

(2016) 05 RAJ CK 0162

In the Rajasthan High Court

Case No : Civil Writ Petition (PIL) No. 4630 of 2016

Abhyutthanam Society

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 13-05-2016

Acts Referred:

Constitution of India, 1950 — Article 21A

Right of Children to Free and Compulsory Education Act, 2009 — Section 2(e)

Citation : (2016) AIR(Raj) 164 : (2016) 4 RLW 3045 : (2016) 4 WLC 63

Hon'ble Judges : Mr. Ajay Rastogi, ACJ and Dinesh Chandra Somani, J.

Bench : Division Bench

Advocate : Mr. Anuroop Singhi, Mr. Saurabh Jain, Mr. Amitav Jatav and Mr. Pranjal Singh, Advocates, for the Petitioner; Mr. O.P. Pareek, Mr. S.K. Gupta, Additional Advocate General assisted by Mr. Aniket Vyas, Advocates, for the Respondent-State

Final Decision : Disposed Off

Judgement

Mr. Ajay Rastogi, A.C.J.—Instant Public Interest Litigation has been filed for ensuring effective implementation of the Right of Children to Free and Compulsory Education Act, 2009. The petitioner is a duly registered Society having its registered office at 192, Swaran Jayanti Nagar, Bharatpur and is allegedly working for effective implementation & mandate of Constitution enshrined u/Art.21A, which has been inserted in the Chapter of Fundamental Rights by the Constitution (86th Amendment) Act, 2002, which provides for free and compulsory education of all children in the age group of 6 to 14 years as a fundamental right in such a manner as the State by law may determine and to fulfil the object, the Right of Children to Free and Compulsory Education Act, 2009 has been enacted.

2. Indisputably, the education is a process which engages many different factors - the one who provides education (the teachers, the owner of educational institution, the parents), the one who receives education (the child, the pupil)

and the one who is legally responsible for the one who receives education (the parents, the legal guardians, the society and the State) and these participants have influence in the right to education. The Act of 2009 makes the right of all children to free and compulsory education justiciable and it has been enacted keeping in mind the crucial role of Universal Elementary Education for strengthening the social fabric of democracy through provision of equal opportunity to all. The Directive Principles of the State Policy enumerated in our Constitution lays down that the State shall provide free and compulsory education to all children upto the age of 14 years. The Act of 2009 provides for the right (entitlement) of children to free and compulsory admission, attendance and completion of elementary education in a neighbouring school. The Act of 2009 received the assent of the President on 26.08.2009 and came into force w.e.f. 01.04.2010. The provisions of this Act are intended not only to guarantee right to free and compulsory education to children but it also envisages imparting of quality education by providing required infrastructure and compliance with specified norms and standards in the schools.

3. The law enacted by the Parliament deals with separate definition of "child belonging to disadvantaged group" and "child belonging to weaker section" u/ Sec.2(d) & 2(e) of the Act, 2009 and if the Parliament intended that benefits of Right of Education Act were to be conferred only on children belonging to disadvantaged group whose parents/guardians belong to economically weaker section of the society, the Parliament would not have given separate definitions of "child belonging to disadvantaged group" and "child belonging to weaker section" but would have given a combined definition of "child belonging to disadvantaged group and weaker section". Similarly, provisions of Section 3 of the Right to Education Act also ensure that no child should be prevented from pursuing and completing elementary education on account of any financial weakness.

4. The State Government in exercise of its power u/Cl.(d) of Section 2 of the Act, 2009 issued Notification dated 29.03.2011 specifying that the child belonging to the following categories as "child belonging to disadvantaged group" namely:-

(a) the Scheduled Castes,

(b) the Scheduled Tribes,

(c) Other Backward Classes and Special Backward Classes whose parents' annual income does not exceed Rs.2.50 lacs, and

(d) a child covered under the definition of "person with disability" under clause (t) of Section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

5. At the same time, the State Government issued another Notification dated 29.03.2011 in pursuance of Clause (e) of Section 2 of the Act, 2009 specifying the child belonging to the following categories as "child belonging to weaker

section", namely:- a) A child whose parents are included in the list of Below Poverty Line families (both Central and State lists) prepared by the Rural Development Department/Urban Development Department of the State Government, and b) A child whose parents' annual income does not exceed Rs.2.50 lacs.

6. The extract of both the notifications dated 29.03.2011 issued by the State Government are reproduced ad infra:-

"Government of Rajasthan

School Education Department

F.21(19) Edu.-1/E.E./2009

Jaipur, the 29th March, 2011

NOTIFICATION

In pursuance of clause (d) of section 2 of the Right of Children to Free and Compulsory Education Act, 2009 (Central Act No.35 of 2009), the State Government hereby specifies the child belonging to the following categories as "child belonging to disadvantaged group", namely:-

(a) the Scheduled Castes,

(b) the Scheduled Tribes,

(c) Other Backward Classes and Special Backward Classes whose parents' annual income does not exceed Rs.2.50 lacs, and

(d) a child covered under the definition of "person with disability" under clause (t) to section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

By order of the Governor,

Sd/-

(Ashok Sampatram)

Principal Secretary to Govt.

Government of Rajasthan

School Education Department

F.21(19) Edu.-1/E.E./2009

Jaipur, the 29th March, 2011

NOTIFICATION

In pursuance of clause (e) of section 2 of the Right of Children to Free and Compulsory Education Act, 2009 (Central Act No.35 of 2009), the State

Government hereby specifies the child belonging to the following categories as "child belonging to weaker section", namely:-

(a) A child whose parents are included in the list of Below Poverty Line families (both Central and State lists) prepared by the Rural Development Department/ Urban Development of the State Government, and

(b) a child whose parents' annual income does not exceed Rs.2.50 lacs.

By order of the Governor,

Sd/-

(Ashok Sampatram)

Principal Secretary to Govt."

7. If we carefully go through the provisions of the Act, 2009 and what is being referred to above does not confined to the children who satisfy the test of both the definitions i.e. "child belonging to disadvantaged group" and "child belonging to weaker section" but the benefits under the Right to Education Act are available to "child belonging to disadvantaged group" as constituting one class and "child belonging to weaker section" as constituting another class. There may, of course, be some cases of overlapping, that their are children who may answer both the definitions, but for availing benefits under the Right to Education Act, it is not necessary that a child must satisfy both the definitions.

8. At the same time, it is not necessary to note that the Statement of Objects and Reasons of the Right to Education Act clearly provide that the object is to ensure provision of free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections and it is clear from the Statement of Objects and Reasons of the Right to Education Act that the children from disadvantaged and weaker sections are not merely entitled to free and compulsory education but also free elementary education of satisfactory quality and if the Government/Municipal Schools provide education of satisfactory quality, there would be no need for children to go to private unaided schools.

9. Under scheme of the Act, the schools which are covered u/Sec.2(n) of the Act, 2009 for imparting elementary education are responsible for free and compulsory education and for fulfilment of the object of the Act, as envisages u/Sec.12 of the Act and they are under an obligation to admit the children belonging to the weaker section and disadvantaged group in the neighbourhood school to the extent of at least 25% of the strength of that class and provide free and compulsory elementary education to all the children till its completion.

10. If we look at the records placed before us and the relevant datas, in which admissions took place against 25% seats reserved for admitting the children belonging to weaker section and disadvantaged group, pursuant to the two separate Notifications issued by the State Government in exercise of its power conferred u/Cl.(d) & (e) of Section 2 of the Act, 2009 dated 29.03.2011, during

the relevant academic sessions i.e. 2013-14, 2014-15, 2015-16, the information has been obtained from the office of the Director, Elementary Education, Rajasthan, Bikaner under Right to Information Act regarding the number of applications received for admission of the categories which are covered u/Cl.(d) & (e) of Section 2 of the Act, 2009 and it will be appropriate to indicate the information provided by the Director, Elementary Education, Rajasthan Bikaner vide its communication dated 16.03.2016 (Ann.5), which reads ad infra:-

"Application received for admission in various categories

Session

General

BPL

SC/ST

OBC/SBC

PH

Orphan

Total

2013-14

N/A

N/A

N/A

N/A

N/A

N/A

--

2014-15

46240

45889

88133

143398

1386

1596

326642

2015-16

72689

20853

89855

160989

1623

739

346748

11. At the same time, figures were also placed on record in the same communication in respect of admissions made in three academic years of various categories and we consider it appropriate to indicate the same ad infra:-

HINDI MATTER

HINDI MATTER

HINDI MATTER

HINDI MATTER

HINDI MATTER

General

BPL

SC

ST

OBC

SBC

PH

2013-14

33258

24311

49550

16465

84928

7598

0
216110
2014-15
24380
25205
34704
14254
69431
5942
0
173916
2015-16
25951
15583
34566
9777
72366
7161
536
165940
Total
83589
65099
118820
40496
226725
20701
536
555966

12. The aforesaid information, which is made available, clearly indicates that for

the academic session 2014-15 almost 3,26,642 applications were received for seeking admission under the Act, 2009 against 25% seats reserved for disadvantaged & weaker sections of the society and for the academic session 2015-16 total number of application received comes to 3,46,748 in all the categories & the admissions were made in substantial number of children against 25% seats reserved for the children belonging to weaker section and disadvantaged group, covered u/Sec.2(d) & 2(e) of the Act, 2009, of which reference has been made by the State Government under its Notifications dated 29.03.2011.

13. The State Government after implementing Notifications dated 29.03.2011 in the four academic sessions amended the category of "child belonging to disadvantaged group" and "child belonging to weaker section" vide its Notifications dated 28.03.2016 and we consider it appropriate to quote both the two Notifications dated 28.03.2016 issued by the State Government which are impugned before us in the instant petition, which read ad infra:-

"Government of Rajasthan

School Education Department

F.21(19) Edu.-1/E.E./2009

Jaipur, the 28th March, 2016

NOTIFICATION

In exercise of the powers conferred by clause (d) of section 2 of the Right of Children to Free and Compulsory Education Act, 2009 (Central Act No.35 of 2009) and in supersession of this department's notification number F.21(19) Edu.-1/E.E./2009 dated 29.03.2011, the State Government hereby specifies the following children as "child belonging to the disadvantaged group", namely:-

- (a) a child belonging to Scheduled Caste;
- (b) a child belonging to Scheduled Tribe;
- (c) an orphan;
- (d) a child whose parent or guardian is HIV or Cancer affected person;
- (e) a child of war widow; and
- (f) a child covered under the definition of "person with disability" under clause (t) to section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

By order of the Governor,

Sd/-

(Sunil Kumar Sharma)

Joint Secretary to Govt.

Government of Rajasthan

School Education Department

F.21(19) Edu.-1/E.E./2009

Jaipur, the 28th March, 2016

NOTIFICATION

In exercise of the powers conferred by clause (e) of section 2 of the Right of Children to Free and Compulsory Education Act, 2009 (Central Act No.35 of 2009) and in supersession of this department's notification number F.21(19) Edu.-1/E.E./2009 dated 29.03.2011, the State Government hereby specifies a child whose parents are included in the list (both Central and State) of Below Poverty Line families (of General, Scheduled Caste, Scheduled Tribe, Backward Classes and Special Backward Classes) prepared by the Rural Development Department/Urban Development Department of the State Government as "child belonging to weaker section".

By order of the Governor,

Sd/-

(Sunil Kumar Sharma)

Joint Secretary to Govt."

14. A comparative analysis of the above data indicated above which have been made available under Right to Information Act by the State Government indicates that the children of OBC/SBC admitted under the Right to Education Act, 2009 constitute more than 40% of the total children and the number of applicants and to be more particular the class of applicants who may now be deprived for being considered to participate and seek admission under the categories of "child belonging to disadvantaged group" and "child belonging to weaker section" and who were considered earlier for the academic sessions 2014-15 & 2015-16 respectively, are as follows:-

"No. of Applications

Session

OBC & SBC

Total Applications

Percentage

2014-15

143398

326642

43.90%

2015-16

160989

346748

46.43%

No. of Admissions

Session

OBC & SBC

Total Applications

Percentage

2014-15

75373

173916

43.33%

2015-16

79527

165950

47.92%

15. If we look into the Notifications dated 28.03.2016, it substantially curtails the category of children who earlier submitted their applications and were admitted in the schools, recognised to impart education and defined u/Sec.2(n) of the Act, 2009.

16. Tabular comparative charts for Disadvantaged Group and Weaker Section of Society have also been placed by the petitioner and we consider it appropriate to quote both the comparative charts of the Notifications dated 29.03.2011 & dated 28.03.2016, in reference to Section 2(d) & 2(e) of the Act, 2009, which read ad infra:-

Disadvantaged Group

According to Section 2(d) of RTE Act, 2009:

Section 2(d) : Disadvantaged Group

"Child belonging to disadvantaged group" means a child with disability [added

through 2012 amendment] or a child belonging to the :

1. Scheduled Caste;
2. Scheduled Tribe;
3. Socially and educationally backward class, or
4. Such other group having disadvantage owing to:
 - a. Social,
 - b. Cultural,
 - c. Economical,
 - d. Geographical,
 - e. Linguistic,
 - f. Gender, or

Such factors, as may be specified by the appropriate government, by notification.

As per Notification dated 29/3/2011 Child belonging to SC & ST

As per Notification dated 28/3/2016 Child belonging to SC & ST

Child belonging to OBC & SBC

NOT INCLUDED

Physically Handicapped Child

Physically Handicapped Child

Orphan Child (Through order)

-

-

Orphan Child, Child of War Widow, Child of HIV/Cancer affected person

Weaker Section

According to Section 2(e) of RTE Act, 2009:

Section 2(d): Weaker Section

Child belonging to such parent and guardian whose annual income is lower than the minimum limit specified by the appropriate government, by notification.

As per Notification dated 29/3/2011

A child whose parents are included in the list of Below Poverty Line families (both Central and State) prepared by the Rural Development/Urban Development Department of the State Government.

A child whose parents' annual income does not exceed Rs.2.50 lacs.

As per Notification dated 28/3/2016

A child whose parents included in the list (both Central and State) of Below Poverty Line families (of General, Scheduled Caste, Scheduled Tribe, Backward Classes and Special Backward Classes) prepared by the Rural Development/ Urban Development Department of the State Government.

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17. The main thrust of submission of counsel for petitioner is that the children belonging to OBC & SBC category and the children whose parents' annual income does not exceed Rs.2.50 lacs is the major segment of the needy children, who have been deprived from their fundamental rights for being admitted to the schools under the Act of 2009 and the petitioners have further demonstrated that since the process of admission has been initiated by the respondents for the academic session 2016-17 in terms of the present Notification dated 28.03.2016, the total applications received off-line/on-line, information whereof is made available to them dated 02.05.2016 from the web-portal of the Directorate of Elementary Education, Rajasthan and the applications received for admission in the last three academic sessions in comparison to 2016-17 gives a shocking figure under the Act of 2009 in private schools against 25% reserved seats are ad infra:-

2013-14

Not Available.

2014-15

3,26,642

2015-16

3,46,748

2016-17

1,59,063

18. So far as the students, admitted in the weaker section and disadvantaged group are concerned, the figures are ad infra:-

2013-14

2,16,110

2014-15

1,73,916

2015-16

1,65,940

19. In the present academic session i.e. 2016-17, the total applications which are received and registered off-line/on-line are 1,59,063 and a comparative table of the total number of applications received under the Right to Education Act, 2009 in the academic sessions 2015-16 and 2016-17, the shortfall in the number of applications is so steep & apparent in both the two separate Notifications, pursuant to which admissions are to be made under the Right to Education Act, 2009 of the children belonging to weaker section and children belonging to disadvantaged group, which reads ad infra:-

"Comparative study of total RTE applications in Session 2015-16 & 2016-17

Category

2015-16

%

2016-2017

%

Total Applications

3,46,748

100%

1,59,063

100%

General/OBC/SBC (with 2.5 lakh income criteria)

2,33,678

67.39%

N/A

N/A

BPL

20,853

6.01%

33,867

21.29%

SC/ST

89,855

25.91%

1,18,320

74.38%

Orphan

739

0.21%

620

0.38%

PH

1623

0.46%

1059

0.66%

Children of War widow/cancer and HIV affected parents

N/A

N/A

1187

0.74%

20. It is also brought to our notice that in the State of Rajasthan, the total schools which are registered for the Academic Session 2016-17 under the Right to Education Act are 34,054 and those schools who have participated in lottery are 18,286 and there are 15,773 schools where not a single application is received and the total applications received for being considered for admission through the process of lottery are 1,59,063, which is less than the number of students admitted in the last three academic years, although, this is subject to verification from the record but ultimately the question which the petitioner highlights in the present petition is that there is a shortfall of half the number of applications which are received because of the change given effect to by the respondents through their later Notification issued u/Sec.2(d) & 2(e) of the Act, 2009 dated 28.03.2016 on redefining the definition which is not within the purview of the State Government.

21. Counsel for petitioner further submits that the categories which are included amongst the "Child belonging to disadvantaged group" certainly fall within the section of disadvantaged group which have been notified by the State Government under its impugned Notification dated 28.03.2016 but the large

section of the society who are socially and educationally backward class or such other group having disadvantage owing to social, culture, economical, geographical, linguistic, gender or such other factors, which the appropriate Government specified in its Notification dated 28.03.2016 is completely missing, which was taken note of by the appropriate Government in its earlier Notification dated 29.03.2011 and the basic thrust of submission is that the child belonging to OBC & SBC whose parents' annual income does not exceed Rs.2.50 lacs have been completely eliminated from the present impugned Notification issued u/ Sec.2(d) of the Act, 2009.

22. At the same time, as regard the children belonging to weaker section are concerned, as contemplated u/Cl.(e) of Section 2 of the Act, 2009, the appropriate Government is under an obligation to indicate the children belonging to such parents or guardians whose annual income is lower than the minimum limit specified by the appropriate Government under the Notification dated 28.03.2016. In the earlier Notification dated 29.03.2011, the appropriate Government, in its wisdom, took a decision that the children belonging to such parents or guardians whose annual income does not exceed Rs.2.5 lakhs, according to them, fall within the category of "child belonging to weaker section" in fulfilment of the object of Section 2(e) of the Act, 2009 but in the present Notification impugned dated 28.03.2016 issued by the appropriate Government in exercise of powers conferred by Clause (e) of Section 2 of the Act, 2009, the annual income which may not exceed the benchmark, the appropriate Government has intentionally failed to specify and this according to the petitioner, the State Government is over-reaching itself in its jurisdiction in re-defining the definitions of Section 2(e) of the Act, 2009 which is beyond its authority and competence.

23. Counsel submits that determination of BPL status is a socio-economic criteria and that according to the petitioner cannot by any stretch of imagination be considered as a yardstick for determining a child belonging to weaker section, as being contemplated u/Cl.(e) of Section 2 of the Act, 2009 and while determining the class of children belonging to weaker section, it is primarily based on economic and financial condition of the parents/guardians & with no other consideration and the two definitions of Section 2(d) & 2(e) of the Act, 2009 being independent to each other, there cannot be any overlapping of the conditions.

24. According to the petitioner's counsel, the Parliament intended to achieve the constitutional goal of equality of opportunity through inclusive elementary education to all by enacting the Act of 2009, which can be traced from paragraphs 4 & 5 of the Statement of Objects and Reasons of the Bill and the State Government under its impugned Notifications debar the major segment of children who are eligible to be considered for admission under the Act of 2009 and debarring members of OBC & SBC, according to the petitioner, is violative of Article 14 of the Constitution.

25. Per contra, the respondents have filed their reply to the writ petition and have justified their action and in support of the present Notifications impugned dated 28.03.2016 issued u/Sec.2(d) & 2(e) of the Act, 2009 and what prompted the State Government for superseding the earlier Notifications, pursuant to which admissions were made in the earlier academic sessions, dated 29.03.2011, the report of Secretary, Elementary Education dated 19.01.2016 (Annx.R/1) and so also the note-sheet annexed thereto have been placed on record.

26. We have looked into the justification which the Government has placed on record for issuance of present Notifications dated 28.03.2016 and the reason prompted to the Government was that if the minimum annual income has to be specified by Notification in regard to "child belonging to weaker section" benefit may not be extended to the children whose parents/guardians are included in the list (both Central and State) of Below Poverty Line families (of General, Scheduled Caste, Scheduled Tribe, Backward Classes and Special Backward Classes) prepared by the Rural Development Department/Urban Development Department of the State Government and Government has specified 13 pointers for being declared BPL and annual income has no significance, for becoming a member of BPL & annual income takes away the rights of major segments of society which are standing last in the queue and the very purport & object with which the Act of 2009 is enacted, may not be achieved.

27. But, the datas placed by the Government on record revealed from the note-sheets, available from page No.185 onwards, that admissions were made of various categories of "child belonging to disadvantaged group" and "child belonging to weaker section" but if we compare it with the statement which has been provided of the previous academic sessions i.e. 2013-14, 2014-15 & 2015-16, does not match with the figures made available by the petitioner & obtained under Right to Information Act and has been referred by us supra. At the same time, the exclusion of OBC/SBC in the impugned Notification dated 28.03.2016 u/Sec.2(d) of the Act, 2009 from "child belonging to disadvantaged group" remained under consideration since 2011 and having effective participation in implementation of the mandate of the Act, 2009, no justification has come forward.

28. Mr. S.K. Gupta, Additional Advocate General appearing for the State with vehemence tried to persuade this court that the Government has reviewed the datas and with a fresh look considered the category is supposed to be considered for admission under the Act of 2009 and the paramount consideration is that those who are really deserving section of the "disadvantaged group" and "weaker section" and needs assistance of the Government for free and compulsory education under the Act of 2009 and standing last in the queue, be considered for admission on priority basis and the past practise reveals that they are still being deprived & neglected because of the reason that other segments of society march over them and get admission & according to the opinion of the appropriate Government other categories may not fall in the category of "child

belonging to disadvantaged group" or "child belonging to weaker section" in fulfilment of the object of Section 2(d) & 2(e) the Act, 2009.

29. As regards facts & figures which have been placed on record, it could not be disputed by the respondents regarding the number of applications received for admission in the previous academic sessions i.e. 2013-14, 2014-15 & 2015-16 and also the number of applications received in the present academic session i.e. 2016-17 and indisputably, there is steep shortfall by half of the total applications received for admission in the previous academic sessions.

30. We are not so concerned about the applications received for admission in the last academic sessions but the reason for shortfall in the present academic session is the question which certainly arises for our consideration is whether the Government was justified and was within its competence while laying down the definition of "child belonging to disadvantaged group" and "child belonging to weaker section" covered by Section 2(d) & 2(e) of the Act, 2009.

31. The definitions of "child belonging to disadvantaged group", "child belonging to weaker section" and "school" as contemplated u/Sec.2(d), 2(e) & 2(n) of the Act, 2009, being relevant for the present controversy, are reproduced ad infra:-

"2. Definitions:-

(d) "child belonging to disadvantaged group" means a child belonging to the Scheduled Caste, the Scheduled Tribe, the socially and educationally backward class or such other group having disadvantage owing to social, cultural, economical, geographical, linguistic, gender or such other factor, as may be specified by the appropriate Government, by notification;

(e) "child belonging to weaker section" means a child belonging to such parent or guardian whose annual income is lower than the minimum limit specified by the appropriate Government, by notification;

(n) "school" means any recognised school imparting elementary education and includes-

(i) a school established, owned or controlled by the appropriate Government or a local authority;

(ii) an aided school received aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority;

(iii) a school belonging to specified category; and

(iv) an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority;"

32. When we look into the definitions of "child belonging to disadvantaged group" it includes a child belonging to the Scheduled Caste, the Scheduled Tribe, the socially and educationally backward class and also such other group having disadvantage owing to social, cultural, economical, geographical, linguistic,

gender or such other factors which may be specified by the appropriate Government and compare it with the earlier Notification dated 29.03.2011, we find that apart from the children belonging to the Scheduled Castes/the Scheduled Tribes, the children belonging to socially & educationally backward class are missing apart from other sections falling in such other groups having disadvantage owing to social, cultural, economical, geographical, linguistic, gender or such other factors, as may be specified by the appropriate Government and those children who are differently abled and orphan children are certainly the children of disadvantaged group and open for the appropriate Government to specify under its Notification to be considered as "child belonging to disadvantaged group" and in the present impugned Notification the appropriate Government has included certain other categories under the head of "child belonging to disadvantaged group":-

- (a) a child whose parent or guardian is HIV or Cancer affected person;
- (b) a child of war widow; and
- (c) a child covered under the definition of "person with disabilities" under clause (t) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

33. The other categories like orphan children, a child whose parent or guardian is HIV or Cancer affected person and a child of war widow, they too certainly fall under the category of "child belonging to disadvantaged group" but the children belonging to Other Backward Classes and Special Backward Classes which remain through out in the category of child belonging to disadvantaged group on its exclusion or elimination, whose parents' annual income does not exceed Rs.2.50 lakhs, which also form a class, no justification has come forward from the Government and we find substance in the submission made by counsel for the petitioner that under the present Notification impugned dated 28.03.2016, the State Government is not competent & holding any authority to re-write the definition of Section 2(d) of the Act, 2009 of "child belonging to disadvantaged group" in the manner that suits the appropriate Government and by eliminating the group of socially & educationally backward class & weaker section applications in sizable numbers for admission has been reduced which is almost half of the earlier academic years and it cannot be ruled out that it can be one of the indirect way to support private schools. At the same time, as regards Clause (e) of Section 2 of the Act, 2009 while defining "child belonging to weaker section", the appropriate Government under its Notification has to satisfy the annual income of the parent or guardian of the child which may not be lower than the minimum benchmark specified by the appropriate Government under its Notification but when we look into the Notification issued by the State Government u/Sec.2(e) of the Act, 2009 dated 28.03.2016, the annual income of the parent or guardian of the child belonging to weaker section has not been defined, which earlier the appropriate Government considered & defined as "does not exceed Rs.2.50 lacs".

34. In absence of the minimum annual income being defined which is the requirement of law to consider a child belonging to weaker section that in our view is not in conformity with the requirement of law and in consonance with Section 2(e) of the Act, 2009, however, it is always open for the appropriate Government to take decision & lay down the parameters of annual income of the parents/guardian of child belonging to weaker section defined u/Sec.2(e) of the Act, 2009.

35. To support there are Notifications arrived by the concerned appropriate Governments u/Sec.2(d) & 2(e) of the Act, 2009. The relevant extract of the Notification issued by the Union Territory of Delhi dated 17.10.2012 is reproduced ad infra:-

"5. Amendment in Clauses 2 and 6- In the Delhi School Education (Free Seats for students belonging to Economically Weaker Sections and Disadvantage Group) Order, 2011.-

(i) In clause 2, in sub-clause (d) after the words "Child belonging to disadvantaged group" means a child belonging to the Scheduled Castes, the Scheduled Tribes, the other backward classes not falling in the creamy layer, child with special needs and suffering from disability as defined in the Persons with Disabilities (Equal Opportunities, Protection and Full Participation) Act, 1996", the following shall be added, namely:-

"Orphan as defined in The Juvenile Justice (Care and Protection of Children) Rules, 2007."

36. The relevant extract of the Notification issued by the State of Uttarakhand dated 31.10.2011 is reproduced ad infra:-

"2(g) "Child belonging to disadvantaged group" means a child belonging to the Schedule Caste, the Schedule Tribe, Other Backward Classes as notified by the State Government (except creamy layer), an Orphan Child, Child suffering from disability as defined in Persons with Disabilities (Equal Opportunities, Protection and Full Participation Act, 1995) (Act 1 of 1996), a child depending on widow or divorcee mother, whose annual income is less than Rs.80000/-, HIV+ child or child of HIV+ parents and a child belonging to parents with disabilities (including leprosy effected persons defined in Persons with Disabilities (Equal Opportunities, Protection and Full Participation Act, 1995) (Act 1 of 1996) whose annual income is less than Rs.4.5 Lakh and includes such disadvantaged children as defined by the State Government from time to time;

Provided that 50% of the children belonging to disadvantaged group to be admitted under provisions of Section 12 of the Act shall be girls.

2(h) "Child belonging to weaker section" means a child belonging to such parent or guardian whose annual income is equal to or less than Rs.55000/-, and includes such children as defined by the State Government from time to time."

37. The relevant extract of the Notification issued by the State of Karnataka dated 28.04.2012 is reproduced ad infra:-

"2(e) "Child belonging to disadvantaged group" means a child belonging to the Scheduled Caste, the Scheduled Tribe, the Backward Class as specified by the Government of Karnataka, by notification under clause (d) of Section 2 of the Act; It also includes orphan, migrant and street child, child with special needs and HIV affected/infected child;

2(f) "Child belonging to weaker section" means a child belonging to such parent or guardian whose annual income is lower than the minimum limit as notified by the State under clause (e) of Section 2 of the Act."

38. The relevant extract of the Notification issued by the Union Territory of Andaman & Nicobar dated 15.07.2011 is reproduced ad infra:-

"Ministry of Human Resource Development (Department of School Education and Literacy)

NOTIFICATION

New Delhi, the 15th July, 2011

S.O.1757(E).- Whereas sub-clause (d) of Section 2 of the Right of Children to Free and Compulsory Education Act, 2009 (35 of 2009)(hereinafter referred to as the RTE Act), defines "child belonging to disadvantaged group" as a child belonging to the Scheduled Caste, the Scheduled Tribe, the socially and educationally backward class, or such other group having disadvantage owing to social, cultural, economical, geographical, linguistic, gender or such other factor, as may be specified by the appropriate Government, by notification;

And whereas, the Central Government, being the appropriate Government in relation to a school established, owned or controlled by the administrator of the Union Territory, having no legislature has received a proposal from Andaman and Nicobar Administration for notifying under clause (d) of Section 2 of the RTE Act, the following categories of children as "children belonging to disadvantaged group":

- (i) children belonging to the Scheduled Tribe, as notified for Andaman and Nicobar Islands by the Andaman and Nicobar Administration;
- (ii) children belonging to the Other Backward Classes, as notified for the Andaman and Nicobar Islands by the Andaman and Nicobar Administration; and
- (iii) the orphans, children of families of scavengers, children with special needs and HIV affected or infected children.

And whereas, the Central Government has examined and considered the proposal of the Andaman and Nicobar Administration:

Now, therefore, in pursuance of sub-clause (d) of Section 2 of the Right of

Children to Free and Compulsory Education Act, the Central Government hereby notifies the following categories of children as children belonging to disadvantaged group for the Andaman and Nicobar Islands;

(i) children belonging to the Scheduled Tribe, as notified for Andaman and Nicobar Islands by the Andaman and Nicobar Administration;

(ii) children belonging to the Other Backward Classes, as notified for the Andaman and Nicobar Islands by the Andaman and Nicobar Administration; and

(iii) the orphans, children of scavenger families, children with special needs and HIV affected or infected children."

39. We find substance in the submission made by counsel for the petitioner that the Government cannot amend and re-write the definitions and the Notification issued by the Government in exercise of powers conferred u/Cl.(e) of Section 2 of the Act, 2009 dated 28.03.2016 considering only such of the children whose parents are included in the list of BPL family and without indicating the annual income of the parents/guardian of the child under the Notification dated 28.03.2016 that cannot be said to be a valid decision of the State Government and in conformity with the mandate & requirement of the Act, 2009.

40. At the same time, it is not the case of the respondents that the children belonging to weaker section and disadvantaged group admitted in the previous years were exceeded 25% of the strength of the class, in reference to the Notifications dated 29.03.2011 and the other sections of the society who are last in queue, as alleged, remain deprived from seeking admission under the Act, 2009. On the contrary, the application forms which have been received for admissions in the current academic year 2016-17 are 1,59,063, which is even less than the admissions made in the last three academic years i.e. 2,16,110 for 2013-14; 1,73,916 for 2014-15 & 1,65,940 for 2015-16, pursuant to the earlier Notification dated 29.03.2011 and this fact can easily be inferred from the material on record that the major section of the socially and educationally backward class of the child belonging to the disadvantaged group has been eliminated and it further supports that the process of admission which has been initiated pursuant to the Notification dated 28.03.2016 of children belonging to disadvantaged group and weaker section of the society, it may leave the 25% of the strength to the extent unfilled and obviously the unfilled seats will revert back to the private schools to admit the students according to their own criteria and by this indirect method the mandate of law, as enshrined u/Art.21A of the Constitution can easily be frustrated.

41. We have carefully considered the provisions of Right to Education Act, 2009, which clearly envisage that the benefits are not confined to children who must satisfy both the definitions i.e. "child belonging to disadvantaged group" and "child belonging to weaker section" but the benefits under the Right to Education Act are available to "child belonging to disadvantaged group" as constituted one class and "child belonging to weaker section" as constituting another class. There

may, of course, be some cases of overlapping, that is children who may answer both the definitions, but for availing benefits under the Right to Education Act, it is not necessary that a child must satisfy both the tests defined u/Sec.2(d) & 2(e) of the Act, 2009.

42. Since the applications for admission in terms of Notifications dated 28.03.2016 have been received, we have the option either to quash and set aside both the Notifications which have been issued by the State Government in exercise of powers conferred by Clause (d) & (e) of Section 2 of the Act, 2009, which are impugned before us, dated 28.03.2016 or fill the gap, which according to us may be in fulfilment of the provisions of Section 2(d) & 2(e) of the Act, 2009, and add the section of the disadvantaged group & weaker section which are missing & deprived from being considered under the two separate heads covered under the definition of "child belonging to disadvantaged group" and "child belonging to weaker section", as contemplated u/Sec.2(d) & 2(e) of the Act, 2009 for fulfilment of the object & purport of Act, 2009 and we make it clear that in the earlier Notifications, appropriate Government considered Rs.2.50 Lacs, as the annual income as a Benchmark for the section of the society to be considered in disadvantaged group & weaker section of the society and that is always open for the appropriate Government to review as and when required but since annual income is completely missing from both the Notifications dated 28.03.2016 issued u/Sec.2(d) & 2(e) of the Act, 2009 in absence thereof, we consider it appropriate to go ahead with the same Benchmark.

43. After we have considered the matter at length and with the deliberation of the parties and keeping in view that applications from the sections of society covered u/Sec.2(d) & 2(e) of the Act, 2009 have submitted their applications for admission and any delay in the process may not be in the paramount interest of the litigating parties, we are of the view that it would be better for us to adopt the later mode which may fulfil the mandate and requirement of the Act, 2009.

44. Accordingly, we dispose of the instant writ petition with the following directions:-

(1) Let the child belonging to OBC & SBC whose parents' annual income does not exceed Rs.2.50 Lacs be also included as part of the Notification dated 28.03.2016 of the appropriate Government for "child belonging to disadvantaged group", as contemplated u/Sec.2(d) of the Act, 2009; and

(2) The children whose parents/guardians annual income does not exceed Rs.2.50 lakhs be considered as "child belonging to weaker section", as contemplated u/Sec.2(e) of the Act, 2009 and both the substitution be made part of the present Notifications dated 28.03.2016 issued by the State Government in exercise of powers conferred by Clause (d) & (e) of Section 2 of the Act, 2009.

45. With these two modifications supra, the writ petition stands disposed of and the respondents are directed to consider the categories which are now being

included by us under the present order & initiate the process for inviting applications & admission to the various schools covered u/Sec.2(n) of the Act, 2009 without any further loss of time so that the students to be admitted may not suffer their studies for the present academic session (2016-17). No costs.