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**(1963) 08 KL CK 0038**

**In the High Court Of Kerala**

**Case No :** O.P. No's. 1266, 1271, 1290, 1294, 1360 and 1407 of 1963

R. Jacob Mathew and Others

APPELLANT

Vs

The State of Kerala and Others

RESPONDENT

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**Date of Decision :** 23-08-1963

**Acts Referred:**

Constitution of India, 1950 — Article 13(3), 15(1), 15(4), 226, 29(2)

**Citation :** AIR 1964 Ker 39

**Hon'ble Judges :** C.A. Vaidialingam, J

**Bench :** Single Bench

**Advocate :** G. Viswanatha Iyer, in O.P. 1266/63, S. Easwara Iyer and L. Gopalakrishnan Potti, in O.P. 1290/63, P.K. Subramonia Iyer and P. Ramanarayanan, In O.P. 1294/63, T.R. Achutha Warriar, in O.P. 1407/ 63 and P.H. Sankaranarayana Iyer, in O.P. 1407/63, for the Appellant; K.V. Surianarayan Iyer and C.M. Devan for Respondents 3 and 4 in O.P. 1266/1963, General, for Respondents Nos. 1 to 8 in O.P. 1271/63, Thayyil K. Vasudevan, for Respondent 9 in O.P. 1271/63, General in O.P. 1290/63, General in O.P. O.P. 1294/63, Ad. General in O.P. 1366/63, Govt. Pleader in O.P. 1407/63, for the Respondent

**Final Decision :** Allowed

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## Judgement

C.A. Vaidialingam, J.—In these writ petitions, the respective writ petitioners dispute, under Article 226 of the Constitution, the principles laid down by the State Government regarding admissions to the Medical and Engineering Colleges in the State.

2 The order, the validity of which is challenged in these proceedings, is Ext. R-1, dated 7th June 1963, in O. P. No. 1266/1963, which, it is accepted by learned counsel appearing for the petitioners as well as the learned Advocate General appearing for the State, governs the matter of admissions to these institutions. According to the petitioners, but for the reservations made in the impugned order, they would have been entitled to admission in respect of the colleges for which they had applied. According to them, as a result of the reservations made by the said order, students who have obtained lesser percentage of marks have

been admitted; and the petitioners, notwithstanding the fact that they have got higher number of marks, have not been admitted.

3. The short contention that is raised on behalf of these petitioners, is that the order under attack, which has denied them the facility of admission in the respective colleges, is void under Articles 15(1) and 29(2) of the Constitution; and, as such, they pray that direction should be given to the respondents, which include the State, not to enforce those directions, as against the petitioners in the matter of their seeking admission to the colleges in question.

4. In these writ petitions, the Principals of the concerned colleges, namely the Medical and Engineering Colleges, have also been impleaded as additional respondents. In one particular writ petition, the committee constituted for selection, as well as the Director of Technical Education and certain other authorities, have also been impleaded as respondents.

5. The petitioners in O. P. Nos. 1266/63, 1290/63, 1294/63 and 1407/63, are applicants for admission either to the Pre-medical or first-year M.B.B.S. course in the Medical College for the year 1963-64. The petitioners in O. P. Nos. 1271/63 and 1360/63, are applicants for admission to the Engineering College for the year 1963-64.

6. Learned counsel for all the writ petitioners as well as the learned Advocate General appearing for the State, have requested this Court to treat the pleadings in "O. P. No. 1266/63 as representing the nature of the attack levelled as against the order in question, as well as the stand taken by the State in defence of the said order. Therefore, I would be referring, in the course of the judgment, to the pleadings in that writ petition, as well as to the exhibits that have been filed in those proceedings, with reference to the exhibit marks they bear in those proceedings.

7. I may also state that there are several other writ petitions, challenging the order in question. The decision in these six matters, will decide one way or the other the result of those writ petitions also. Therefore, I have permitted the counsel appearing in those matters, to place before this Court, any special aspects that they may wish to place. Accordingly, most of the learned counsel appearing in those writ petitions, have supported in a large measure the stand taken by the learned counsel in the above writ petitions, and they have also placed before this Court certain other aspects. All the aspects so covered by all the learned counsel, are being dealt with by me in the course of this Judgment.

8. Before I advert to the nature of the attack levelled as against the order in question, as well as the stand taken by the State Government, it is desirable to refer to the order Ext. R-1 itself. Before I advert to this notification, issued by the Government, it is also desirable to refer to certain other orders issued by the State Government, which may, in my view, have a large bearing in considering the controversy that is raised in these proceedings.

9. The State Government passed an order dated 15th June 1957, evidenced by Ext. P-2, relating to "Professional Colleges -- admission --reservation of seats for Backward Communities and Scheduled Castes." In that communication, the Government advert to the fact that representations have been received by them from the Kerala State Muslim League and the Akhila Kerala Ezhava Convention, requesting the Government to give legitimate representation "due to their communities", in the matter of admission to professional colleges. The Government then proceed to state that they have examined the question and they order accordingly that 35% of the seats will be reserved for Backward Classes, and 5% for Scheduled Castes and Tribes, ia the Professional Colleges, viz., Engineering, Agricultural and Veterinary. The. Government also state that in the case of Engineering and Medical Colleges, a minimum of 45% of the marks in the optional subjects, should be insisted upon for candidates from Backward Classes and Scheduled Castes and Tribes. After stating that there will be no regional representation, the Government declare that subject to the reservations mentioned in the order, admissions will be strictly in accordance with merit.

10. The State Government issued another notification, Ext. P-3 dated 28th June, 1957. That again, relates to the same subject as Ext. P-2. Under Ext. P-3, the Government partially modified the order Ext. P-2, and state that for admission to professional colleges in the State, viz., Engineering, Agricultural, Medical and Veterinary Colleges, the principle of sub-rotation that will have to be applied to the reservation of 35% made in favour of Backward classes is to be as follows :

(1) Ezhavas.

... 13%

(2) Muslims.

... 9%

(3) Latin Catholics.

... 3%

(4) Backward Christians.

... 1 %

(5) Other Hindus.

9%

Total

35%

11. Under Ext. P-4 dated 5th July 1957, the Government again refer to reservation of seats to "Backward communities"" in professional colleges. In that order the Government state that the Thiyyas will be treated as Ezhavas for

purposes of admission to professional colleges. They also refer to a notification dated 6-2-1957, wherein the latest list of Backward communities and Scheduled Castes and Tribes has been given. Under Ext. P-4 the Government also state that Backward Christians include S.I.U.C. and other Christians, and that Other Christians include Pulayas, Parayas and other Scheduled castes and Backward Community members converted to Christianity. The Government also state that "all the communities mentioned in annexure I" to the Government order, dated 6-2-1957, excepting Ezhavas and those belonging to "religions other than Hinduism", are to be treated as "Other Hindus".

12. Under Ext. P-5 dated 13th July 1957, the Government have given a direction to the effect that the principles, regarding reservation of seats

for backward Classes and Scheduled Castes and Tribes to Professional Colleges laid down in Exts. P-2 and P-3, will apply to all technical institutions under the control of the Government, including technical institutions under the University. They also emphasise that according to those principles 5% of the total number of seats will be reserved for Scheduled Castes and Tribes and 35% for Backward Classes. They also refer to the sub-rotation that is to be made of the 35% among the various groups already referred to in Ext. P-3.

13. One of the aspects that has been pressed before me by the learned counsel for the various petitioners, is that the reservation of 35%, which originated under Ext. P-2, and the sub-rotation of this 35% under Ext. P-3, as well as the clarifications given in the later orders referred to above, have been continued and repeated in the present order under attack. It is their further contention that these orders will clearly show that the ascertainment of Backward Classes has been only on the basis of the community or the caste as such, in whose favour the reservation has been made. In fact, they also refer to the representations that were made by the Muslim League and the Ezhava Convention, that they should be given legitimate representation due to their communities; and that is also referred to in Ext. P-2. They also refer in this connection to the sub-rotation made under Ext. P-3, which again clearly shows that it is made only on the basis of caste or community. They also refer to the order of the Government Ext. P-4, wherein the Government themselves have stated that the list of "Backward Communities" is the one given in the order dated 6-2-1957. The learned counsel emphasise that these orders clearly show that no other circumstance to treat a particular group as a "Backward Class" has weighed with the Government, excepting their belonging to a particular caste or community, which is violative of Article 15(4) of the Constitution.

14. The order that is under attack, as I mentioned earlier, is Ext. R-1 dated 7th June 1963, issued by the State Government. That no doubt, lays down the principles governing admission to the Medical Colleges. I have already adverted to the fact that these directions, which apply to the admissions to the Medical Colleges, substantially govern the matter of admission to the Engineering Colleges also.

15. The Government start by saying that the procedure and principles laid down in the said order shall form the basis for selection of candidates for admission to the M.B.B.S., B.D.S., and Pre-Medical / Pre-dental courses in the year 1963-64. The number of seats in the first-year M.B.B.S. course in the Medical colleges of the State, is stated to be 425, which is to be distributed among the three Medical Colleges in Trivandmm, Calicut and Kottayam, in the manner mentioned therein. The order further states that after admitting the Pre-medical passed candidates, Central Government nominees, children of Registered Medical Practitioners, etc., 213 candidates will be selected for the Pre-Medical Course and 15 for Pre-Dental Course.

16-17. Then come the two provisions relating to reservation, which are under attack in these proceedings. Clause (d) provides for two seats being reserved for children of Registered Medical Practitioners in Modern Medicine of the State, having the qualifications stated therein, on Statewide merit basis, from among the applicants who have not been selected otherwise. Clause (e) provides for the filling up of the remaining seats, in the manner indicated therein, after giving effect to the reservations under Clauses (a) to (d) of paragraph II, item 1, relating to the M.B.B.S. Course. This clause provides for the remaining seats being filled in the following manner, viz.,

- (1) 10% on State-wide merit basis;
- (2) 50% on District-war merit basis;
- (3) 35% by reservation for Backward Classes on State-Wide merit basis; and
- (4) 5% by reservation for scheduled Castes and Tribes, on State-wide merit basis. Clause (e) also states, that the seats reserved to be filled on District-war merit basis, are to be distributed among the nine Districts on the basis of the population reported at the 1961 Census, as follows :

District.

Population (in lakhs)

Percentage of seats.

Trivandrum.

17-45

10.3

(10)

Quilon.

19.41

11.4

(10)

Alleppey.

18.11

10.7

(11)

Kottayam

17.33

10.2

(10)

Ernakulam..

18.60

11. 0

(11)

Trichur.

16.40

9.7

(10)

Palgnat.

17-77

10.5

(11)

Kozhikode.

26.17

15.4

(15)

Cannanore.

17.80

10.5

(11)

Total

(100)

Clause (e) again proceeds to state that the sub-rotation of 35% seats reserved for Backward Classes, is to be in the manner indicated therein, viz.,

Ezhavas.

13

Muslims ...

9

Other Hindus

9

Latin Catholica, (including Anglo-Indians) ...

3

Backward Christians (including SIUC and other Christians.) ...

1

Total.

35

18. There is a very severe attack, in these proceedings, against the reservation of two seats for children of Registered Medical Practitioners and the selection of 50% on District-war merit basis, as well as the reservation of 35% for Backward Classes. At this stage I may also state that though the petitioners in these writ petitions pray for cancelling the reservations directed to be made under Ext. R-1, it has been made clear during the hearing that none of them challenge the reservation of 5% made in favour of the Scheduled Castes and Tribes on State-wide merit basis. Therefore, it will be seen that the main attack regarding Clause (e) relates to 50% of the seats being reserved on District-war merit basis, as well as the District-war proportion worked out for giving effect to this principle, as also the reservation of 35% for Backward Classes. I may also state that the sub-rotation of 35% is also attacked on the ground that the principle adopted therein by the Government will clearly show, according to the petitioners, that the Government have only taken into account castes and communities as such, and no other relevant aspects have been considered by the Government.

19. Paragraph (ii) item 2, of Ext. R-1 then deals with Pre-Medical Course. It is not necessary to advert to the nature of the reservation made under Clause (a) or (b) therein. Clause (c) under this heading, make provision for reservation of 3 seats for out-standing Sportsmen, who are otherwise qualified for admission to

the Pre-Medical Course; and the selection is to be made from a panel of candidates recommended by the Kerala Sports Council. Then Clause (d) again makes provision for reservation of one seat to children of Registered Medical Practitioners in Modern Medicine of the State, on State-wide merit basis, from among applicants who have not been selected otherwise. While Clause (d) of item 1 of paragraph (ii), relating to M. B. B. S. Course, reserves two seats for children of Registered Practitioners, Clause (d) of item 2, paragraph (ii) relating to Pre-Medical Course, reserves only one seat to children of Registered Medical Practitioners. Clause (e) in item 2, of paragraph (ii) again states that the remaining seats, after making reservations under Clauses (a) to (d) are to be filled up by Kerala State candidates in accordance with the rules regarding State merit, district-war merit, and reservation for Backward Classes, Scheduled Castes and Tribes, as in the case of direct admission to the M. B. B. S. course. That means that the same principles laid down in Clause (e) of item 1 of paragraph II, relating to M. B. B. S. course in Ext. R-1, will apply in respect of the selection of the remaining seats relating to Pre-Medical Course also.

20. Here again, it may be noted that the reservation made under Clauses (c) (d) and (e) of paragraph (ii) of item 2 in Ext. R-1, relating to

the Pre-Medical Course, is under attack in these proceedings.

21. Paragraph III of Ext. R-1 deals with the basis of selection and assessment of merit, both regarding admissions to the M. B. B. S., Pre-Medical, and B. D. S. Course. Paragraph IV deals with the application forms as also the last dates for receipt of applications in respect of the Pre-Medical/Pre-Dental Courses, and the M. B. B. S. B. D. S. Courses. Paragraph V deals with the Selection Committee, its constitution, etc. Paragraph VII again deals with miscellaneous matters. The only point to be noted therein is what is provided in Clause (2), namely, that out of the three seats that have been reserved for children of Registered Medical Practitioners namely, two seats for First M. B. B. S. Course and one seat for Pre-Medical Course -- two will be reserved for children of Registered Medical Practitioners in the State Government Service, and one seat for children of Registered Private Medical Practitioners. Naturally this clause is attacked by the petitioners, because according to them, the reservations as such for children of Registered Medical Practitioners are illegal, and in consequence, the distribution of the reservation is also illegal.

22. Ext. R-1 (Appendix) gives the various matters to be taken into account for assessment of extra-curricular attainments.

23. Ext. R-2 series (three in number) are various orders passed by the State Government either approving the prospectus and application forms for the M. B. B. S. etc., courses or directions issued regarding the nativity certificates to be produced by children or wards of Government servants. Item 1 in Ext. R-2 series, relates to the approval by the Government of the draft prospectus and application forms for the M. B. B. S. and other courses mentioned therein. It will

be seen that the Government also approve the form of the certificate which is to be issued by the Tahsildar, stating, the District to which the candidate belongs. Items 2 and 3 of Ext. R-2 series, relate to the production of nativity certificates by children of Kerala Government Servants.

Item 2 is an order dated 7th June, 1963. In the said order, the Government advert to the fact that candidates seeking admission to the Medical colleges, have to submit along with their applications, nativity certificates issued by the Tahsildar concerned. They also refer to the fact that those certificates are in part certificates of residence relating to the fact of permanent residence in a taluk for more than five years. The Government then refer to the inconvenience that is caused to Government servants, who are liable for transfer and as such find it impossible to obtain nativity certificates required to be produced by them for their children. Therefore, the Government state that in the case of children of Kerala Government servants, who are natives of Kerala, the condition regarding permanent residence in the same taluk for more than five years, will not be insisted upon. They also state that in the case of every applicant for admission to the Medical colleges in the State, who happens to be a child of a State Government Servant and is a native of Kerala, it will be deemed that the applicant belongs to the district and taluk where the parent (Government Servant) happens to work at the time of the application. The effect of this order is that the residence of the children of Government servants, will be the residence or the place where the Government servant happens to work at the time when the application is made.

There has been a further modification under item 3 of Ext. R-2 series. That again, is an order dated 14th June, 1963, wherein the Government refer to the earlier order, namely item 2 in Ext. R-2 series. The Government also advert to the question that has been raised R-2 series -- it is open to a child of a Government servant to apply from his own native district, and not from the District where the Government servant is actually working at the time of submission of the application for admission. After adverting to this question, the Government proceed to state, that the order -- item 2 was issued by the Government with the intention of liberalising the rules regarding nativity certificate for admission of candidates so far as children of Kerala Government servants are concerned; and that permitted a child of a Government servant to apply from the district where the Government servant is employed, inasmuch as the requirement of five years" rule cannot be satisfied in such cases.

Then the Government make it clear in the order -- item 3 in Ext. R-2 series -- that the children of Government servants can either apply from their native District or from the District where their parent are employed at the time of application for admission to the professional colleges and that the choice is left to the applicants. But the said order also states that in no case will they be allowed to apply from more than one District. Therefore, it will be seen that under item 3 of Ext. R-2 series, a child of a Government servant has a right to apply either

from the native District where he has got his residence, or from the District where his parents are employed at the time of application for admission; i. e., such a child can choose from which District he is to apply for admission.

24. Though the order Ext. R-1 does not refer to the notification regarding reservation for Backward Classes under Ext. P-2 dated 15th June, 1957, there is such a reference to this latter order in a similar notification issued by the Government regarding admissions to Engineering Colleges. That notification regarding admissions to Engineering Colleges was issued by the Government on 7th May, 1963, copy of which has been produced by the petitioner in O. P. No. 1360/63. Even there the State Government have filed a counter-affidavit; but they have made it very clear in the said counter affidavit that the stand taken by them in O. P. 1266/63 is adopted in respect of admissions to the Engineering Colleges also, because the same principles govern the admissions in respect of both sets of institutions. In this order dated 7th May, 1963, relating to Engineering colleges, the Government, in paragraph 5, proceed to state that three seats in the Engineering colleges and five seats in the Polytechnics will be set apart to be filled up by eminent athletes to be nominated by the Kerala Sports Council, Trivandrum. Paragraph 6 of the said order states that ten per cent of the total seats will be filled up purely on merit on State basis, both for the Engineering colleges, and the Polytechnics. Paragraph 7 clearly states that

"the reservation quota for Backward Communities, and Scheduled Castes and Tribes, as laid down in the order dated 28th June, 1957, will be continued to be filled up on State wide basis."

Pausing here for a minute, it will be noticed that the Government themselves use the expression, when referring to reservation, as "Backward Communities", and not as "Backward Classes". In that connection they also refer to the order Ext. P-2. Therefore, it is clear that Ext. P-2, according to the Government, is the order which has fixed the reservation quota in respect of Backward Classes. Paragraph 8 of the order deals with the District-wide percentage on the basis of which the remaining seats are to be filled up. The other matters mentioned in this order, namely the order dated 7th May, 1963, do not require to be adverted to. The provisions made in paragraph 5 regarding reservation to sportsmen, as well as the reservation for Backward communities provided in paragraph 7, and the selection on a District-wide basis, referred to in paragraph 8 of this order, are all attacked by all these writ petitioners.

25. The allegations of all the petitioners in their affidavits, are that they have all applied for admission, either to the Pre-Medical or Medical or Engineering Courses, and they have not been selected, though candidates with lesser marks have been selected. Their grievance is that the rights guaranteed to them under Article 15(1), read with Article 29(2) of the Constitution, have been grossly violated and the reservations, in particular, of 35% in favour of Backward classes, is irrational and goes far beyond the permissible limits provided by Article 15(4). In fact, their main ground of attack is that the classification of

Backward Classes, has been done by the Government arbitrarily on a caste or communal basis, and not after collecting data and other particulars relevant for taking a decision for such purposes.

26. The petitioners' attack regarding the 35% reservation for Backward communities, is that the said reservation is purely on the basis of caste or communities, without any regard to any other relevant circumstances. They also allege that Ezhavas are not socially or educationally or financially backward, and are not entitled to any special treatment in the matter of college admissions. In this connection it is also stated in the affidavits that Ezhavas are a very influential and dominant community in the State, and they have attained important positions, as merchants, factory-owners, land-owners, cultivators, and Government servants and Ministers. It is also stated that the members of that community occupy very high position in the social life, and that there are from among the members of that Community Members of Parliament, Members of the State Legislative Assembly, Members of the Devaswom Board and President of the Devaswom Board also.

According to the petitioners, there are also, from among the members of that community, very high officers in the Judicial Department, as well as in the Colleges, as Heads of Departments, Secretaries to Government and Ministers, and in all other walks of life. It is also alleged that there are also a large number of Gazetted officers in the Government service. They also take up the stand that Ezhavas and Thiyyas are financially a very rich community and they cannot be characterised as poor; nor can they be called socially backward. It is also their contention that prior to issuing the order Ext. R-1 no attempt has been made by the Government to make any investigation or collect any relevant data, regarding the communities referred to in the order, as backward.

The petitioners further allege that the Thiyyas of Malabar have never been considered as Backward classes even by the Madras Government; and therefore, it is idle to pretend that after formation of Kerala State on 1-11-1956, the Thiyyas have suddenly become socially and educationally backward classes. Muslims, as a community, also, according to the petitioners, can never be called socially and educationally backward. Even here no survey has been made, no investigation conducted, no materials collected, by the Government to arrive at a scientific conclusion before characterising the Muslims as a whole as socially and educationally backward. Similar objections are also raised to the inclusion of other Hindus and Christians as Backward classes, in the order Ext. R-1. Such a classification, according to the petitioners, is absolutely artificial, and cannot be constitutionally supported.

27. The reservation for sportsmen and children of Registered Medical Practitioners, is again attacked as purely artificial and having no relation to the object, namely of admitting students with qualifications into the professional colleges. The distribution of seats on District-wide basis is also attacked as highly objectionable, arbitrary and irrational. The petitioners allege that the seats have

been distributed on a District-wide basis, merely on the basis of population, and not with reference to any test of uneven development of territorial division in the matter of education; nor has any scientific data been collected regarding the percentage of student population in those districts. The requirement regarding production of nativity certificate is also under attack. According to the petitioners, nativity means nothing but a place of birth, and therefore Article 15(1) is violated.

The petitioners also attack the modified instructions issued by the Government regarding children of Government servants, under the orders, items 2 and 3 in Ext. R-2 series. In particular, the writ petitioner in O. P. 1266/63 states that he has obtained 296 marks and has a nativity certificate for Trivandrum, but has not secured admission; whereas persons with lesser marks have got admission on account of the reservations made. These petitioners also allege that by virtue of the adoption of filling up the admissions on District-wide basis, has resulted in candidates with lesser marks having got admission in particular districts; whereas candidates who have obtained more marks than such candidates who have not got admission, because they belong to other Districts. This, according to the petitioners, is absolutely arbitrary, and amounts to discrimination under Article 14. The basis adopted, namely of district-wide merit, has no relation to the object to be achieved, namely of admitting qualified students to the professional colleges.

28. The particular manner in which the district-wide proportion has worked, is clearly brought out in the particulars given by the petitioner in O. P. 1290/63. The said petitioner has got other grievances regarding the fact that he has not been allowed to have the benefit of the orders passed by the State Government under items 2 and 3 of Ext. R-2 series. That is a matter of detail and I am not considering that aspect at present. But the point to be noted is that the said candidate has obtained 298 marks out of a total of 400; and because he gave his native District as Trivandrum, he has not been able to get a seat. Whereas persons who have got only 268 marks have been given admission from the Kozhikode District. This petitioner states in paragraph 12 of the affidavit that the minimum number of marks obtained by the candidates who have been selected on district-war basis in accordance with the percentage. fixed for the Districts by the order Ext. R-1, is as follows:

(1) Trivandrum

303

(2) Quilon

288

(3) Alleppey

294

(4) Kottayam

294

(5) Ernakulam

296

(6) Trichur

297

(7) Palghat

277

(8) Calicut

268

(9) Cannannore

290

This petitioner also states that when he has actually got 298 marks out of 400, while he has not been given selection because he applied from the Trivandrum District, in the same state, candidates with far less marks have been given admission from other Districts. This, the petitioner urges, is violative of Article 14 of the Constitution and is arbitrary.

29. The State Government, in their counter-affidavit, very strenuously controvert the stand taken by the petitioners, both regarding the reservation in favour of Backward Classes as well as the reservations made in favour of sportsmen, children of Registered Medical Practitioners, and the selection on a District-wide basis. They aver that the petitioners must first establish that they are persons who are entitled to a seat in the colleges in question, on the basis of merit; and unless they establish the same, they have no locus standi to come to this Court. The State Government also take up the position that persons, who have already been admitted and who are likely to be prejudicially affected by the order that may be passed by this Court in these original petitions, ought to be joined as parties to these applications, and without such persons being parties, the writ petitions will have to be dismissed in limine as not being maintainable.

30. The State Government take up the position that the various grounds of attack regarding the principles of selection for admission to the professional colleges laid down in Ext. R-1, do not suffer from any of the infirmities or illegalities alleged by the petitioners. The State Government further aver that the reservation for the communities is not on the sole basis of caste or communities or without any regard to any other standard of backwardness, as alleged by the petitioners. The Government also refer to the various considerations, which have been taken into account by them for classifying the group as "Backward Classes"

eligible for reservation of 35%. What those considerations are, is dealt with by the State Government in the counter-affidavit dealing with Ground A.

31. The State Government first take up the case of Ezhavas, and say that they were satisfied that Ezhavas are really socially and educationally backward and they were also regarded as socially backward on account of the fact that till very recent times they were regarded as untouchables, occupying a low place in the social ladder. In this connection, the Government advert to the fact that access to temples frequented by caste Hindus was denied to them, and even bathing by Ezhavas in tanks used by caste Hindus was regarded as amounting to pollution of the tanks. They also refer to the fact that Ezhavas were even regarded as unapproachables by caste Hindus. The Government then refer to the Travancore area, where the disability against temple entry was removed by the Temple Entry Proclamation of 1112 M. E., and also to the Cochin area where a similar Proclamation was issued in 1123, namely Proclamation V of 1123 M. E. Such a result was achieved in the Malabar area, only by the passing of the Madras Temple Entry Authorisation Act, V of 1947.

The Government also state that the other social disabilities, such as pollution and unapproachability, were really terminated only by Article 17 of the Constitution. The Government state that in spite of all these reforms, the Ezhavas cannot, even now, be regarded as having been completely emancipated from their social disabilities. They illustrate this, by stating that inter-marriage between Ezhavas and other Hindus, even of the Sudra caste, such as Nairs, is generally viewed with disfavour; and that attempts to promote such, inter-caste marriages have not so far met with any appreciable success or encouragement.

32. The Government then deal with the educational backwardness of the Ezhavas. According to them, Ezhavas are educationally backward, and it was after an assessment of their position and situation that the Government were satisfied that the Ezhavas were really educationally backward. The Government state that the occupation of Ezhavas in this State as a class, is predominantly manual labour and toddy tapping, and a considerable part of them represent the poor and middle class tenantry in the State, and that this community has not taken prominently to education, and in fact it was late comer in the field of education and educational activities. The Government also state that by the time the Ezhavas entered the field of education, the other forward communities in the State, such as the Brahmins, Nairs, Syrian Christians, etc., had made rapid strides in educational progress. And therefore, the Government felt that the Ezhavas stood much in need of some fillip and encouragement before it could catch up with the pace of these other communities in the matter of educational progress. The Government also felt that it was necessary to show some concession to this community for the purpose of levelling up the disparity in the educational sphere that existed between the Ezhavas and the other progressive communities. The State Government then give the percentage of literacy according to the 1941 Census in the States of Trivandrum and Cochin, as follows :

Communities

Travancore

Cochin.

Brahmins

73-9

72.7

Syrian Christians

61.9

59-8

Nairs

61.7

63.2

Kammalas

46.6

38.7

Ezhavas

46.5

34-7

Muslims

30.02

23-2

The Government also state that as far as Travancore State was concerned, for the year 1941, the State average was 67.9% for males and 42.1% for females, and the State Average itself was 55%. Again, for the corresponding year, in the Cochin State the State average for literacy was 41%. Therefore, according to the State Government, the community-wise percentage of literacy of Ezhavas in Travancore and Cochin, for the year 1941, was well below the State average. But the Government also state that the community-wise percentage of literacy in the Census of 1951 or 1961 has not been worked out in those areas. The Government also state that so far as Malabar area is concerned, even the 1941 Census does not disclose the percentage of literacy community wise, and therefore the Government have not been able to give the data regarding the Malabar area. They then refer to the State average literacy for the Travancore-Cochin State as per the 1951 Census, as 53.8%. They also state that the

percentage of literacy for the Kerala State as per the 1961 Census works out to 46.8%.

The Government then work out the community-wise ratio of population with reference to the 1931 Census, and state that the Ezhavas form roughly 1/6 of the total population in Travancore, 1/4 of the total population in Cochin, and about 1/3 of the total population in the Malabar area. On this basis, the Government allow 25% for increase of population for every ten years, and they estimate the Ezhava population at present, at roughly 47 lakhs which represents nearly 25% of the total population of the State. On this basis, the Government claim that the reservation allowed for the Ezhava community under Ext. R-1, is only a small percentage viz., 13%. The Government also state that without any reservation or weightage being allowed in favour of backward communities in the matter of admission to professional colleges, admissions to these colleges would be virtually monopolised by what are called the forward communities.

They also illustrate this position in the counter-affidavit, namely as to what would be the position in respect of applications received, at any rate, in respect of Engineering colleges. As, in my view, the figures given for this purpose are not relevant for deciding the points that arise for consideration here, I am not adverting to those figures as such, Because those figures again relate to communities as such. Again, the Government refer to what the position would have been in the matter of admission without reservation in respect of the various communities referred to by them. And according to the Government, the Backward communities would have got only 13% of the total number of 213 seats. Here again, I am not adverting to the figures given, for the same reasons referred to immediately above.

33. The State Government next deal with the case of Muslims. According to the Government, that community suffers even now from a serious social disability, namely observance of the Purdah amongst its women-folk. It is also stated by the Government that this observance of the Purdah, has considerably impeded the social, development of the community, especially in the matter of the training and upbringing of children in the formative years, when the mother's guidance is felt to a large extent. In view of the social backwardness of the mother, according to the State Government, that reacts on the children. According to the State Government, even in cases where the Muslims have abandoned Purdah, they are socially far less advanced than the women in other communities. The Government also state that educationally too the Muslims as a community are backward; their occupation is predominantly trade or business, and, like the Ezhavas, the Muslims also were late-comers in the field of education, and in consequence that community requires to be spurred and speeded up.

The Government again refer to the percentage of Muslim community as per the 1941 Census in the Travancore area, as 30.02%, and in the Cochin area as 23.2%, when the State average in these two States were 55% and 41% respectively. They also refer to the population of this community in Travancore,

Cochin and Malabar, as per the 1941 Census; and state that the reservation for this community made under Ext. R-1, is only 9% as against their population of 16.5 per cent.

34. The Government then refer to the case of Latin Catholics, and they say that these Latin Catholics are largely converts from among Hindus occupying socially backward position, namely fishermen. And, as fishermen, they occupy a low place in the social ladder, and they most inhabit, the coastal areas far removed from the town, and having absolutely no amenities for education.

35. The Government then refer to "other Backward Christians", as persons who are mostly, converts from Hindu Harijans, who belong to the Scheduled Castes, such as Pulayas, Koravas, etc. The Government state that their social disability cannot admit of any doubt, and educationally also they are very backward, being mostly agricultural labourers.

36. Government then advert to the "Other Backward Hindus", and state that under this heading a large number of backward classes such as Amabalakkaran, Arayan, etc., are included, and that the 1931 Census will disclose the low percentage of literacy of these classes. No further particulars are given about this group of Hindus.

37. The Government state that it is after a consideration of the social and educational backwardness of the various communities dealt with earlier, that they decided to make reservations under Ext. R-1. They also refer to the fact that most of these communities have been included as eligible for reservation under Article 16(4) of the Constitution. The Government again emphasize that it was in the light of all the materials referred to above that they came to the conclusion that reservation for the communities, in whose favour reservation is to be ordered in the Government order Ext. R-1, was to be made, and that reservation was made only after the Government came to the conclusion that those communities were socially and educationally backward.

38. The Government also take up the position that the conclusion arrived at by the Government, regarding the backwardness of the communities, on the basis of the materials referred to in the counter-affidavit, is not liable to be interfered with by this Court, unless this Court comes to the conclusion that the conclusion is either arbitrary or capricious or has been arrived at on no materials whatsoever.

39. Then the Government specifically deal with the contention of the writ petitioners regarding the right of the Backward Classes to seek admission, on the basis of the common merit pool. According to the Government, there is no violation of either Article 15(4) or 29(2) of the Constitution, arising at all. Regarding the reservation in favour of Sportsmen, Government state that the said reservation has been made to encourage proficiency in sports and to prevent professional colleges turning what may perhaps be characterised as mere book-worms. And according to the State, the reservation in favour of Sportsmen is absolutely justified. Again the Government justify the reservation

of seats for children of Registered Medical Practitioners; and the percentage of reservation, according to the Government, is small and insignificant. They also state that they felt that some recognition should be shown to distinguished members of the medical profession, and it was in recognition of their services rendered to the State that the reservation was made.

40. Regarding the attack made on the distribution, of seats on a district-war basis, the Government state that the said principle is based on a consideration of residence. The Government also state that the said principle is perfectly in accordance with the decisions of the Supreme Court and of this Court. Positively the Government state that the principle of district-war reservation had to be adopted because the various territorial divisions of the State were unevenly developed from the point of view of educational attainments and standards, and the Government felt that it would be fair and equitable that all the territorial divisions of the State should be developed or allowed to develop to the same level in the field of education.

41. The Government then refer to the necessity of production of nativity certificate, and they emphasise that the concept underlying the same is one of residence of the candidate, and it is but fair that candidates should satisfy the requirements of residence before they claim the benefit of district-war reservation for admission. The Government also state that this principle, based upon residence, does not violate Article 15(1) of the Constitution.

42. Finally the Government aver that uniform marks for admission cannot be prescribed, as such a rule will adversely affect the socially and educationally backward classes of the State, and that would also adversely affect the various territorial divisions of the State which are unequally developed in matters of education. Ultimately, the State Government take up the position that the principles enunciated in Ext. R-1 cannot be challenged as violative of either Article 15(1) or 29(2); nor can it be challenged on the ground that it exceeds the permissible limits under Article 15(4) of the Constitution. The Government pray for dismissal of the applications with their costs.

43. From what is stated above, it will be seen that the main and important question that arises for consideration is as to whether the reservation of 35% made in Ext. R-1 for the Backward Classes referred to therein, is in accordance with the provisions of Article 15(4) of the Constitution, and as to whether the classification as Backward Classes, to be eligible for the said reservation, is one made on the basis of caste and communities alone, and whether it is in accordance with Article 15(4), and whether the exercise of the power by the Government is a fraud on the powers conferred by the Constitution.

44. The other questions that arise for consideration are:

(1) Whether the order Ext. R-1 is bad, because that by itself does not give any reasons for holding the groups mentioned therein as eligible for 35% reservation as "Backward Classes";

(2) Whether competing in the general merit pool, by candidates belonging to the Backward Classes, for whom reservation is made of 35%, is in any manner violative of the rights of persons, like the petitioners, guaranteed under Articles 15(1) and 29(2) of the Constitution;

(3) Whether the basis of selection on a district-war basis, is justifiable, and whether it is discriminatory;

(4) Whether the reservation made in favour of Sportsmen and in favour of children of Registered Medical Practitioners, is permissible and legal.

45. Before I deal with the main question that arises for decision, it will be desirable to dispose of the 1st question that has been adverted to. In respect of the main question that arises for consideration, namely regarding the reservation for Backward Classes, the learned counsel for the petitioners, as well as the learned Advocate General have both relied upon the recent decision of the Supreme Court reported in *M.R. Balaji and Others Vs. State of Mysore*, . According to the learned counsel for the petitioners, the reservation in this case is made, predominantly, if not exclusively, on the basis of caste and community alone; and therefore, it is hit by the decision of the Supreme Court. Whereas, according to the learned Advocate General, such a classification is not made on the basis of caste or community alone, but having due regard to the various other factors, which could be and have been taken into account, as laid down by the Supreme Court in the said decision. Therefore, those factors which have been taken into account, are perfectly in accordance with the principles laid down by the Supreme Court and in accordance with the provisions of Article 15(4) of the Constitution.

46. Before I advert to the various principles laid down by the Supreme Court, this will be a convenient stage to refer to the material Articles in the Constitution, having a bearing on the questions arising for consideration in these writ petitions; and they are Articles 14 15 (1) and (4) 16 (2) and (4) 17 29(2), and 46. These Articles are as follows : -

"14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

"15 (1). The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place or birth or any of them.

\* \* \* (4) Nothing in this Article or in Clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally Backward Classes of citizens or for the Schedule Castes and the Scheduled Tribes.

"16 (i) \* \* \* (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

\* \* \*

(4) Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any Backward Class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

\* \* \*

"17. "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "untouchability" shall be an offence punishable in accordance with law.

"29. (1) \* \* \* (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State Funds on grounds only of religion, race, caste, language, or any of them.

46. The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Schedule Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

47. It is well known that Article 15(4) was added in the Constitution, by the Constitution (First Amendment) Act, 1951, in consequence of the decision of the Supreme Court reported in *State of Madras v. Sm. Champakam Dorairajan* AIR 1951 SC 236 . The validity of an order of the Madras Government, fixing certain proportion for students seeking admission to the Engineering and Medical Colleges, was challenged. That challenge, on the basis that the said Government order was on the face of it a communal one, was accepted by the Madras High Court, and the said decision was confirmed by the Supreme Court in *The State of Madras Vs. Srimathi Champakam Dorairajan*, . It was really in consequence of this decision of the Supreme Court, that Article 15(4) was added to the Constitution.

48. Article 338 of the Constitution provides for a Special Officer for the Scheduled Castes and Scheduled Tribes, to be appointed by the President, and also other incidental matters. Article 340 again deals with the appointment by the President, of a Commission to investigate the conditions of socially and educationally Backward Classes. Article 341 deals with a notification being issued by the president, specifying the Scheduled Castes. Similarly, Article 342 relates to the President issuing a notification specifying the Scheduled Tribes, In this connection, it may be noted that Clauses (24) and (25) of Article 366 define the expression "Scheduled Castes" and Scheduled Tribes".

49. It will also be noticed that Article 15(4) refers to "any socially and educationally Backward Classes"; whereas in Article 16(4), which had also come up for consideration before the Supreme Court, there is only a reference to making provision for reservation of appointments or posts in favour of "any Backward Class of citizens". Again, it will be noted that while Article 16(4) states

that provision can be made for reservation of appointments or posts in favour of "any Backward Class of citizens, which, in the opinion of the State, is not adequately represented in the services under the State", there is no such provision in Article 15(4). The scope of Article 15(4) has been if I may say with respect, considered very elaborately by their Lordships of the Supreme Court in the decision reported in M.R. Balaji and Others Vs. State of Mysore, .

50. Before I advert to the various principles deducible from the said decision of the Supreme Court, I may also advert to the decision of the Supreme Court in Heggade Janardhan Subbarye Vs. The State of Mysore and Another, , wherein the Supreme Court has categorically held that in their earlier decision, namely M.R. Balaji and Others Vs. State of Mysore, , they never intended to declare the reservations made by the Mysore Government, in so far as they related to Scheduled Castes and Scheduled Tribes, as illegal. In fact, in the later decision the Supreme Court affirms the position that reservation in favour of Scheduled Castes and Tribes made by the Mysore Government, will stand.

51. Coming to the decision of the Supreme Court in M.R. Balaji and Others Vs. State of Mysore, , it will be seen that an order passed by the Mysore Government regarding the fixation of particular percentage for Backward Classes, came up for attack, on the ground that the fixation is on the basis of caste and community alone, and that it is beyond the limits permissible under Article 15(4) of the Constitution. In that decision, the Supreme Court ultimately struck down the said notification. In the course of the judgment, the Supreme Court deals very elaborately with the various aspects that have to be taken into account by the Government concerned, in coming to a conclusion that a particular class is Backward Class, so as to justify provision being made under Article 15(4) of the Constitution. The following propositions so far as I could gather, are deducible from the said decision of the Supreme Court:

(1) Article 15(4) has to be read as a proviso or exception to Articles 15(1) and 29(2). If an order which is attacked, is justified by Article 15(4), its validity cannot be impeached on the ground that it violates Article 15(1) or 29(2); and the fundamental rights guaranteed by Articles 15(1) and 29(2) do not affect the validity of the special provision which it is permissible to make under Article 15(4).

(2) It is open to the State Government by an executive order, to make the special provision, in question, under Article 15(4).

(3) As there is no clause defining "socially and educationally Backward Classes of citizens", in determining the question as to whether a particular provision has been validly made under Article 15(4) or not, the first question which falls to be determined is whether the State has validly determined who should be included as Backward Classes.

(4) The Backward Classes, for whose improvement, special provision is contemplated by Article 15(4), are, in the matter of their backwardness,

comparable to Scheduled Castes and Scheduled Tribes.

(5) The concept of backwardness, under Article 15(4) is not intended to be relative in the sense that any classes who are backward in relation to the most advanced classes of the society should be included in it.

(6) The backwardness, under Article 15(4) must be social and educational. It is not either social or educational, but it is both social and educational. In considering the question as to whether any class of citizens is socially backward or not, it must be remembered that Article 15(4) applies to the group of citizens described as "classes of citizens", and not as "castes of citizens". In dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens. But inasmuch as the special provision in Article 15(4) is contemplated for "classes of citizens", the castes of the group of citizens, though relevant, its importance should not be exaggerated.

(7) Both caste and poverty are relevant in determining the backwardness of citizens.

(8) In considering the question of social backwardness, the occupation of citizens is also a very important factor.

(9) The problem of determining who are socially Backward Classes, is undoubtedly very complex. Sociological, social and economic considerations come into play in solving the problem; and evolving proper criteria for determining as to which classes are socially backward is obviously a very difficult task. It will require an elaborate investigation and collection of data and examining the said data in a rational and scientific way, which is the function of the State, which purports to act under Article 15(4). But the Court's duty is only to decide whether the tests applied by the impugned order are valid under Article 15(4). And, if the tests applied are improper, or invalid, then the classification of socially Backward Classes, based on such test, will have to be held to be inconsistent with the requirements of Article 15(4).

(10) If the classification of socially Backward Classes of citizens is made only as predominantly on the basis of caste, without regard to other factors, which are very relevant, the order will be suffering from a very vital infirmity regarding the validity of the said notification.

(11) Regarding the educational backwardness of classes of citizens, it is only communities which are well below or substantially below the State average, that can be properly considered as educationally Backward Classes of citizens; but that requires investigation and collection of materials and data.

(12) The interests of weaker sections of the society, are certainly a first charge on the States and the Centre; but they have to be adjusted with the interests of the community as a whole.

(13) Article 15(4) is not a provision which is exclusive in character, so that in looking after the advancement of those classes, the State would be justified in ignoring altogether the rest of the society. It is because the interests of the society at large would be served by promoting the advancement of the weaker elements of the society, that Article 15(4) authorises special provision to be made. It is extremely unreasonable to hold that in enacting Article 15(4), the Constitution intended to provide that where the advancement of Backward Classes or Scheduled Castes and Scheduled Tribes was concerned, the fundamental rights of the citizens constituting the rest of the society were to be completely and absolutely ignored.

(14) It would be against the national interest to exclude from the portals of the Universities, qualified and competent students, on the ground

that all the seats in the Universities are reserved for weaker elements in society.

(15) Reservation should and must be adopted to advance the prospects of the weaker sections of society. But, in providing for special measures in that behalf, care should be taken not to exclude admission to higher educational centres to deserving and qualified candidates of other communities. A special provision contemplated by Article 15(4), like reservation of posts; and appointments, contemplated by Article 15(4), must be within reasonable limits.

(16) When the State makes a special provision for the advancement of the weaker sections of society specified in Article 15(4), it has to approach its task objectively and in a rational manner. It has undoubtedly to take reasonable and even generous steps to help the advancement of weaker element. It must consider the extent of the problem, the requirements of the community at large, and a proper formula must be evolved, which would strike a reasonable balance, having due regard to several relevant considerations.

(17) If an executive action does not patently or overtly transgress the authority conferred on it by the Constitution, but the transgression is covert or latent, the said action can be struck down as being a fraud on the relevant constitutional power.

52. In my view, a decision regarding the question, as to whether the reservation made for Backward Classes in Ext. R-1 is in accordance with Article 15(4) of the Constitution, will have to be decided one way or the other, having due regard to the various principles laid down by the Supreme Court, in the decision referred to above.

53. Mr. P. K. Subramania Iyer, learned counsel appearing for the petitioner in O. P. 1294/63, has advanced the leading arguments; and his contentions have been substantially accepted and adopted by learned counsel appearing for the other writ petitioners namely Messrs. G. Viswanatha Iyer, S. Easwara Iyer, P. H. Sankaranarayana Iyer, T. K. Narayana Pillai, and T. R. Achutha Warriar.

54. Before I consider the most important point that arises for consideration, it is

desirable to dispose of the first contention raised by learned counsel for the petitioners, and referred to above, namely as to whether the order Ext. R-1 is bad, inasmuch as it does not give or indicate any reasons, for the State Government classifying the particular groups mentioned therein as Backward, and in consequence, eligible for the 35% reservation. No doubt, Mr. P. K. Subramania Iyer, learned counsel, urged that a reference to the decision of the Supreme Court in *M.R. Balaji and Others Vs. State of Mysore*, and as to the manner in which the Supreme Court considered the order passed by the Mysore Government on 31st July, 1962, criticising the various reasons given by the State Government therein, will clearly show that such an order, when passed by the State Government under Article 15(4), must itself set out clearly the reasons which prompted the State Government to give the protection, for any particular group of citizens. Therefore, according to the learned counsel, inasmuch as the order Ext. R-1 in this case, does not admittedly give any such reasons, this Court must strike down the said order in limine, on that sole ground. I must also state that this stand taken by Mr. P. K. Subramania Iyer, has not been adopted, at any rate by Mr. T. K. Narayana Pillai, learned counsel appearing for the petitioner in *O. P. 1271/63*. Mr. Narayana Pillai was prepared to take up the position that it is not necessary for the State Government to specify in the order itself the reasons which prompted them to give protection under Article 15(4). According to Mr. Narayana Pillai, there is an obligation on the part of the State Government to place before this Court the nature of the investigation made, and the data and the materials collected by the Government, on the basis of which they came to a particular conclusion.

55. The learned Advocate General controverts the stand taken by Mr. P. K. Subramania Iyer, on this aspect. According to the learned Advocate General, the decision of the Supreme Court relied on by Mr. P. K. Subramania Iyer, does not lend any support whatsoever to his contention that the order itself must disclose fully and completely the various reasons which prompted the Government to make the reservation under Article 15(4). If this contention is accepted, the learned Advocate General urged, that notwithstanding the fact that very elaborate inquiries may have been conducted and a decision also arrived at, they will serve no purpose whatsoever, if they are not also incorporated in the order making the reservation.

56 So far as this aspect is concerned, I am not inclined to accept the contention of Mr. P. K. Subramania Iyer that the order itself must disclose the various reasons, which prompted the State Government, to make the reservation under Article 15(4). The question as to whether the reservations satisfy the requirements of Article 15(4), is a totally different point; and that is being dealt with by me in the latter part of this judgment. I am not able to find any support in the decision of the Supreme Court, for the stand taken by Mr. P. K. Subramania Iyer that the order itself must give the reasons for making the reservations. In my view, if the State Government had materials available before them, and also the data collected, in the manner indicated by the Supreme

Court, and if they had taken a decision on the basis of such materials, it would be certainly open to the State Government to rely upon those materials for justifying their making the necessary reservations under Article 15(4).

No doubt, in the order of the Mysore Government, which was under attack before the Supreme Court, the Mysore Government seems to have given fairly elaborate reasons for making the necessary reservations, in the manner indicated therein. But it will be seen that the Supreme Court relies upon the various earlier orders passed by the Mysore Government, as well as the various reports bearing on the matter; and it is ultimately after a consideration of all those materials that the Supreme Court came to the conclusion in that case, that the classification, as Backward has been made by the Mysore Government, predominantly, if not solely, on the basis of caste alone. Therefore, the position in this case also will be that if the State Government are able to satisfy this Court, by any relevant materials and circumstances, that were available before them, when they passed the impugned order, the mere circumstance, that the order does not give, as such, the reasons for making the reservation, in the manner indicated therein, will not justify this Court striking down the said order on that ground alone.

57. Before I consider points 2 to 4 referred to above, I will take up for consideration the main question, which is in controversy in these writ proceedings namely as to whether the reservation of 35% for Backward classes, made in the order Ext. R-1, is valid and is in accordance with Article 15(4) of the Constitution. I have already indicated that Article 15(4) was introduced in the Constitution, as a direct result of the decision of the Supreme Court in *The State of Madras Vs. Srimathi Champakam Dorairajan*, , confirming the decision of the Madras High Court, striking down an order passed by the Madras Government which, according to the High Court and the Supreme Court, was of a communal nature. The Supreme Court, in the said decision has, with reference to Article 15(4), stated at p. 227.

".....clause (2) guarantees the fundamental right of an individual citizen. The right to get admission into any educational institution of the kind mentioned in Clause (2), is a right which an individual citizen has as a citizen, and not as a member of any community or class of citizens." According to Mr. P. K. Subramania Iyer, the sole test adopted by the State Government, for classifying the groups referred to in the order, under attack Ext. R-1, as being eligible for 35% reservation as Backward classes, is only caste or community, and nothing more. Alternatively, the learned counsel urged, that even if this Court does not accept his contention that the sole test adopted by the Government in Ext. R-1 is caste or community, nevertheless the order clearly shows that the predominant test, that has weighed in the mind of the Government, to classify such groups as Backward, is on the basis of caste or community alone. If either of these contentions is accepted by this Court, according to the learned counsel, then the order Ext. R-1 suffers from the same infirmity as pointed out by the Supreme Court in *M.R. Balaji and Others Vs. State of Mysore*, in respect of the Mysore

Government's order.

The learned counsel also urged that one of the important questions that will arise in considering whether an order under Article 15(4) has been validly made or not, will be as to whether the State Government have validly determined who should be included in the "Backward Classes"; and if, ultimately, it is found that the test applied by the Government order in question in that behalf is improper and invalid, then it follows that the classification, as socially backward classes, based upon that test, will have to be held to be inconsistent with the requirements of Article 15(4).

Similarly, the learned counsel urged that the question as to whether the groups, in question, are educationally backward, has not also been considered properly by the State Government. In respect of the social and educational backwardness of a particular group, the learned counsel rather strenuously urged, that notwithstanding the fact that the determination of such a question may be difficult, nevertheless there is an obligation on the part of the State Government, to make an elaborate investigation, collect the necessary data, and examine the said data in a rational and scientific way, and then make an objective approach, before taking a final decision.

In this connection, the learned counsel has stressed upon the very many observations made by the Supreme Court regarding the nature of the approach to be made by the State Government, which purports to act under Article 15(4). In fact, the learned counsel has relied upon the various principles, which I have referred to earlier in the judgment, as deducible from the decision of the Supreme Court. Therefore, the contention of the learned counsel is that the classification of the particular groups as backward, and the consequential reservation of 35% for those groups in Ext. R-1, have been both done in flagrant violation of the decision of the Supreme Court.

The learned counsel also urged that notwithstanding the fact that the decision of the Supreme Court was rendered as early as 28th September 1962, no regard has been shown to that judgment, notwithstanding the fact that the order in question, namely Ext. R-1, has been passed only as late as 7th June 1963.

58. There has been a very severe criticism as against the various reasons given by the State Government in the counter-affidavit, on the basis of which the Government claim to have taken the decision in question. According to the learned counsel those reasons relied upon by the State Government, clearly show that the State Government contented themselves by having regard to the facts which may have existed nearly 20 years ago, and that the Government have completely ignored the advancement made by the groups in question, both socially and educationally. The reasons given by the State Government, in their counter affidavit, according to the learned counsel for the petitioners, clearly show that the State Government have not cared to conduct any investigation, collect any data or materials, to come to at conclusion as to how far the groups

in question require assistance by the State Government, by appropriate action under Article 15(4).

While the Supreme Court has referred to the fact that the Backward classes, for whose improvement special provision is contemplated by Article 15(4), are, in the matter of their backwardness, comparable to the Scheduled Castes and Scheduled Tribes, and that the concept of backwardness is not intended to be relative in the sense that any class should be considered as backward in relation to the most advanced classes of society, the learned counsel urged that these principles have been completely given the go-by when the State Government passed the order Ext. R-1. There is absolutely no claim either in the order Ext. R-1 or even in the counter affidavit filed on behalf of the Government, that the groups are, in the matter of their backwardness, comparable to the Scheduled castes and Scheduled Tribes. It is also pointed out that the question of backwardness has been considered by the Government only from the point of view as to whether the groupa, in question, are backward in relation to the more advanced classes of the society, namely Brahmins, Nairs, and Christians. And, this, according to the learned counsel, is an additional circumstance which vitiates the order under attack.

59. Another criticism that has been levelled by the learned counsel for the petitioners as against the order Ext. R-1, is that the Government, even on their own showing in the counter affidavit, have proceeded on the basis that reservation must be made for Ezhavas and Muslims, having due regard to the proportions the said communities bear to the total population of the State. According to the learned counsel, though the Government refer to some truncated materials as found in the 1941 Census report so far as the Travancore-Cochin area is concerned, the learned counsel urged that even according to the State Government themselves, there is absolutely no materials available before them so far as the Malabar area is concerned. Therefore, the position, according to the learned counsel, is that at any rate so far as the Malabar area is concerned, without any reference to actualities, or without having any materials or data, or without making any attempt to collect the necessary data, even after the formation of Kerala State from 1-11-1956, a decision has been made in respect of that area treating the particular groups as backward under Article 15(4).

60. The learned counsel for the petitioners controvert the stand taken by the Government that Ezhavas are socially backward, at the time when the order under attack was passed; and the only reasons given by the Government to come to that decision is some disabilities attached to that community very long ago. According to the learned counsel, in any event, even in accordance with the various enactments referred to by the Government, those disabilities have vanished very long ago; and in any event, any disability on the ground of untouchability cannot exist by virtue of Article 17 of the Constitution from 26th January 1950. Ignoring the progress that has been made by the said community

and ignoring the social position that that community now occupies, the learned counsel urged, the classification has nevertheless been made of that community as a Backward class, and the only reason given, so to say, by the Government is that inter-marriage between the Ezhavas and the other Hindus, such as Nairs, is viewed with disfavour.

61. Regarding the criteria adopted by the State Government for coming to the conclusion that the Ezhavas are educationally backward, the learned counsel for the petitioners urged that even the percentage of literacy in the 1941 Census, and adverted to by the Government, will clearly show that the rate of literacy of the Ezhavas in the Travancore area was 46.5%; and in the Cochin area it was 34.7%: whereas the State average for both those areas in the 1941 Census was 55% and 41% respectively. And on that basis, to come to a conclusion that the Ezhavas should be considered to be educationally backward, is, according to the learned counsel, absolutely fallacious. After 1941, in any event, no further or fresh materials have been collected by the State Government, because the learned counsel urged that even according to the Government the Census reports of 1951 or 1961 do not give the community-wise percentage of literacy, and apart from the Census reports no independent investigation has been done by the Government either.

According to the petitioners, while the Government refer to the fact that the State average literacy for Travancore-Cochin in the 1951 Census is 53.8%, and the State average literacy for Kerala State as per the 1961 Census is 46.8%, the Government have not given any indication as to what is the percentage of literacy among the Ezhavas either in the Census of 1951 or in the census of 1961. According to the petitioners, even as per 1941 Census the Ezhava community does not appear to have suffered from disabilities; because it was having a literacy rate of 46.5% in the Travancore area, and 34.7% in the Cochin area, and that percentage must have gone up much higher later, because of the encouragement given to that community and also the establishment of schools and facilities provided for education. These aspects have been completely and totally ignored by the State Government, according to the petitioners.

62. The same criticism that has been levelled as against the grouping of Ezhavas as Backward class, is levelled as against the grouping of Muslims also. The 1941 Census report, relied upon by the State Government clearly shows, according to the petitioners, that the percentage of literacy of Muslims in the Travancore and Cochin area were 30.02 and 23.2 respectively, while the State average literacy for the two areas was 55% and 41% respectively; but there is no further data available either in the Census report of 1951 or 1961 regarding this community. Admittedly, so far as the Malabar area is concerned, even the 1941 census report does not throw any light on this aspect.

The circumstance that in this community the women-folk observe Purdah and therefore the entire community must be considered to be socially backward, is very strenuously criticised by the petitioners. So far as their educational

backwardness is concerned, the claim made by the State Government on their behalf is controverted. Even here, the petitioners urge that the claim of the Government appears to be that the population of Muslims has to be taken into account for providing protection under Article 15(4). There is also a similar criticism levelled as against the approach made by the State Government in respect of the social and educational backwardness of the other groups, for whom reservation has been made, namely the Latin Catholics, Other Christians, and Other Backward Hindus. In short, the very serious criticism levelled as against the approach made by the Government to treat these groups as socially and educationally backward, is that the various tests laid down by Supreme Court have either been not adopted or totally ignored. In particular, one of the circumstances that has been pointed out by the Supreme Court for considering the social backwardness of a particular group, is poverty and its economic position in life; and that aspect, according to the petitioners, has never been investigated by the Government in respect of any of the groups for whom reservation has been made in Ext. R-1.

63. In particular, the learned counsel for the petitioners also urged that even the circumstances referred to by the State Government, which according to them will justify the classification of the groups as socially and educationally backward, are also not true. In this connection, the learned counsel relied upon the Census report of 1951 in relation to the District of Trivandrum, in the Travancore-Cochin State. At page XIV, in the Census of India, Travancore-Cochin (District Census Handbook -- Trivandrum), regarding backward classes, it is mentioned.

"Time was when Kerala used to be considered as the most caste-ridden part of India. The old order has, however, been changed during the past half century. A social reform movement with the avowed object of removing the social and economic disabilities of citizens belonging to the so called "low castes" was inaugurated early in the 19th century by the ruling Sovereigns of Travancore. Several iniquitous taxes imposed on these castes were abolished ..... Public roads were thrown open to all castes. Schools were specially established for them, and subsequently free admission to Government as well as aided schools, was given to them. Suitable provisions were made for the recruitment of backward classes to the public service. A comprehensive programme for the amelioration of the conditions of backward communities was launched about three decades ago. Thanks to these measures, (the Temple Entry Proclamation, throwing open Hindu temples to all classes and the enactment of the Civil Marriages Act were important milestones in the path of progress), the uplift work carried on by the Christian and Hindu missions, caste barriers have broken down, so that today caste is no longer the controlling feature of social life."

To a similar effect are the passages occurring in the 1951 Census report of Travancore-Cochin State, in respect of the reports pertaining to the Districts of Quilon, Trichur, and Kottayam. As the passages are almost identical, I do not think it necessary to advert to those passages. According to the petitioners,

these reports published as early as 1951, clearly show that very many of the disabilities on the basis of which citizens were considered of a low caste, have ceased to exist, and educational facilities have been provided and the social bar imposed as against them has been removed long ago. The contention of the learned counsel for the petitioners is that these circumstances, which are true, even in respect of the 1951 Census report, as borne out by official records, have been completely ignored by the Government when they proceeded to practically perpetuate the caste system, which is tabooed by the Constitution, by recognising castes in the order under attack, which was passed in 1963.

64. Again, in this connection, the learned counsel for the petitioners have referred to certain extracts found in the Kerala District Gazetteers of the Districts of Trivandrum, Trichur and Kozhikode, published by the State Government, themselves, as late as 1962. In the Kerala District Gazetteer, relating to the Trivandrum District, at page 264, it is stated thus :

"Next to the Nairs, the community which is numerically strong among the Hindus in Trivandrum District are the Ezhavas, whose traditional occupation was toddydrawing, but who have, in the wake of the introduction of prohibition, taken to agriculture, trade and industries and have under proper guidance from their spiritual and social leaders, considerably improved their social, economic and political conditions."

Again, in the Kerala District Gazetteer relating to Trichur District, at page 208, it is stated :

"The Ezhavas who follow Makkathayam are numerically one of the strongest communities in Trichur. Their hereditary occupation is the planting and tapping of the cocoanut tree, but the introduction of prohibition, has taken away from them this occupation. This has obliged the Ezhavaa to take to other avocations. Moreover, in recent times there has been a great ferment among them in all parts of the state, and the community has been forging ahead. They have attained an important position as merchants, landowners and cultivators. A good number of them have also taken 19 the learned professions. Under the inspiring guidance of great men like Sri Narayana Guru and Kumaran Asan, they have become a very influential community in the State."

Similarly, in the District Gazetteer relating to the Kozhikode District, at page 204 it is stated :

"Below the Nairs, come what were regarded as the lower castes among the Hindus. First may be mentioned the Thiyyas who constitute a considerable bulk of the Hindu population of the district. The traditional occupation of the Thiyya was the planting and tapping of cocoanut tree. But this occupation was gradually given up and many of the Thiyyas became agriculturists, traders, shop-keepers, etc. They also attained a considerable position as land owners. The Thiyyas of the District form a most progressive community. Many of the members of this community have risen to the highest positions in the learned professions."

These passages have been relied upon by the learned counsel for the petitioners to show that even according to the State Government, as late as 1962, considerable progress has been made in the social and educational attainments of the Ezhavas and Thiyyas and that they cannot be considered to be either socially or educationally backward, as has been done under the order Ext. R-1, passed within less than a year of the publication of these District Gazetteers by the Government themselves. All these, according to the learned counsel, clearly show that there has been absolutely no attempt made by the Government to investigate and collect the necessary materials or data for the purpose of taking action under Article 15(4).

65. In particular, Mr. G. Viswanatha Iyer, learned counsel for the writ petitioner in O. P. 2266/63, has also placed considerable reliance upon the order passed by the State Government, as early as 1957, namely Ext. P-2, as well as the various consequential directions given in the subsequent orders, namely Exts. P-3, P-4, and P-5. I have already referred, in the earliest part of this judgment to the nature of these orders. The point that is stressed by Mr. Viswanatha Iyer, is that the basis adopted for giving reservation in accordance with the caste or community enunciated in the order Ext. P2, has been continuously kept up and reiterated in the order Ext. R-1 also. The order Ext. P-2 and the consequential orders Exts. P-3, P-4 and P-5, according to Mr. G. Viswanatha Iyer are mainly based upon caste or community, and no other considerations have been taken into account by the Government. There is nothing placed by the Government, according to the learned counsel, before this Court, to show that any additional factors or circumstances, which are relevant, have been taken into account after the passing of the order Ext. P-2 and before the passing of the order Ext. R-1. Ultimately the learned counsel urged that the order Ext. R-1 is violative of Article 15(4).

66. Mr. S. Easwara Iyer, learned counsel appearing for the petitioner in O. P. 1290/63 has stressed the fact that even in the counter affidavit, the Government proceed to consider the percentage of population of the Ezhavas and Muslims in relation to the total population, and attempt to justify the reservation of 13% for Ezhavas and 9% for Muslims, and show that it is not in accordance with their population strength. This itself clearly shows, according to the learned counsel, that the Government have proceeded to make the reservation only on the basis of caste or community, with reference to their population ratio alone.

67. The learned Advocate General, on the other hand, very strenuously urged that the State Government have acted strictly in accordance with the principles laid down, in particular by the Supreme Court in its latest decision, when they came to the conclusion that the particular groups in question, in whose favour reservations have been made in Ext. R-1, after treating them as backward classes, require assistance under Article 15(4) of the Constitution. The learned Advocate General quite naturally relied upon the various circumstances that have been referred to by the Government in their counter affidavit, as having operated

in their mind, before treating the particular groups in question as socially and educationally backward.

In this connection the learned Advocate General stressed that Government's satisfaction arrived at on the basis of the materials referred to in the counter affidavit, cannot be the subject of scrutiny by this Court, once the Government are able to establish that they have not acted arbitrarily or capriciously or without any materials whatsoever. It is also the contention of the learned Advocate General, that having due regard to what is stated in paragraph 6 of the counter affidavit and with reference to Ground No. A dealt with therein, all relevant aspects have been taken into account by the State Government before treating the particular groups as backward, requiring protection under Article 15(4).

In particular, the learned Advocate General relied upon the fact that the disabilities, under which the Ezhavas were suffering from, were so great, that the Government had to step in at all stages, to ameliorate their condition. In this connection, the learned Advocate General also referred to the fact that the Ezhavas were denied entry into temples, they were treated as untouchables and unapproachables, and even their bathing in tanks used by caste Hindus was regarded as amounting to pollution of the tanks. The learned Advocate General also referred to the fact that inter marriages between Ezhavas and other Hindus are even now viewed with utmost disfavour.

The learned Advocate General also urged that the Supreme Court has categorically stated that caste is a relevant circumstance to be taken into account in considering the social backwardness of any group. The Supreme Court, according to the learned Advocate General, has also held that in considering the social backwardness of a group, its occupation as well as its habitation are relevant circumstances; and those circumstances have been taken into account by the State Government when passing the impugned order. The occupation of the Ezhavas, according to the learned Advocate General, is predominantly manual labour and toddy tapping. So far as the Travancore area is concerned, it can be considered that some disabilities attaching to the Ezhavas were removed by the Temple Entry Proclamation of 1112 M.E.; and such a relief in the Cochin area was also given by the Cochin Temple Entry Proclamation, V of 1123; and that was achieved in the Malabar area only by the Madras Temple Entry Authorisation Act, V of 1947. Finally all the social disabilities such as untouchability, pollution, etc., can be considered to have been terminated, only by virtue of Article 17 of the Constitution with effect from 26th January 1950.

68. The learned Advocate General rather stenuously urged that the fact that these disabilities can be considered to have been removed by statutes, in the manner referred to above, do not again lead to the conclusion that after the date of the statutes, the social position of the community in question, has been radically altered. It is the view of the Government, the learned Advocate General urged, that notwithstanding all these ameliorative measures, the condition of the

groups is still one of social backwardness. In this connection, the learned Advocate General referred quite naturally to the Census report of 1941 regarding the percentage of literacy of the various communities referred to therein. But frankly, the learned Advocate General accepted the position, that so far as the Malabar Area is concerned, even the 1941 Census report does not give any indication regarding the percentage of literacy community-wise. He has also accepted the position that no further investigation has been made either with reference to the Travancore-Cochin area after 1941, or with reference to the Malabar area at any time in this regard,

But the learned Advocate General urged that the fact that the materials available before the Government may be considered to be meagre, does not mean that the Government, which have got this sacred duty imposed on them under Article 46 of the Constitution to give encouragement to the weaker sections of the public, should sit quiet for all time till an elaborate investigation is made in that regard. Therefore, the learned Advocate General urged, that the Government in this case were satisfied that even on the basis of the materials referred to in the counter affidavit, and in view of the fact that the groups in question were both socially and educationally backward, they deserve protection under Article 15(4).

69. The learned Advocate General quite naturally found considerable difficulty in explaining the various passages occurring in the Kerala District Gazetteers relating to the Trivandrum, Trichur, and Kozhikode Districts, The learned Advocate General was even prepared to take up the position that the statements occurring therein regarding the vast progress, social and educational, made by the communities referred to therein, cannot be accepted by this Court. The learned Advocate General urged that the statements occurring in the Gazetteers to the effect that the traditional occupation of the Thiyyas and Ezhavas of toddy tapping has been given up, because of the introduction of prohibition, cannot be accepted.

In this connection the learned Advocate General referred to the Cochin Prohibition Act, Act III of 1123, as well as the Travancore-Cochin Prohibition Act, 1950 (Act 13 of 1950), and the Madras Prohibition Act, Act X of 1937. The learned Advocate General relied upon these statutes in support of his contention that it is not as if prohibition has come into force in all parts of the areas, referred to in the statutes; and that those statutes also clearly refer to the granting of licences and permits for toddy tapping, etc. Those statutes, according to the learned Advocate General, will also show that prohibition has been introduced only, at any rate, in some parts of Cochin and Travancore-Cochin areas. Therefore, the assumption in the District Gazetteers, according to the learned Advocate General, no doubt published under the authority of the Government, that there has been total prohibition and in consequence the Thiyyas and Ezhavas have taken to other avocations, cannot be accepted as representing the true state of affairs.

70. The learned Advocate General also referred me to the attempts made by the

Madras Legislature for removing the disabilities in respect of the Harijans, untouchables or depressed classes, by passing the Removal of Civil Disabilities Act, Act 21 of 1938. That statute, especially the matters referred to in Section 2 thereof, will clearly show the nature of the disability the depressed classes were suffering from.

71. The learned Advocate General, again, in respect of the Muslims, referred to the fact that the women of that community suffer from a social disability of observing purdah and that observance has impeded the social development of that community itself. The learned Advocate General urged that the fact that this community is also educationally backward, will be seen from the available 1941 Census report relating to the States of Travancore and Cochin, and wherein they have obtained only 30.02% and 23.2% literacy, whereas the average literacy in Travancore and Cochin areas was 55% and 41% respectively; and the Government took into account the circumstance that this average was well below the State average.

72. According to the learned Advocate General, the circumstance that no materials are available relating to the Malabar area about the percentage of literacy of the community, or the fact that there has been no special investigation conducted after 1941 in respect of any of these areas, is of no consequence. According to the learned Advocate General, the Government are entitled to rely upon the materials furnished by the 1941 Census report, as well as the position occupied socially by all these groups and come to a conclusion that they are socially and educationally backward, go as to require action being taken in this favour under Article 15(4).

73. The learned Advocate General, in particular, referred also to certain passages occurring in the publication entitled "The Cochin Tribes and Castes", published in 1909. In Volume. I of that publication, at page 338, relating to the social status of Ezhavas, it is stated as follows:

"The status of the Ezhuvans in former times seems to have been very low. In their manuscript memoirs of Travancore and Cochin, Ward and Comer say that they were treated with contempt by the members of the Higher castes and were owned in a kind of servitude, mitigated to be sure, when contrasted with the predial slaves. They also add that during late years the caste has been raised in some from the low state of degradation in which they were held, and that the repeal of poll-tax, from which the lowest poverty could not exempt the abrogation of the oozhium (forced labour) and many vedatious restraints, might have taught them their own rights and given them confidence to claim liberty."

The further passage that is relied upon in the same volume, is at page 339, to the effect

"Always destitute of literature, both sacred and profane, they were not solicitous for education."

The learned Advocate General has also drawn my attention to another passage, occurring in Chapter XVII of Volume II of the same publication, at page 459, relating to the Jonakan Mappillas. The particular aspect that is referred to is where it is stated that the Jonakans are mostly either the descendants of the offspring of Arab traders and the low caste women of Malabar, or converts to the faith of Islam, from the lower Hindu castes. The further aspect that is referred to is where it is mentioned that the Mappillas are considered to be the offspring of fugative alliances of the Arabs with the Thiyya or Choga women of the coast.

74. Regarding the other groups, namely the Latin Catholics, Backward Christians, and other Backward Hindus, who have been treated as Backward classes, the learned Advocate General referred me to the Census Report of 1931 of the Travancore State regarding the low percentage of literacy of those groups. And the learned Advocate General urged that there has been no material progress, either socially or educationally in those groups ever since; and therefore urged that the State Government were entitled to treat them as socially and educationally backward, requiring assistance under Article 15(4).

75. The learned Advocate General also placed considerable reliance upon the report submitted in 1955 by the Backward Classes Commission appointed by the President under Article 340(1) of the Constitution. At page 27 of Volume I of that report, the Commission adverts to the representations made on behalf of some Muslim organisations, asking that all Muslims should be treated as backward and be given educational aid and adequate representation in the Government Services. At page in, of Volume II of the report, the Commission refer to the Travancore-Cochin area, and state that Ezhavas and Thiyyas are agricultural and industrial labourers, coir makers, and handloom weavers. Again, at page 112 of the same volume, the Commission refer to "Mappilla" as agriculturists and petty traders.

Then at page 72 of Volume II of the report relating to the Madras State, the Commission refer to the Ezhuvans of Malabar as having the traditional occupation of toddy tapping. Again at page 75 of the same volume relating to Madras, the Commission refer to the Mappillas as labourers and petty traders. The learned Advocate General urged that the State Government's view expressed in the counter affidavit relating to Ezhavas, Thiyyas, Muslims, and the other communities, is perfectly in accordance with the views expressed in the report of the Backward Classes Commission, and therefore the State Government were perfectly justified in relying upon the traditional occupation of those groups for treating them as Backward classes. In fact, the learned Advocate General urged that more or less the same criteria or tests laid down by the Supreme Court in its recent decision, have been adopted by the Backward Classes Commission to designate a particular group as backward.

76. The learned counsel for the petitioners, in turn, relied upon the statements contained in the same report, at page xxii of Volume I, wherein it is stated that in Kerala, the Nair and the Ezhava are declared to be dominant. The learned

counsel also referred to the approach made by the Commission itself, mainly on the basis of caste or community. Again the learned counsel for the petitioners referred to the statements contained at page 27 of Volume I of the report, wherein, in dealing with the claims of Muslims that all Muslims should be treated as backward, the Commission has stated that it would not be fair or just to list all Muslims as socially and educationally backward and that there are certain professions, however, carried on by the Muslims, that are regarded as inferior even by the Muslims.

77. I do not think it necessary to go into these aspects adverted to, no doubt by the Backward Classes Commission in the report referred to above, for the reason that the said report itself has been referred to, by the Supreme Court in its decision reported in *M.R. Balaji and Others Vs. State of Mysore*, . After adverting to the circumstances under which the Commission was appointed, as well as to the various recommendations made by the Commission, the Supreme Court has definitely adverted to the views expressed by the Central Government in respect of the recommendations made by the Commission. And it is the view of the Supreme Court that the Central Government did not feel satisfied about the approach made by the Commission. The Supreme Court has also adverted to the fact that the approach made by the Commission, was largely on the basis of caste or community; and therefore the Central Government have themselves emphasized that action on a systematic and elaborate basis can be proceeded with only after the necessary positive tests and criteria have been laid down for determining which classes or sections are really entitled to get special relief and assistance. Therefore, it will be seen that the Central Government themselves have not acted upon those recommendations, and therefore no reliance can be placed upon the recommendations contained therein, either by the learned Advocate General for the State, or by the learned counsel for the petitioners.

78. Ultimately the learned Advocate General urged that in this case, when the State Government have, on a proper consideration of all the materials referred to in the counter-affidavit, ultimately decided to classify certain groups as Backward classes, entitling them to protection under Article 15(4) of the Constitution, this Court should not interfere with the opinion so expressed.

79. Mr. K. V. Surianarayana Iyer, learned counsel appearing, for two of the Ezhava candidates, who apprehend that the admissions already given to them, on the basis of the reservation as Backward classes under Ext. R-1, may be affected, and who had been permitted by me to intervene in these writ proceedings, strongly supported the stand taken by the learned Advocate General on behalf of the State. Mr. Surianarayana Iyer, has also urged that Article 15(4) of the Constitution deals with the right of individuals, whereas Article 15(4) deals with classes or groups. If there has been a proper classification, having a rational relation to the object sought to be achieved, the learned counsel urged, that the said classification cannot be characterised as discriminatory and violative of Article 14.

The learned counsel also urged that the Supreme Court itself has laid down that in considering the classes, who are to be treated as Backward classes for the purpose of Article 15(4), caste is a relevant factor to be taken into account. Therefore, the learned counsel urged that the expression "class" in Article 15(4) must be a well-defined unit, and it may take in an entire caste or a community; that is a matter entirely for the State to take into account when they take action under Article 15(4).

And according to the learned counsel, such an action has been taken in this case, by giving executive directions. When once the State Government have come to the conclusion that the particular groups, viz., Ezhavas, Muslims, and the like-- though they may all be well-defined castes or communities -- are to be considered as Backward, the only question that this Court should consider will be, as to whether the test applied for treating them as socially and educationally backward, is proper or not. For that purpose, the learned counsel rather strenuously urged, that the State Government were entitled to take into account the traditional occupation of the particular groups, as well as the percentage of literacy as disclosed by the 1941 Census report. The learned counsel also urged that it is impossible, in the nature of things, to go on making investigations every time for the purpose of enumerating the Backward classes. And, according to the learned counsel, having due regard to the various disabilities under which these groups have admittedly suffered from, and also having due regard to their social position in life and the percentage of literacy obtaining in those groups, the State Government were perfectly justified in treating the particular groups as Backward classes, and, in consequence, declaring them entitled to the reservation of 35%.

80. Mr. Thayyil Vasudevan, learned counsel appearing for another candidate belonging to the reserve group, who according to him, will be eligible to get a seat if the reservation is accepted, has urged that the reservation, even on a communal or caste basis, is absolutely legal and is justified by the Constitution itself. The learned counsel has also urged that unless there is reservation of seats in all educational institutions on a communal basis, forward communities will become more forward at the costs of the backward communities, and backward communities will become more backward for no fault of theirs. Therefore, the learned counsel very strenuously urged that even assuming that the reservation of 35% to Backward classes, made in Ext. R-1, is essentially on the basis of caste or community, it is nevertheless valid and legal.

81. After giving very anxious and careful consideration to the various aspects that have been referred to by the learned counsel for the petitioners, the learned Advocate General for the State, and also by Messrs. K. V. Surianarayana Iyer, and Thayyil Vasudevan for the interveners, in my view, the contentions urged by the learned counsel for the petitioners, in this regard, will have to be accepted. In my view, the enumeration of backward classes in Ext. R-1, leaves no room for doubt that the predominant, if not, the sole test that has weighed in the mind of the State Government, is the test of caste or community. Though I

am not inclined to accept the contention of the learned counsel for the petitioners that the test applied by the State Government is solely and exclusively on the basis of caste alone, I have to accept the contention of the petitioners that, in the circumstances of this case, the approach made in Exhibit R-1, is predominantly on the basis of caste. And, even in such a case, according to the decision of the Supreme Court, it must be held that the social and educational backwardness of the communities, to whom the order under attack applies, has been determined in a manner, which is not permissible under Article 15(4), and that itself introduces an infirmity, which is fatal to the validity of the said classification.

It must also be remembered, as stated by the Supreme Court, that the executive action that has been taken under Article 15(4) by the State Government, must be based on an objective approach, having due regard to the materials that have been collected by the Government, after a proper investigation of the data relevant for such purposes. This is not one of those cases where it is open to the State Government to be subjectively satisfied that a particular group is a backward group; in which case, the contention of the learned Advocate General that when once the Government have applied their mind and come to a satisfaction of their own, this Court should not interfere under Article 226 with that satisfaction expressed by the Government may have considerable force.

It must also be borne in mind that the first and essential question that arises for consideration, again as laid down by the Supreme Court, in considering the validity of a particular provision claimed to be made under Article 15(4), is the determination of the question as to whether the State Government have validly determined, who should be included as Backward classes. It is also recognised by the Supreme Court that the Court should certainly consider whether the proper test necessary for such purposes, has been applied by the State Government when they decided to include the particular groups as Backward Classes. The various principles that could be gathered from the decision of the Supreme Court have already been

referred to by me earlier.

82. Admittedly, in this case, even according to the averments made in the counter-affidavit filed on behalf of the State Government, no investigation has been made, or data or materials collected, for the purpose of enabling the State Government to consider, as to which particular groups or sections of the citizens have to be treated as Backward Classes and made eligible for assistance to be provided, by taking action under Article 15(4). In this connection it may be noted that the Supreme Court has stressed that the problem of determining who are socially Backward Classes, is undoubtedly a very complex one and that sociological, social and economic considerations come into play in solving the problem, and evolving proper criteria for determining, as to which classes are socially backward is obviously a very difficult task. The Supreme Court has also stressed that it will need an elaborate investigation and collection of data and

examining the said data in a rational and scientific way, and that it is the function of the State, which purports to act under Article 15(4), No doubt, one can readily agree with the contention that has been urged on behalf of the State Government by the learned Advocate General that the directive principles enshrined in Article 46 of the Constitution must be given full effect to. One can also readily accept the contention of the learned Advocate-General that reservation should and must be made to advance the prospects of the weaker sections of the society. But, as pointed out by the Supreme Court, in providing for special measures for rendering assistance to the weaker sections of the society, care should be taken not to exclude admission to higher educational centres to deserving and qualified candidates of other communities and that the special provision contemplated by Article 15(4) must be within reasonable limits.

83. Before I advert to the reasons given by the State Government for treating the particular groups referred to in Ext. R-1 as Backward Classes, it is really necessary to refer to the orders passed by the State Government in 1957. I have already referred to those orders, which are Exts. P-2, P-3, P-4 and P-5. So far as the materials available in these proceedings go, the reservation of 35% of the seats for Backward Classes, regarding admission to the professional colleges, has originated from Ext. P-2, dated 15th June, 1957. The Government specifically refers to the subject, in Ext. P-2 as "Reservation of seats for Backward Communities .....". They also refer to the representations received on behalf of two organizations, namely the Kerala State Muslim League and the Akhila Kerala Ezhava Convention. The request of these organisations, is itself stated in Ext. P-2, to be for giving legitimate representation "due to their communities" in the matter of admission to the professional colleges. Therefore, it will be seen that the claim made by those two organisations, was only on the basis of caste or community, and the Government also appear to proceed on that basis, as will be seen by the reference to "Backward Communities" in Ext. P-2, and that the claims of communities or castes as such will have to be recognised for giving reservation.

84. Ext. P-3, which indicates the sub-rotation of the 35% referred to in Ext. P-2, again deals with the five groups, only on the basis of caste or community. No other approach appears to have been made; nor is there any indication, either in Ext. P-2 or in Ext. P-3, to show that any other relevant matters, which have to be taken into account as per the decision of the Supreme Court, were ever adverted to. Under Ext. P-4, I have already stated that the State Government declare that the Thiyyas are to be treated as Ezhavas for the purposes of admission to the professional colleges. Here again, it is worthy of note that both Exts. P-3 and P-4 specifically refer to "reservation of seats for Backward Communities". Again, Ext. P-4 states that the list of "Backward Communities" is the one to be found in the order dated 6-2-1957. In paragraph 4 of Ext. P-4, it is stated that

"All the communities mentioned in Annexure I to the above-said Government proceedings excepting Ezhavas and those belonging to religions other than

Hinduism are to be treated as "other Hindus" ".

This again, clearly shows that the Government were giving reservation only according to the test of community, religion and caste. Ext. P-5 is the order passed on 13th July, 1957, wherein the subject dealt with is "Reservation of seats for Backward Communities ...". That order specifically applies the directions given in Exts. P-2 and P-3 to all technical institutions under the control of the Government, including such institutions under the University. The sub-rotation referred to in Ext. P-5, which is the same as referred to in Ext. P-3, is again only on the basis of caste or community.

85. So far I could see, there is absolutely no explanation or other material furnished in the proceedings now before me by the State, as to whether any other circumstance, such as the social and educational backwardness of the communities referred to in those orders, were taken into account or considered before characterising those groups as Backward Classes. I have already adverted to the contention of the learned counsel for the petitioners that the reservation made in Ext. P-2 has been continued under the present order Ext. R-1. At the time of taking a decision under Ext. P-2, the State Government do not claim to have adverted to the relevant factors laid down by the Supreme Court for treating a particular group as socially and educationally backward. If so, the learned counsel ask that when the same orders or directions are continued in 1963, have the State Government placed before this Court any other materials that have been adverted to by them, in between the passing of the orders Exts. P-2 and R-1? According to the learned counsel for the petitioners, the position is the same in 1963 as it was in 1957. If so, the order of 1957, namely Ext. P-2, proceeds solely on the basis of caste and community; and that is adopted in toto without any exception whatsoever, in Ext. R-1 also.

86. In the circumstances of this case, these contentions of the learned counsel, for the petitioners in my opinion, appear to have considerable force. Inasmuch as no other material has been placed before this Court by the State Government regarding the circumstances under which the orders, covered by Exts. P-2 to P-5 have been passed, in my view, this Court will be justified in proceeding on the basis that the statements referred to in those orders must be given full effect and operation. If so, the irresistible conclusion is that when representations have been made by communal or caste organisations for giving their communities proper representation regarding admission to the professional colleges, and the Government have accepted that claim, the acceptance made by the Government, is solely and exclusively on the basis of caste, religion or community. No other conclusion, in my view, is possible, if a decision has to be rendered only having regard to the orders Exts. P-2 to P-5. The same is the position if one goes far Ext. R-1 alone.

87. But inasmuch as the State Government have taken up the position that at the time when the order Ext. R-1 was passed, they did consider the several circumstances mentioned in their counter-affidavit, on the basis of which they

have treated the particular groups as backward, in my view, this Court should consider the claim made by the Government, in that behalf, and find out whether a proper approach has been made by them in the matter of validly determining as to who should be included as Backward Classes. Inasmuch as I have already referred very elaborately, at the beginning of this judgment to the various circumstances referred to by the State Government in paragraph 6 of their counter-affidavit, with special reference to Ground A therein, I do not think it necessary to cover the grounds over again. The circumstances taken into account by the State Government for coming to the conclusion that Ezhavas must be considered to be socially and educationally backward, are briefly six in number, namely (i) they were denied access to temples frequented by the caste Hindus; (2) they were suffering from the disability of untouchability and unapproachability; (3) their bathing in tanks was considered to pollute the waters therein (4) inter-marriage between the Ezhavas and other Hindus, even of the Sudra caste, such as Nairs, is generally viewed with disfavour; (5) their traditional occupation is manual labour and toddy tapping; and (6) they were late-comers in the field of education and educational activities, as will be disclosed by the percentage of literacy according to the 1941 Census report, available for the two areas, namely Travancore and Cochin.

88. No doubt, the learned Advocate-General referred to the statements contained about the Ezhavas in the Cochin Tribes and Castes, published in 1909. In my view, the matters mentioned, as existing in 1909, cannot certainly form the basis of any decision, that has to be taken by the Government in 1963. Even otherwise, I have already referred to the reliance placed by the learned counsel for the petitioners on the extracts from the District Gazetteers published by the State Government themselves relating to the Districts of Trivandrum, Trichur and Kozhikode, as late as 1962, wherein there is a specific reference to the fast progress made by the Ezhavas and Thiyyas and to the important and high position occupied by members of that community in various spheres.

The learned Advocate-General, no doubt, urged that the statements contained in these District Gazetteers, though published by the Government themselves, should not be given full effect. The learned Advocate-General also urged that the assumption in the District Gazetteers that prohibition has been introduced in the whole State, which resulted in the community taking to other avocations, namely of trade, industry, agriculture, etc., is erroneous; because, according to the learned Advocate-General, even the Prohibition Acts in force in the Travancore-Cochin and Malabar areas, will clearly show that the entire State has not become dry. I have no hesitation in rejecting this contention of the learned Advocate-General.

The extracts made from the District Gazetteers regarding the fast progress made by this community in respect of trade and industries, and to their occupying important positions such as merchants, land-owners, and also in the learned professions, are statements made by the State Government themselves in their

publications. And those statements contained in the said publications made as late as 1962, will show that the Ezhava community, even according to the Government, was progressing very fast, both socially and educationally. They do not fit in with the stand taken by the State Government in 1963, that the said group must be considered to be socially and educationally backward. Both the statements cannot certainly stand side by side. If at all, it only means that a greater endeavour and effort will have to be made by the State, regarding this question, having due regard to the various principles laid down by the Supreme Court. It is not the case of the State Government that after the decision of the Supreme Court was rendered on 28th September, 1962, any further attempt has been made, to find out whether the reservation made under Ext. P-2 in 1957, should be continued; and if so, on what basis. Therefore, in my view, the learned counsel for the petitioners are perfectly entitled to rely upon the various statements made by the Government in the District Gazetteers referred to above, which have been published as late as 1962.

89. Even otherwise, it will be seen that according to the State Government, the various ameliorative measures for improving the lot of untouchables have been taken in the various areas of the State concerned, namely in Travancore, as early as 1112 M. E., in Cochin area in 1123 M. E., and in the Malabar area in 1938 and 1947. Even according to the State Government, no investigation has been made as to the changes those legislations have brought about in the social and educational activities of any particular group. No doubt, I am prepared to accept the contention of the learned Advocate-General, that the mere fact that a legislation is passed for removing a particular disability, does not also automatically mean that from the date of passing of the said measure, the society or the group, who are benefited by the legislation, have advanced rapidly. That, again, is a matter to be investigated and found by the State Government, when they purport to take action under Article 15(4). At any, rate, after the coming into force of the Constitution, and the prohibition of untouchability under Article 17 with effect from 26-1-1950, it is accepted on all hands, that no group or any class of citizens suffers from any such disability at all. Therefore, even from that point of view, the State Government, before they passed the impugned order in 1963, should have made an effort to find out the effect of the legislations referred to above, as well as the constitutional provision, namely Article 17.

90. The only other reason given by the State Government, that, can survive, if at all, for treating the Ezhavas as socially backward, is that intermarriage between the Ezhavas and other Hindus, even of the Sudra caste, such as Nairs, is generally viewed with disfavour. In my opinion, even assuming that the statement is correct, merely on the basis of such an assumption, the social backwardness or otherwise of a group cannot be held to have been properly considered for the purposes of Article 15(4).

91. Regarding the educational backwardness of the Ezhavas, again, the only data

that is referred to by the State Government is the percentage of literacy of this community as per the 1941 Census report available for the States of Travancore and Cochin. Even the State Government accept the position that, so far as the States of Travancore and Cochin in 1941 are concerned, the State averages of literacy were 55% and 41% respectively. Even according to the data furnished by the State Government, the literacy percentage of Ezhavas in Travancore is 46.5, and in Cochin 34.7.

The State Government clearly advert to the fact that no material is available regarding the percentage of literacy among the Ezhavas either in the 1951 or 1961 Census. Admittedly, no attempt has also been made by the Government to collect any material or statistics in this behalf. It is solely on the basis of the literacy percentage of the group in question, as disclosed by the 1941 Census report and the traditional occupation of the Ezhavas, that the State Government have come to the conclusion that this group must be considered as educationally backward. Even here, the counter-affidavit accepts the position that so far as Malabai area is concerned, no materials are available in this regard, even in the 1941 Census report. That no such materials are available for 1951 and 1961 for any of the areas, is also accepted. Therefore, it is without any material or data at any rate, regarding the percentage of literacy of the Ezhavas in the Malabar area, that it is stated in the order Ext. R-1 that this group is educationally backward even in the Malabar area, which forms part of Kerala State.

92. A very severe attack has been made by the learned counsel for the petitioners that when the Ezhavas, even according to the figures furnished by the State Government, had 46.5% literacy in Travancore as against the State average of 55% and had 34.7% literacy in Cochin area as against the State average of 41% -- and that as early as 1941 -- designating that group as educationally backward in 1963, without any materials or further investigation, is absolutely arbitrary and capricious. Suffice it to say that no conclusion can be arrived at in 1963, regarding the educational backwardness or otherwise of any group on the basis of the figures collected in 1941. Even going by the statistics given in 1941, in my view, the State Government cannot be considered to have acted properly in treating the Ezhavas as educationally backward when they appear to have had as high a percentage of literacy, namely 46.5% in Travancore as against the State average of 55%, and 34.7% in Cochin as against the State average of 41%. Surely the community must have progressed further in the field of education from 1941 to 1963. According to the State Government, this community has not advanced in the field of education. It may be correct or may not be correct. But there is no material collected by the Government or placed before this Court, from which it is possible to accept the contention of the State Government that the progress has not been appreciable at all.

93. Even the State Government proceed, in the counter-affidavit, on the basis, that as against 47 lakhs of the Ezhava population that must be considered to exist in 1963, which all represent 25% of the total population of the Kerala State,

reservation has been made to this community only of 13%.

94. So far as the Muslims are concerned, again, it is seen that the State Government proceed to treat them as socially backward, because the Muslim women observe Purdah, and that it must have impeded the social development of the community in the matter of training and bringing up the children in their early years of life. This is the only reason given by the State Government for considering the Muslims as socially backward. Again, referring to their educational backwardness, the State Government aver that the Muslims are educationally backward and their occupation is predominantly trade or business, and they were also late-comers in the field of education. In this connection, the State Government refer to the percentage of literacy of the Muslims as revealed in the 1941 Census report. That again will show that, BO far as Travancore area is concerned the literacy of the Muslims was 30.02% as against the State average of 55%, and so far as the Cochin area is concerned, it was 23.2% as against the State average of 41%. There are no other materials, even according to the State Government available regarding the position of the Muslim Community in the educational field, either in the 1951 or 1961 Census. And even regarding, the Malabar area, the Government proceed on the basis, that there is absolutely no data available so far as Muslims are concerned even for the year 1941. The Government then refer to the ratio of population of the Muslims in the 1941 Census and proceed to state that whereas their population is about 16.5 per cent of the total population, the reservation given to them is only 9%.

95. In my view, the approach made by the State Government for treating the Ezhavas and Muslims as both socially and educationally backward, is not certainly in accordance with the principles laid down by the Supreme Court in *M.R. Balaji and Others Vs. State of Mysore*, . No doubt, the Supreme Court has stated that in considering the social backwardness of a particular group, caste is not irrelevant. But the Supreme Court has also emphasised the point that the caste of the group of citizens, should not be exaggerated. Another circumstance that has been indicated by the Supreme Court in considering the social backwardness of a group, is their economic position in life. The Supreme Court also" emphasises that social backwardness, on an ultimate analysis, is the result of poverty to a very large extent, and classes of citizens who are deplorably poor automatically become socially backward. And it is in that connection that the Supreme Court also states that the occupations of citizens may also contribute to make classes of citizens socially backward, and that there are some occupations which are treated as inferior according to conventional beliefs and classes of citizens who follow these occupations are apt to become socially backward.

These observations, in my view, clearly indicate that these various circumstances to be taken into account, must be found to exist by the State Government, as far as possible within a reasonable time of passing the order declaring a particular group as a Backward Class, entitling to assistance under Article 15(4) of the Constitution. In my view, no such approach has been made in this case at all. On

the other hand, reliance has been placed on very ancient matters, which may or may not have relation to actualities, and which could be decided only after a proper investigation and collection of materials relevant for the said purpose has been made. The approach appears to have been almost on the basis that reservations that are to be given to the Ezhavas and the Muslims are not even in accordance with the percentage that the said groups bear to the total population. That again shows that the basis to include the Ezhavas and the Muslims as a whole as Backward Classes, is predominantly on the basis of applying the test of caste, community or religion. No investigation regarding their economic condition has been attempted to be made.

96. More or less the same position exists regarding the other groups included as Backward Classes in Ext. R-1, namely Latin Catholics, Other Backward Christians, and Other Backward Hindus. Even the materials adverted to in the counter-affidavit regarding these groups are absolutely scanty and insufficient. Here again, there has been no investigation or attempt made to collect materials or data regarding the social and educational backwardness of these groups or about their economic condition.

97. Therefore, the conclusion that has to be arrived at ultimately, is that the State Government, when they made the reservations under Article 15(4) in favour of Backward Classes, have not validly determined as to who should be included in the Backward Classes. The Supreme Court has emphasised that the backwardness under Article 15(4) must be social and educational; and that it is not either social or educational, but it is both social and educational. From the materials adverted to by the State Government themselves in their counter-affidavit, in my view, it cannot be considered that there has been a proper approach made to this very important aspect, when alone it can be stated that the State Government have validly determined, as to who should be included in the Backward Classes. Inasmuch as the test applied by the order in question in that behalf is improper and invalid, it follows that the classification of socially backward classes, based predominantly on the test of caste, community or religion, will have to be held inconsistent with the requirements of Article 15(4) of the Constitution. If so, it follows that the 35% provided for them and the subdivision of this 35% in Ext. R-1, cannot also be sustained.

98. Before I close the discussion on this aspect, I may also advert to the contention of Mr. K. V. Surianarayana Iyer, learned counsel appearing for some of the interveners, that the classification, even on the basis of community or caste as a whole under Article 15(4) is a proper classification under Article 14. The question regarding the reservation under Article 15(4) having regard to Article 14, in my view, does not at all arise for consideration. Article 15(4) itself provides for the manner in which the classification and in whose favour the classification is to be made. That again lays down the test for the purpose of classification, namely the socially and educationally Backward Class. Article 15(4) also indicates the object for which the said classification is to be made.

Therefore, Article 14 does not, in my view, at all come into the picture, when considering reservation to be made under Article 15(4). The entire matter will have to be considered only having due regard to what is laid down in Article 15(4) itself.

99. I do not think it necessary to specially discuss the contentions that have been urged by Mr. Thayyil K. Vasudevan, learned counsel for one of the interveners, namely one of the students coming under the reserved category, that reservation on a communal or caste basis, as such, is perfectly justified under Article 15(4). Those contentions are against the teeth of the provisions contained in Article 15(4) and the limits of the reservation that can be made under Article 15(4), as explained by the Supreme Court in the recent decision in the Mysore case, which has been discussed above. From the various provisions of the Constitution and the principles laid down by the Supreme Court, it follows that these contentions of the learned counsel will have to be summarily rejected.

100. That takes us on to the consideration of the second ground of attack referred to earlier. The grievance in this case in this regard, of the petitioners is that notwithstanding the fact that there has been a special reservation for Backward Classes and Scheduled Castes and Scheduled Tribes, under the order Ext. R-1, nevertheless the candidates belonging to that group are again made eligible for competing with the other candidates on a State-wise or District-wise merit basis. This, according to the learned counsel for the petitioners, is again illegal and constitutes an infringement of the rights guaranteed under Article 29(2) of the Constitution to candidates who do not come under the reserved category. This stand taken by the learned counsel

for the petitioners, is very strenuously challenged by the learned Advocate-General.

101. So far as I could see, the grievance of the petitioners appears to be that when 35% of the seats are reserved for the Backward Classes, that is the minimum number of seats that is guaranteed to that group as a whole. According to the learned counsel for the petitioners, if 35% of the seats are reserved for a particular group, and that group is able to get some seats -- say, 5% -- on the basis of merit, the number of seats that could be given to that group under the reserved category must be proportionately reduced, and they can get only 30% of the seats reserved for them under the reserved category. That is, according to the learned counsel, Article 29 (2), which has been extracted earlier, provides a constitutional guarantee in the manner laid down therein. Allowing candidates of the reserved group, who are given protection under Article 15(4), to compete also in the general category really amounts, according to the petitioners, giving them more number of seats than is justified under the reservation; and to that extent, it affects the rights guaranteed to other candidates under Article 29(2).

102. No doubt, at this stage it may be mentioned that none of the learned counsel for the petitioners was prepared to take up the position that if the

reserved candidates are able to get more number of seats on a merit basis than that reserved to them as Backward Classes, they are not entitled to get all those seats. But in such a case, the contention of the learned counsel is that no further allotment need be made to any member of that group under the reserved category.

103. On the other hand, the learned Advocate-General urged that by allowing candidates, who may belong to the classes described as "Backward Classes", and to whom protection has been given by providing for a particular percentage under Article 15(4), to compete in the general merit pool and obtain a few seats, if they can, does not in any manner infringe the constitutional rights guaranteed to any other candidate under Article 29(2). Article 15(4), the learned Advocate-General pointed out, is as explained by the Supreme Court, a special provision to be made for the purpose of advancing the cause of the weaker sections of the citizens. Any candidate belonging to any class whatsoever, has got equally a constitutional guarantee given to him under Article 15(4). When a candidate, who may, no doubt, belonging to the Backward Class and for whom protection has been given under Article 15(4), competes in the general merit pool and is able to get a seat, he gets it, not because he is a member of the Backward Class, but in his own individual right. Such a candidate equally has got a constitutional right guaranteed to him under Article 29(2). Accepting the contentions of the learned counsel for the petitioners, the learned Advocate-General urged, would mean that a provision, which is intended for advancing the cause of the weaker sections of the citizens, as provided under Article 15(4), is being invoked really to hinder the cause of such weaker sections of the citizens, by placing an embargo on their right to compete in the general merit pool.

104. In my view, the contentions of the learned Advocate-General will have to be accepted in this regard. As pointed out by the Supreme Court in the Mysore case, action to be taken under Article 15(4), is really with a view to advancing the cause of the weaker sections of the citizens, which sacred duty is cast upon the Government concerned, by the directive principles enunciated in Article 46 of the Constitution. A candidate, who may, no doubt, belong to a class characterised as "Backward Class", when he competes on merit in the general pool, does so, as rightly pointed out by the learned Advocate-General, not as a member of the "Backward Class", but really in his own individual right, which is as much guaranteed to him under Article 29(2), as to any other candidate competing in the general merit pool. No doubt, there are some observations in the decisions of the Andhra Pradesh High Court and the Mysore High Court, namely those reported in *P. Sudarsan v. State of Andhra Pradesh* AIR 1958 AP 569, and in *S.A. Partha v. State of Mysore* AIR 1961 Mys 220 respectively, which may appear to lend some support to the contention of the learned counsel for the petitioners. The learned Advocate-General has also drawn my attention to another decision of the Andhra Pradesh High Court, namely *Raghuramulu v. State of Andhra Pradesh* AIR 1958 AP 129, wherein the right of a member of the Backward Classes to compete and obtain seats in the general merit category, has been

recognised, without in any manner affecting the quota that is fixed for the Backward Classes as a whole under Article 15(4).

105. The particular observations relied upon by the learned counsel for the petitioners in the decision of the Andhra Pradesh High Court reported in AIR 1958 AP569, are those contained at p. 371 of the report, to the following effect :

"..... The fundamental right of a citizen whether he belongs to a Backward Community or not, is to secure admission in any educational institution maintained by the State without his being discriminated on grounds only of religion, race, caste, or any of them. The State may abridge this right by making a provision for the advancement of any socially and educationally backward class of citizens.

"Presumably in exercise of that power, the State directed that a maximum of 15% of the seats in each faculty should be reserved for candidates from backward classes. If the boys belonging to the backward classes by their merit secure more than 15% of the seats in the general competition, this rule cannot be invoked to reject the boys above the prescribed manner; for, in that event, their fundamental right under Article 15(4) would be violated.

"On the other hand, if the selection is made in two different compartments, in such a way that some boys belonging to the backward classes are allowed to compete- for the general pool and some for the reserved seats, it would cause great hardship to the boys belonging to other communities. The rule, therefore, can be worked out in such way as to protect the interests of students of the backward classes without at the same time causing prejudice to students of other communities.

"This could be achieved by pooling all the candidates together and guaranteeing minimum seats for those belonging to the backward classes. To illustrate : If there are 100 applicants for selection to the Medical College, they would be arranged in the order of merit, and even if more than 15 per cent of the candidates belonging to the backward classes could be selected on merit alone, they would be so selected.

"If they fell short of that number they would be selected to make up their number on the basis of merit inter se between them, though they got less marks than boys belonging to other communities. This process will protect students of backward classes without doing any injustice to the forward ones ....."

I do not think these observations assist the learned counsel for the petitioners. The observations made by the learned Chief Justice, and extracted above, in my view, and if I may say so with respect, clearly emphasise that there is a fundamental right in a citizen, whether he belongs to a backward class or not, to secure admission in any educational institution maintained by the State, in accordance with Article 15(4) of the Constitution. The above extract also recognises that if a larger number of candidates of the particular backward

classes are able to secure seats on a general merit basis, than the quota allotted to that class under Article 15(4), then they are clearly entitled to all the seats so captured on the general merit basis. The emphasis that is laid by the learned Chief Justice is on the fact that if in the general merit pool the reserved candidates are able to get only a lesser number of seats than the percentage reserved to that particular reserved category, the deficiency or the difference must be made good for the reserved category.

No doubt, the learned Chief Justice also suggests a workable arrangement, so that no particular class can feel frustrated. But, if I may say so with respect, I do not find that the learned Chief Justice lays down any proposition of law, as such, to the effect that whenever some candidates coming in the reserved group have been able to get a few seats in the general merit pool, to that extent there must be a reduction effected in the percentage reserved for them as backward classes. In fact, in my view, the stand taken by the learned Advocate-General gets support from the decision of the Andhra Pradesh High Court, relied upon by him, to which also the learned Chief Justice was also a party. I will advert to that decision of the Andhra Pradesh High Court, after considering the decision of the Mysore High Court, relied upon by the learned counsel for the petitioners.

106. That decision of the Mysore High Court is the one reported in AIR 1961 Mys 220. The particular observations relied upon by the learned counsel for the petitioners occur at page 234 of the report which is to the following effect:

"The first and the most important idea which should not be lost sight of, is that although the Scheduled Tribe, Scheduled Castes and other Backward Classes are by reason of their backwardness treated as deserving of encouragement intended to improve their conditions, they are nevertheless citizens of India in the same way as members of all other castes are citizens of India, and as such citizens, they are equally entitled to the constitutional guarantee of fundamental rights. They are entitled, therefore, to the same equality of status and opportunity as the rest of the citizens are.

"Therefore, any special provision by way of reservation of seats or otherwise made in their favour cannot be worked in such a way as to prevent them from exercising their fundamental rights. Such will be the position if the Scheduled Castes and the Scheduled Tribes and the other Backward Classes are put in separate compartments and the rest of the citizens put in another compartment and each confined to its own respective compartment. At the same time, if these Scheduled Castes, Scheduled Tribes and other Backward Classes are thus entitled to their fundamental rights, other citizens are equally entitled to say that the same fundamental right of theirs shall not be abridged beyond the limits constitutionally permissible for the protection and encouragement of Scheduled Castes, Scheduled Tribes and other Backward Classes.

"When, therefore, a reservation of a certain percentage of seats is made in favour of Scheduled Tribes or Scheduled Castes or other Backward Classes, they

cannot on the basis of their backwardness ask for more seats than are included in the reserved percentage. Therefore, compartmentalisation is open to objection from the point of view of the fundamental rights, of both categories of citizens To prevent a member of the category entitled to reservation from competing in the other or general category, abridges, his fundamental right,

"To permit him to compete separately both in the reserved category as well as in the general category abridges the fundamental right of a member of the general category beyond the limits constitutionally permissible for the protection of the reserved category. Hence for a reservation of a certain number of percentage of seats to be constitutionally correct or appropriate, it should not be in the nature of compartmentalisation, but in the nature of a guaranteed minimum in the course of a general competition among all categories of citizens."

In particular, the learned counsel for the petitioners relied upon the observations in the above extract, to the effect that when a reservation of a certain percentage of seats is made in favour of Scheduled Tribes or Scheduled Castes or other Backward Classes they cannot, on the basis of their backwardness, ask for more seats than are included in the reserved percentage. Even here, if I may say so with respect, I do not understand the learned Judges as laying down any proposition of law as such that when a few seats have been captured in the general merit pool by the candidates belonging to the Backward Classes, there must be a proportionate reduction in the percentage allotted to that class when action has been taken under Article 15(4). In fact, the above extract also emphasises that though the Scheduled Castes, Scheduled Tribes and other Backward Classes can be given protection under Article 15(4), they are as much entitled to the same guarantee as given to other citizens under Article 15(4).

107. In my view, the question more specially arose in the decision relied on by the learned Advocate General, namely the one reported in AIR 1958 AP 129, In that case, the claims of two candidates, who belonged to the Backward Classes, for whom a percentage had been fixed under Article 15(4), were rejected in the merit pool, though they obtained higher marks, on the ground that all

the seats for that backward class have been exhausted by filling up the percentage reserved for that class. This was challenged as unconstitutional and illegal. The learned Chief Justice observes at page 131 of the report as follows:

"..... The State may allot a minimum number of seats in professional colleges for backward classes. This provision would be for the advancement of the backward classes for irrespective of the marks they secured, certain seats would be guaranteed to those classes. But if in a particular locality the members of the backward classes secure high marks and are able to compete with students of other classes they would not be deprived of their right to get admission into colleges beyond the quota allotted to them.

"Such a provision would certainly be for the advancement of the backward classes. On the other hand, if a maximum be fixed, instead of providing for the

advancement, of those classes in the contingency visualised above, it would retard their progress; for students of those classes who secure more marks than students who compete for the general seats and get less marks than students belonging to their classes would not get seats.

"To that extent, the provision made by the State would be in excess of the power conferred on it by Clause (4) and therefore cannot affect the fundamental right of the citizens, whether they belonged to backward classes or not. To put it differently, every individual citizen as a citizen, whether he belongs to the backward classes or not, has a right to get admission into an educational institution of the kind mentioned in Clause (2) of Article 29."

In that case, as it was established that the two candidates, in question, had obtained higher marks than those selected in the common merit pool, the learned Judges directed the authorities concerned, to give admission to those students, even by creating two additional seats. If I may say so with respect, such a direction would not have been given, if no seats more than the percentage provided in respect of that class, could ever be given. In my view, this decision clearly shows that, notwithstanding the fact that a class has been treated as Backward and given protection under Article 15(4) by providing a particular percentage for that group, it does not take away the right of any number of that group, from competing on the general merit basis, and securing as many seats as possible. That circumstance, in my view, cannot be taken into account for cutting down the percentage that is fixed for that class as a whole, by action being taken under Article 15(4). The few seats that may be captured by members of that group on a general merit basis, are seats obtained by them in their individual right in accordance with the guarantee given to them under Article 15(4), and not as members of a backward class, for whom protection is provided under Article 15(4). When a candidate competes in the general merit pool, no consideration, excepting that of merit, comes into the picture; and surely no other considerations can be taken into account also. That is an individual right guaranteed under Article 15(4). The right guaranteed under Article 15(4) is for a particular class as such.

108. In my view, if the contentions of the learned counsel for the petitioners are accepted in this behalf, it will mean that the provisions of Article 15(4), which are really intended for the advancement of the weaker sections of the citizens, are really invoked for the purpose of causing prejudice to the members of that class. That certainly is not the intention of the constitution; nor do I find any support for that principle in the decision relied upon by the learned counsel for the petitioners. I have already referred to the extract from the decision of the Supreme Court in *The State of Madras Vs. Srimathi Champakam Dorairajan*, , to the effect that Clause (2) of Article 29 guarantees the fundamental right of an individual citizen, and that the right to get admission into any educational institution of the kind mentioned in Clause (2) is a right which an individual citizen has as a citizen, and not as a member of any community or class of

citizens.

109. Therefore, the conclusion that I have arrived at regarding this aspect of the matter derives support from the observations of the Supreme Court referred to above. This closes the discussion on this aspect of the matter, and it follows that the contention of the learned counsel for the petitioners in this regard will have to be rejected.

110. That takes us on to the consideration of the attack made by the learned counsel for the petitioners regarding the selection being made on a district-war basis. The order Ext. R-1 provides for selection of 50% of the seats on a district-war merit basis. I have also referred to the percentage of distribution made by the State Government on a district-war merit basis, earlier in this judgment. Actually the percentage that has been worked out, is on the basis of the population reported in the 1961 Census report regarding the nine districts of the State. The contention that is urged on behalf of the petitioners is that the said district-war distribution, is absolutely irrational and constitutes violation of the guarantee under Articles 14 15(4) and 29(2) of the Constitution. The manner in which the district-war percentage prejudicially works, has also been illustrated by the petitioner in O. P. 1290/63. I have also referred to that fact in the earlier part of the judgment. The petitioner, in the said O. P., has obtained 298 marks out of 400 and had applied from the Trivandrum District, though according to him, he being the son of a government servant, is entitled, even, according to the Government Orders, to apply from the Quilon District. But in view of the percentage of selection fixed for the Trivandrum District, it will be seen that only candidates who have obtained a total of 303 marks and above were able to get admission from that district, viz., Trivandrum District, and therefore the petitioner has not obtained a seat. Whereas, according to the petitioner, if he had applied from the Quilon District, -- as he claims to have a right to apply from that district -- he would certainly have got a seat, because the last candidate, who has been selected from the Quilon District, has obtained only 288 marks. A perusal of the list of marks obtained by the last candidates, from the several Districts, and referred to by me in the earlier part of the judgment, will clearly show that candidates with far less marks than those obtained by this petitioner in other Districts, have got admission; for instance, a candidate who has got as low a total of 268 marks, has been given admission from the Kozhibode District; whereas the petitioner who has got 298 marks, has not obtained a seat at all. This principle therefore is very severely attacked by the petitioner, as absolutely irrational and unjust.

(III) The learned counsel for the petitioners urged that the basis of allotment, depending upon the population of an area, cannot be considered to be a classification at all, permissible under Article 14. The learned counsel also urged that though some sort of equitable distribution can be arranged for, on the basis of the student population of an area, or the number of educational institutions existing in that area, or on the basis of the number of applications from a

particular area, having due regard to the actual number of marks obtained by them, the principle now adopted is absolutely unreasonable. The fact that a small percentage is allotted to a particular district results in a candidate having larger number of marks than the candidates from the other Districts, not being given a seat at all.

The learned counsel also urged that according to the State Government, the reasons for making the selection, on a district-war basis, is to enable the various territorial divisions of the State, which are unevenly, developed, from the point of view of educational attainments, and standards and to ensure a fair and equitable distribution to all the territorial divisions of the State, so as to allow those territorial divisions to develop to the same level in the field of education. Another reason given by the State Government, according to the learned counsel for the petitioners, is that, the distribution of seats on a district-war basis is based on considerations of residence and that no objection can be taken to the manner of such distribution.

112. The learned counsel for the petitioners urged that both these considerations will break down when the actual manner in which the selections have been made is considered. The learned counsel also urged that the claim made by the State Government that the object of the distribution district-war is to enable the unevenly developed territorial divisions of the State to properly develop to the same level in the field of education, is absolutely fallacious and without any basis, as will be seen from the publication entitled "Census of India 1961 -- Final Population Totals".

The learned counsel for the petitioners have referred to the fact that the proportion of literates in the various districts, as gathered from the said report, is as follows:

Name of District

Proportion of literates to the total population.

Cannannore

41%

Kozhikode

40%

Palghat

34%

Trichur

48%

Ernakulam

50%

Kottayam

56%

Alleppey

56%

Quilon

49%

Trivandrum

45%

The learned counsel urged that in this case a perusal of the percentage of literates in the various districts given in the Census report, will not certainly fit in with the percentage allotted to the districts concerned. For instance, the learned counsel urged that the percentage of seats allotted to the Palghat and Quilon districts under Ext. R-1, is the same, namely 11%. According to the learned counsel, if the basis, which is stated to have been adopted by the State Government was the educational unevenness of a particular district, it will be seen that according to the 1961, Census report the percentage of literate population in the Quilon district is 49, and that in the Palghat District is 34. If really the object was the further development of the particular areas concerned, the learned counsel urged, the Government must certainly have had regard to the Census report of 1961 and must have allotted a higher percentage to the Palghat district and a comparatively less percentage to the Quilon district.

The learned counsel have also compared the percentage allotted to the other districts under Ext. R-1, with special reference to the percentage of literacy obtaining in those districts, and given in the census report of 1961. Therefore the learned counsel urged that there has been no rational principle whatsoever adopted by the State Government in the matter of the distribution of seats made on a district-wise basis, excepting one of population strength. The learned counsel also urged that decisions have no doubt recognised a geographical classification, on historical reasons, as not being violative of Article 14; but no decision, according to them, has ever recognised a sort of classification being made among the territorial areas forming part of the same State, without any rational basis underlying that classification.

113. The learned counsel for the petitioners also urged that even according to the State Government, residence has absolutely no value or significance, so far as children of Government servants are concerned. The learned counsel have referred to the directions given by the State Government in items 2 and 3 of Ext. R.II series. I have already referred to the matters mentioned in those items. It may be recalled that under item 2 the State Government state that in the case of

every applicant for admission to the Medical colleges in the State, who happens to be a child of a State Government servant and is a native of Kerala, "it will be deemed that the applicant belongs to the district and the taluk where the parent (Government servant) happens to work at the time the application is made." This, according to the learned counsel for the petitioners, clearly shows that residence has absolutely no merit whatsoever, at any rate so far as children of Government servants are concerned. Therefore the learned counsel urged that the object underlying the principle of district-war allotment is absolutely arbitrary and based upon no rational principle. If, for instance, the learned counsel asked, a Government servant accidentally or otherwise happens to be serving for one day in particular district, his child will be deemed to belong to the district where the Government servant actually works at the time when the application is sent up.

The learned counsel further urged that the claim of the State Government hopelessly fails when we come to the order item 3 of Ext. R-2 series, wherein a right is given to a child of a Government servant to apply either from his native district or from the district where his father or mother may be working as a Government servant at the time of sending the application. The right to choose the district has been absolutely vested by this order in the candidate concerned. That again, according to the learned counsel, clearly shows that residence has absolutely no value, and the object stated in the counter affidavit has also no basis whatsoever.

114. The learned counsel urged that these directions violate Article 14 of the Constitution as being discriminatory, and have been introduced in such a manner as to side-track the provisions of Articles 15(4) and 29(2) of the Constitution. The learned counsel also urged that the State Government cannot take protection on the ground that the notification Ext. R-1 is not "law", as defined in Article 13. In this connection the learned counsel also relied upon the observations of the learned Chief Justice of the Supreme Court, occurring at page 550 in the decision reported in *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, , to the effect:

"Article 14 protects all persons from discrimination by the legislative as well as by the executive organ of the State. "State" is defined in Article 12, as including the Government, and "law" is defined in Article 13 as including any notification or order. It has to be conceded, therefore, that it is open to the petitioners also to question the constitutionality of the notification. The attack against the notification is that the Government has not properly implemented the policy or followed the principle laid down in the Act and has consequently transgressed the bonds of the authority delegated to it....."

The learned counsel have also relied upon the observations of the Supreme Court in the decision reported in *Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another*, , to the effect that Article 14 is an injunction to both the legislative as well as the executive organs of the State and the other

subordinate authorities, and that it is a command issued by the Constitution to the State as a matter of public policy, with a view to implement its object of ensuring the equality of status and opportunity. On this ground, the learned counsel for the petitioners urged that the notification Ext. R-1 in this case, adopting the principle of district-war allotment, has to be struck down, as it discriminates between candidates identically situated. That is, according to the learned counsel, a candidate obtaining 298 marks does not get admission, because he happens to come from a particular district; whereas candidates similarly situated like him have been able to get admission from various other districts.

115. The learned Advocate General urged, with reference to Articles 15(4) 16(2) and 29(2). that in the matter of admission to educational institutions, it is Article 29(2) that governs the field. In this case he urged that nobody is discriminated on the ground of place of birth, and therefore, Article 15(1) is not violated. If at all, residence is adopted as the test and residence does not come under one of the prohibitive categories either under Article 15(1) or under 29(2). The learned Advocate General urged that discrimination on the ground of residence is specifically referred to in Article 16(2). Residence, is a significant omission in Articles 15(1) and 29(2). Then fore, the learned Advocate General urged that there is no question of any violation of Article 15(1) or 29(2). In consequence the learned Advocate General urged that no fundamental rights guaranteed, to persons like the petitioners, can be considered to have been violated in the matter of the adoption of the district-war selection.

That a classification on the basis of residence can be adopted, is seen from the decision of the Supreme Court reported in D.P. Joshi Vs. The State of Madhya Bharat and Another, . At page 336 of the said decision, Mr. Justice Venkata-rama Iyer, speaking for the Court, observes as follows :

"The ground for exemption from payment of capitation fee as laid down therein is "bona fide" residence in the State of Madhya Bharat. Residence and place of birth are two distinct conceptions with different connotations, both in law and in fact, and when Article 15(1) prohibits discrimination based on the place of birth, it cannot be read as prohibiting discrimination based on residence...."

Therefore, the learned Advocate General urged that in this case, inasmuch as discrimination, if at all, is on the basis of residence Article 15(1) is not violated. If so, as "residence is not referred to in Article 29 (2), that Article also is not violated.

116. One can readily accept the contention that discrimination on the ground of residence, by itself, has not been referred to either in Article 15(1) or 29(2). And prima facie it can also be held that those two Articles cannot be considered to have been violated. The learned Advocate General has strenuously relied upon a Division Bench judgment of this Court of Koshi, C. J. and M. S. Menon, J., (as he then was), reported in Joseph Thomas Vs. State of Kerala, . It is needless to

state, that if that decision, directly supports the validity of the territorial division adopted in the order Ext. R-1 in this case, I am bound by that decision and I have to accept the contentions of the learned Advocate General. It will be seen that the order dated 10-7-1957, which was under attack before the learned Judges in that case, directed that the seats for the Engineering and Medical colleges in the State, are to be distributed between the Mala-bar area and the Travancore-Cochin area in the ratio of 5 : 8. That order was challenged on the ground that it contravened Articles 14 15(1) and 29(2) of the Constitution. That contention was not accepted by the learned Judges on the ground that the decision of the Supreme Court in (S) D.P. Joshi Vs. The State of Madhya Bharat and Another, which laid down, as I have already indicated, that residence and place of birth are two distinct conceptions with different connotations both in law and in fact, and that Article 15(1) cannot be read as prohibiting discrimination based on residence. The learned Judges have also adverted to the fact that place of birth or residence do not occur in Article 29(2).

117. But the learned Judges, in that case, consider the attack made as against the order fixing the particular proportion, from the point of view of Article 14. No doubt, the learned Judges state that they do not propose to decide the question, as to whether the notification issued by the State Government which was under consideration before them is a "law" or a mere administrative or executive order. But nevertheless the learned Judges, consider the validity of the order, from the point of view of Article 14. In this connection, it should be noted that the stand taken by the State Government in that case for adopting that particular proportion between the Malabar area and the Travancore-Cochin area, was clearly indicated in their counter affidavit. The Government's stand appears to be that for several reasons, the Malabar area was not having the same facilities for medical education as those obtaining in the Travancore-Cochin area. They also refer to the fact that a Medical college was started in Kozhikode in 1957 and the students in due Malabar area were under severe handicap regarding education in medicine. The State Government also advert to the fact that there was a crying need for more doctors in the Malabar area, and the Government therefore felt that the only way to ameliorate the condition in the Malabar area was to distribute seats in the Medical colleges in the Kerala State in the ratio of 5 : 8 between Malabar and Travancore-Cochin. This stand taken by the State Government in that case, has been accepted by the learned Judges, as will be seen from the various observations contained in the judgment itself; and it is after having due regard to these circumstances, that the learned Judges ultimately accepted the contention taken by the State Government that the classification, in that case, is founded on an intelligible differentia, which distinguishes persons or things that are grouped together from others left out of the group and that the differentia has a rational relation to the object sought to be achieved and that it is also a proper classification.

118. In my view, this decision in fact supports the contention of the learned counsel for the petitioners that if the classification of district-war selection, does

not satisfy the various requirements laid down in that decision, the classification will have to be struck down. The learned Advocate General no doubt adverted to the decision of the Andhra Pradesh High Court reported in *A. Muralidhar and Others Vs. The State of Andhra Pradesh*, wherein the learned Judges held that the allocation of 30% seats in the professional colleges to the students of Secunderabad and Hyderabad, as against 70% of seats reserved for the rest of the Telengana area does not infringe Article 14 of the Constitution. In particular, the learned Judges advert to the stand taken by the Andhra Pradesh Government regarding the existence of college facilities and the student population; and it is on that basis that the Court came to the conclusion that the classification is based on an intelligible basis and satisfies the requirements of Article 14.

119. In my view, here again the contentions of the learned counsel for the petitioners will have to be accepted. I am in entire agreement with the various contentions that have been urged by the learned counsel for the petitioners and referred to by me earlier. The adoption of the principle of district-war selection is certainly not based upon any scientific data collected, either regarding the student population of a particular area or having due regard to the educational backwardness of a particular district concerned. On the other hand, I have already referred to the fact, with reference to the data available in the 1961 Census report, and the percentage allotted for the districts, that it has no relation at all to the object referred to in the counter affidavit. Admittedly the question of residence completely breaks down when we consider the orders passed by the State Government with reference to the children of Government Servants. Those two orders, I have already adverted to, clearly show that residence has no significance whatsoever, which will not be the case, if the object to be achieved, as stated in the counter-affidavit by the Government, was to advance the educational interests of a particular district or a territory. I am not inclined to accept the contention of the learned Advocate General that this notification Ext. R-1, cannot be judged from the point of view of Article 14. I have already referred to the decision of the Supreme Court in *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, where their Lordships have held that a notification or an executive direction issued by the State Government against the provisions of the statute will come within the definition of the expression "law" referred to in Article 13 of the Constitution. Even otherwise, it is a bit difficult to accept the contention of the learned Advocate General that when a constitutional guarantee has been given to claim admission in the educational institutions under Article 29(2), it is certainly not in accordance with the spirit of that provision to take away that right by any notification that may be issued by the State Government. No doubt, residence, as such, is not referred to in Article 29(2). If the contention of the learned Advocate General, that the notification issued by the Government, similar to the one relating to the district-war allotment of seats, cannot be interfered with by this Court, is accepted, the position will be anomalous. For instance, supposing the State Government issues a notification to the effect that an entire district need not be represented for a

particular year in any of the professional colleges. No doubt, one does not expect the State Government to issue any such directions.

But if such a direction is issued, is it not open to the candidates belonging to that particular district, who may be aggrieved, to challenge the same? In my view, the attack based as against the district-war selection will have to be accepted. The basis adopted for district-war selection and the reasons given in the counter affidavit by the State Government for adopting that basis, are certainly not in accordance with the principles laid down by the Division Bench of this Court in the decision reported in *Joseph Thomas Vs. State of Kerala*, , already adverted to. It is certainly not a geographical classification, based on historical reasons, which was the case in the above Division Bench case, with reference to the Malabar area which had just then come into the Kerala State, when the Government fixed the ratio of 5 : 8 in 1957. Even the claim of the State Government that the object is to advance the educational interests of the territorial divisions, cannot be accepted. And I have already indicated the percentage of literacy in the various districts, as disclosed by the 1961 census report. The percentage now fixed in Ext. R-1 on a district-war basis, has no relation to the literacy percentage of the districts concerned, referred to in the Census report of 1961.

120. To conclude on this aspect. The adoption of the principle of district-war selection in the impugned order Ext. R-1 is arbitrary and has to be struck down.

121. The only other point that remains to be considered, is the attack made by the petitioners regarding the reservation of seats in the pre-Medical and Medical courses for sportsmen and the children of Registered Medical Practitioners. I have already adverted to the reasons given by the State Government for showing this preferential treatment. One can readily appreciate that a father or mother, who is a registered Medical Practitioner, may like his or her children to follow in his or her own footsteps. That is a very laudable object and a wish of the father or mother. Similarly, sportsmen also may have to be encouraged. No doubt, the reservations made under this category are also only of a very small percentage. But unless the State is able to satisfy that the said principle can be accepted by this Court, on a legal basis, the State cannot succeed regarding that aspect either. Here again, the learned Advocate-General has referred to the fact that while a prohibition is made of discrimination on the grounds of descent in Article 16(2), there is no such prohibition either in Article 15(1) and 29(2). Therefore, the learned Advocate General urged that the fact that a few reservations are made to children of Registered Medical Practitioners on the ground of descent, should not be interfered with by this Court.

122. However much I sympathise with this claim made by the Government, regarding the children of Registered Medical Practitioners, and also the necessity to encourage sports, I am not able to find any legal basis for sustaining these reservations either. After all, any reservation made, as I have already indicated, must be on a proper classification, and that classification must have a reasonable

relation to the object sought to be achieved. The object sought to be achieved. is to get the best, among the student population, for admission, into the professional colleges. The classification itself cannot be considered to be rational. In any event, in my view, it can have no reasonable relation to the object, namely that of admitting the best students in the professional colleges.

123. Therefore to conclude. The reservation in Ext. R-1 of 35 per cent, in favour of Backward classes, as well as the sub-rotation of that 35%, the reservation in favour of outstanding sportsmen, the further reservation in favour of sportsmen and children of Registered Medical Practitioners, as well as the adoption of 50% selection on district-war basis, cannot be enforced as against the petitioners. In view of the fact that the district-war selection and the other reservations made in Ext. R-1 cannot be enforced, it follows that the State will have to modify its directions even in respect of the 10% selection on State-wide merit basis, in accordance with the decision rendered in these proceedings.

124. In the result the writ petitions are allow-ed to the extent indicated above; and there will be a direction to the respondents to consider the applications of each of these petitioners, for admission to the courses concerned, without reference to the reservation of 35% for backward classes and the sub-rotation of that 35%, the reservation for sportsmen and children of Registered Medical Practitioners, and also the selection of 50% on district-war merit basis, as indicated above.

125. As directions have been given in most of these writ petitions, even at the time of admission, to reserve seats, there cannot be much of a hardship caused to anybody else, because those seats will have to be filled up after a proper consideration of the claims of these petitioners. As far as possible, and if it can be avoided, I do not wish to interfere with the selections that may have been already made. But the claims of these writ petitioners, will have to be considered in accordance with the directions contained herein. It is a matter for the State Government to con-eider, under the circumstances, as to whether disturbance of the selections already made can be avoided, by providing additional seats, if it becomes necessary. The parties will bear their respective costs.