, etc. it was concluded that operation of Section 217(1) is to obliterate the Act 4 of 1939 or any corresponding law in force; however repeal shall not affect any right or liability acquired, accrued or incurred. In that case, though there was a saving clause in Section 217(2), it was held that right to renewal of permit cannot be said to be an accrued or vested right; it is only a privilege. It was held that a right to apply for renewal and to get a favourable order would not be deemed to be a right accrued unless some positive acts are done, before repeal of Act 4 of 1939. In para.24 , it was held as follows:

> ***"24.*** *When there is a repeal and simultaneous re-enactment, Section 6 of the GC Act would apply to such a case unless contrary intention can be gathered from the repealing Act. Section 6 would be applicable in such cases unless the new legislation manifests intention inconsistent with or contrary to the application of the section. Such incompatibility would have to be ascertained from all relevant provisions of the new Act. Therefore, when the repeal is followed by a fresh legislation on the same subject, the Court would undoubtedly have to look to the provisions of the new Act only for the purpose of determining whether the new Act indicates different intention. The object of repeal and re-enactment is to obliterate the Repealed Act and to get rid of certain obsolete matters."*

45. It is also relevant to note the following extracts from Principles of Statutory Interpretation (9th Edn P. 595) authored by Justice G.P. Singh:

> *"General savings of rights accrued, and liabilities incurred under a repealed Act by force of section 6, Interpretation General Clauses Act, are subject to a contrary intention evinced by the repealing Act. In case of a bare repeal, there is hardly any room for a contrary intention; but when the repeal is accompanied by fresh legislation on the same subject, the provisions of the new Act will have to be looked into to determine whether and how far the new Act evinces a contrary intention affecting the operation of section 6, General Clauses Act. "The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to*

> *destroy them", for, unless such an intention is manifested by the new Act, the rights and liabilities under the repealed Act will continue to exist by force of section 6, General Clauses Act. It is the repealing Act and not the Act repealed which is to manifest the contrary intention so as to exclude the operation of section 6. The silence of the repealing Act is consistent and not inconsistent with section 6 applying xxxxxxx A provision in the repealing Act (which also enacts a new law) that the provisions of the new law 'shall have effect notwithstanding anything inconsistent contained in any other law for the time being in force' does not show a contrary indication to displace the application of section 6 of the General Clauses Act for the repealed law deemed to be in force for enforcement of accrued rights and liabilities by virtue of that section is not a law 'for the time being in force'*

46. In the 2016 Act there is no legislative intent contrary to that behind the 1995 Act. On the other hand, it is more elaborate and more beneficial to those for whose benefit it is enacted. The observations made by the Apex Court in ***Justice Sunanda Bhandare***'s case is that there has been sea change and it cannot be taken as ruse to deny the benefit of a judgment. Sea Change is only with respect to enhancement in the percentage of reservation and type of disabilities. Section 6 of General Clauses Act would therefore apply. 3% reservation in appointments was a right accrued to the persons with disability, under the 1995 Act. The Apex Court had been issuing consistent and time bound directions to implement those provisions. Therefore, it cannot be said that those rights ceased to exist by way of Section 102 of the 2016 Act. It is relevant to note that even before the 1995 Act came into force, reservation was provided to the differently abled persons. The concept of vertical reservation and horizontal reservation was evolved in ***Indra Sawhney***'s case as early as in 1992, well before the enactment in

1995. The difference in percentage of reservation or difference in the definition of establishment or the procedure provided for determining benchmark disability are not intended to destroy the right accrued or liabilities incurred under the old Act and there is no incompatibility between the two Acts. Therefore, the right accrued to persons with disabilities under the old Act for appointment under the 1995 Act as well as the liability of the aided Colleges/schools would continue.

47. It is relevant to examine the directions issued by the Apex Court while considering the rights available to the differently abled from 2010 onwards. In ***Govt. of India v. Ravi Prakash Gupta****: (2010) 7 SCC 626* the Apex court accepted the claim raised by the respondent that appointments to Civil Service are to be made against the vacancies in the 3% quota irrespective of the date when it was identified. Contention of the Central Government that provisions under the Act could be implemented only after identification of posts under Section 32 was repelled observing that the same would be contrary to the legislative intent behind the 1995 Act and that the delay in identification of posts under Section 32 cannot be used as a tool to defer or deny the benefit of appointment under Section 33 of the Act to the differently abled persons, when a duty is cast on every establishment to make appointment under Section 33 of the Act. In the judgment in ***Union of India v. National Federation of the Blind: (2013) 10 SCC 772*** a three Judge Bench of the Apex Court repelled the contention of the Union of India that 3% vacancies shall be computed only in identified posts. It was held that from Section 33 of the Act itself it is clear that the intention of the legislature is that vacancies

are to be computed on the basis of total vacancies in the strength of a cadre which would include group A, B, C and D. Reiterating the judgment in ***Ravi Prakash Gupta***'s case, the Apex Court observed that practical barriers prevent the differently abled persons from joining the workforce, as a result of which several of them are in poverty and deplorable conditions as they are denied the right to livelihood.

> ***"51.*** *The Union of India, the State Governments as well as the Union Territories have a categorical obligation under the Constitution of India and under various international treaties relating to human rights in general and treaties for disabled persons in particular, to protect the rights of disabled persons. Even though the Act was enacted way back in 1995, the disabled people have failed to get required benefit until today.*
>
> *xxxx*

It was inter-alia directed the following:

> ***"55.2.*** *We hereby direct the "appropriate Government" to compute the number of vacancies available in all the "establishments" and further identify the posts for disabled persons within a period of three months from today and implement the same without default.*
>
> *xxx xxx xxx*
>
> • *The appellant herein shall issue instructions to all the departments/public sector undertakings/government companies declaring that the non-observance of the scheme of reservation for persons with disabilities should be considered as an act of non-obedience and the Nodal Officer in department/public sector undertakings/government companies, responsible for the proper strict implementation of reservation for person with disabilities, be departmentally proceeded against for the default."*

Thereafter, another three Judge Bench in ***Justice Sunanda Bhandare Foundation v. Union of India*** *: (2014)14 SCC 383,* took serious note of the lethargy on the part of the Union, States and all those on whom obligation is cast under the Act, in implementing the beneficial provisions of the Act, and thereby defeating the very purpose of the same. The Governments of Centre, State and Union Territories were

directed to implement the provisions of 1995 Act in letter and spirit by the end of 2014. They were alerted stating that their role in such matter has to be proactive. In para.9 it was held that:

> *"9. xxxxxIn the matters of providing relief to those who are differently abled, the approach and attitude of the executive must be liberal and relief-oriented and not obstructive or lethargic. A little concern for this class who are differently abled can do wonders in their life and help them stand on their own and not remain on mercy of others. A welfare State that India is, must accord its best and special attention to a section of our society which comprises of differently abled citizens. This is true equality and effective conferment of equal opportunity."*

Regarding the reservation to the differently abled, the Apex Court in ***Rajeev Kumar Gupta v. Union of India****: (2016) 13 SCC 153,* while considering whether reservation is permissible in promotions, explained the difference between reservation under Article 16(4) and reservation under Article 16(1) and held that Article 16(1) does not prevent any preferential/differential treatment to the physically challenged and that what is forbidden is such differential treatment on factors such as caste, religion, etc. and the class of physically disabled is not forbidden. It was also held that persons with disability cannot be equated with backward classes contemplated in Article 16(4) of the Constitution. As 3% reservation was seen denied on the ground that the method of appointment to group A and B posts is by promotion, it was observed that rigorous measures are to be employed for ensuring the reservation under the 3% and such reservation cannot be denied in promotions**.**

48. This Court has in the judgment in ***Dineshan E v. State of Kerala and Others***: 2014(4)KHC 988, held that filling up of vacancies in the 3% quota only

for the period from the date of identification of the post was in violation of the mandate under Section 33 of the 1995 Act and directed to fill up all the backlog vacancies in Government owned companies and Public Sector Undertakings for the period from 1996, the date of commencement of the 1995 Act, irrespective of the date on which the Government identified the post or the date on which the selection was entrusted to Public Service Commission. It was held that the Act passed by Parliament would prevail and that the State is duty bound to implement the provisions contained in Section 33 from the date of the enactment. Affirming that judgment, the Division Bench in ***Kerala Public Service Commission v. E. Dineshan and others***: 2016(2) KHC 910 repelled even the contention that the supplementary list of differently abled candidates cannot be operated after the main list was exhausted, as the issue is covered by the provisions contained in the 1995 Act and the judgments of the Apex Court in ***Ravi Prakash Gupta***'s case and ***Sunanda Bhandare***'s case (*supra*) directing its implementation. Therefore, the contention of the Senior Counsel that identification under 2016 is yet to be made and reservation or appointments need be made only thereafter is unsustainable. The contention that the State Government had been issuing orders on identification without taking note of the 2016 enactment cannot also be correct, as identification was made by the expert committee even before the enactment.

49. In the judgment in ***Justice Sunanda Bhandare Foundation v. Union of India***: (2017) 14 SCC 1, the Apex Court, after analysing the provisions contained in the 2016 Act, again directed the State Governments to take immediate

steps to comply with the requirements of the 2016 Act and file the compliance report. It was again reminded that a duty is cast on the States and its authorities to see that the statutory provisions that are enshrined and applicable to the co-operative societies, companies, firms, associations and establishments, institutions are scrupulously followed.

50. The Apex Court had also observed that the 2016 Act visualises a sea change. Relying on the aforesaid observation, the learned Counsel for the petitioners argued that once the 2016 Act came into force, the State Government has no authority to direct implementation of the repealed Act. It is therefore necessary to have a look at those observations in paras.24 to 26 of the judgment.

> ***"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 realize that under the 2016 Act their responsibilities have grown and they are required to actualize 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 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."*

It is therefore evident that the Apex Court had only observed that more rights are conferred on the differently abled under the 2016 Act. There is not even a remote indication that the rights already conferred under 1995 Act and the obligations/liabilities under it which were directed to be discharged by the end of 2014, got divested or ceased to exist after the commencement of 2016 Act.

51. Therefore, I am of the view that the order dated 18.11.2018 - Ext.P8 in W.P.(C)No.1806/2018 and Ext.P1 in W.P.(C)No.2800/2019, does not warrant any interference.

52. In the result, W.P.(C).Nos.1806/2018 and 2800 of 2019 are dismissed. W.P.(c).Nos.224/2019 and 4753/2020 are disposed of with a direction to the respective managements to conduct the selection and appointment in tune with the aforesaid Government Order in implementation of the 1995 Act and Right to Persons with Disability 2016. They are bound to fill up the vacancies as directed in the Government Order.

As the respondents colleges in the Writ Petitions have not filled up any vacancy under the 3%/4% quota, they shall fill up the vacancies only in accordance with the Government Orders, after issuing notification specifying the same.

Sd/-

(P.V.ASHA, JUDGE)

rtr/rkc

APPENDIX OF WP(C) 4753/2020

PETITIONER'S EXHIBITS:

EXHIBIT P1	**TRUE COPY OF THE STANDING DISABILITY ASSESSMENT BOARD CERTIFICATE DATED 28.06.2011.**
EXHIBIT P2	**TRUE COPY OF THE DEGREE CERTIFICATE DATED 08.08.2012 ISSUED BY THE VICE-CHANCELLOR OF KERALA UNIVERSITY.**
EXHIBIT P3	**TRUE COPY OF THE CERTIFICATE DATED 27.02.2017 BY THE HEAD NET BEUREO.**
EXHIBIT P4	**TRUE COPY OF THE CERTIFICATE DATED NIL ISSUED BY THE MADHURAI KAMARAJ UNIVERSITY.**
EXHIBIT P5	**TRUE COPY OF THE GO(P) NO.18/2018/SJD DATED 18.11.2018 OF THE SOCIAL JUSTICE (DEPARTMENT).**
EXHIBIT P6	**TRUE COPY OF THE PAGE NO.49 OF THE SERVICES MAGAZINE DATED 01.12.2018 PUBLISHED BY NSS PERUNNA CHANGANASSERY.**
EXHIBIT P7	**TRUE COPY OF THE APPLICATION DATED 25.12.2018.**

RESPONDENTS' EXHIBITS

EXT.R3(a)	**TRUE COPY OF DIRECT PAYMENT AGREEMENT AS BETWEEN NAIR SERVICE SOCIETY WHICH IS THE EDUCATIONAL AGENCY AND GOVERNMENT OF KERALA.**
EXT.R3(b)	**TRUE COPY OF ORDER DT.20.11.2019 BY GOVERNMENT GIVING GOVERNMENT NOMINEE FOR SELECTION OF 51 POSTS OF ASSISTANT PROFESSORS.**

APPENDIX OF WP(C) 224/2019

PETITIONER'S/S EXHIBITS:

EXHIBIT P1	THE TRUE COPY OF NO. GO(P) NO. 18/218/SJD, DATED 18.11.2018 ISSUED BY THE 1ST RESPONDENT.
EXHIBIT P2	TRUE COPY OF NOTIFICATION REGARDING THE APPLICATION CALLING FOR TO VARIOUS POSTS IN VARIOUS EDUCATIONAL INSTITUTIONS UNDER THE GURUVAYOOR DEVASWOM.
EXHIBIT P3	TRUE COPY OF NOTIFICATION PUBLISHED IN THE MALAYALA MANORAMA DAILY DATED 22.11.2018 CALLING FOR APPLICATIONS TO VARIOUS POSTS IN VARIOUS EDUCATIONAL INSTITUTIONS UNDER THE NSS
EXHIBIT P4	TRUE COPY OF THE APPLICATION DATED 3.12.2018 SUBMITTED BY THE PETITIONER BEFORE THE NSS COLLEGE UNDER THE KERALA UNIVERSITY
EXHIBIT P5	TRUE COPY OF THE APPLICATION DATED 3.12.2018 SUBMITTED BY THE PETITIONER BEFORE THE NSS COLLEGE UNDER M.G. UNIVERSITY.
EXHIBIT P6	TRUE COPY OF THE APPLICATION DATED 4.12.2018 SUBMITTED BY THE PETITIONER BEFORE THE APPOINTING AUTHORITY OF GURUVAYOOR DEVASWOM
EXHIBIT P7	TRUE COPY OF THE MEDICAL CERTIFICATE ISSUED FROM THE TD MEDICAL COLLEGE HOSPITAL, ALAPPUZHA DATED 04.10.14

RESPONDENT'S/S EXHIBITS:

EXHIBIT R3 A	TRUE COPY OF THE COMMUNICATION DATED 14/6/2019 ISSUED BY THE PRINCIPAL SECRETARY TO THE GOVERNMENT, HIGHER EDUCATION DEPARTMENT
EXHIBIT R3 B	TRUE COPY OF THE COMMUNICATION DATED 5/11/2019 IS ISSUED BY THE PRINCIPAL SECRETARY TO THE GOVERNMENT, HIGHER EDUCATION DEPARTMENT
EXT.R3C	A TRUE COPY OF THE LETTER DT.13.8.20 ISSUED BY THE PRINCIPAL, SREE KRISHNA COLLEGE,

	GURUVAYUR TO THE 2ND RESPONDENT
EXT.R4A	**TRUE COPY OF THE ORDER DT.20.11.19 BY THE GOVERNMENT GIVING GOVERNMENT NOMINEE FOR SELECTION OF 51 POSTS OF ASSISTANT PROFESSORS**
EXT.R4B	**TRUE COPY OF DIRECT PAYMENT AGREEMENT AS BETWEEN NAIR SERVICE SOCIETY WHICH IS THE EDUCATIONAL AGENCY AND GOVERNMENT OF KERALA**

APPENDIX OF WP(C) 2800/2019

PETITIONER'S/S EXHIBITS:

EXHIBIT P1	**THE COPY OF G.O.(P) NO.18/2018/SJD DATED 18.11.2018**

APPENDIX OF WP(C) 1806/2019

PETITIONER'S EXHIBITS:

EXHIBIT P1	**TRUE COPY OF THE LIST OF MEMBERS OF THE FIRST PETITIONER.**
EXHIBIT P2	**TRUE COPY OF THE LIST OF MEMBERS OF THE 2ND PETITIONER.**
EXHIBIT P3	**TRUE COPY OF THE ORDER DATED 17.10.2012 ISSUED BY THE GOVERNMENT.**
EXHIBIT P4	**TRUE COPY OF THE ORDER DATED 04.01.2013 ISSUED BY THE GOVERNMENT.**
EXHIBIT P5	**TRUE COPY OF THE ORDER DATED 04.04.2013 ISSUED BY THE GOVERNMENT.**
EXHIBIT P6	**TRUE COPY OF THE ORDER DATED 05.01.2015 ISSUED BY THE GOVERNMENT.**
EXHIBIT P7	**COPY OF THE GOVERNMENT ORDER DATED 14.09.2017 ISSUED BY THE GOVERNMENT.**
EXHIBIT P8	**COPY OF THE ORDER DATED 18.11.2018 ISSUED BY THE GOVERNMENT.**

RESPONDENTS' EXHIBITS

EXT.R3(a)	**TRUE COPY OF THE RELEVANT PORTIONS OF THE BOOK.**