*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 28.03.2014
Pronounced on: 03.04.2014

\+ **W.P.(C) 1225/2014**

PRAMOD ARORA .....Petitioner

Through: Sh. Kirti Uppal, Sr. Advocate with Sh. Ayushmaan Sahni, Sh. Aman Bhalla and Ms. Aastha Dhawan, Advocates.

versus

HON'BLE LT. GOVERNOR OF DELHI AND ORS.
..... Respondents

Through: Sh. Rajeeve Mehra, ASG with Sh. Sachin Datta, CGSC with Sh. Ashish Virmani, Ms. Niti Arora, Sh. T.D. Dhariyal, Dy. CCPD and Sh. Shukla, National Trust, Min. of Social Justice, for Min. of HRD, Min. of Social Justice and CCPD.
Sh. Ashok Aggarwal, Advocate.
Ms. Zubeda Begum, Standing Counsel, GNCTD, for DoE with Sh. A. Majumdar, Pr. Secretary (Edn) and Ms. Madhu Tewatia, DDE.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S. RAVINDRA BHAT
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1. In this public interest litigation, preferred under Article 226 of the Constitution of India, the petitioner claims directions to the

respondents, i.e. the Govt. of NCT of Delhi ("GNCT") and the Union of India ("UOI") with respect to admission of children with disabilities (hereafter "children with special needs" ["CWSN"]). The reliefs claimed include a direction to quash the amendment to Section 2(d) of the Right to Education Act, 2009 ("RTE Act") brought into force through the amendment of 2012, and also for a direction to quash paragraph 14(b) of Order no. F/DE/15/1031/ACT/2013/12795-12809 issued by the Lt. Governor of Delhi on 18th December, 2013.

2. The petitioner is parent of a child with special needs. He states that he got his ward admitted with great difficulty in a school in Delhi in 2013. The child could not progress and was neglected on account of lack of proper attention and infrastructure. He claims to be deeply concerned about welfare of such CWSN and that parents of several such children have been in touch with him since they have been placed at a disadvantage in more ways than one with the advent of the amendment to the RTE in 2012, especially the impugned order of 18th December 2013. It is stated that several letters and communications were addressed to the respondents but have yielded no response. The petition alleged that in their anxiety to ensure free education available to the largest possible numbers, the needs of CWSN who have to face multiple disadvantages have been overlooked, thus marginalizing them completely. The impugned order, it is stated, clubbed the CWSN with those children belonging to "economically weaker sections" and "disadvantaged group" as defined under the RTE Act ("EWS" and "DG") for the purpose of admission to pre-primary and other classes

governed by the Delhi School Education Act, 1973 and Rules framed under it. The petitioner highlights that the number of schools/institutions equipped with infrastructure and personnel to handle CWSN is very few and further, that the nature of the guidelines is such that those children have very little chances of getting admission in these institutions.

3. The petitioner relies upon the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation), Act 1995 ("PWD Act"), especially the definitions provided in that enactment and Section 26 to say that the respondents are bound to provide access to free education in an appropriate environment to CWSN and also to permit the integration of CWSN. It is stated that an overall reading of the PWD Act clarifies that the Parliament intended that there should be a concerted effort to ensure that CWSN are enrolled in appropriate schools till they successively complete their education. Stressing upon the need to have an inclusive educational set-up in the entire country, it is submitted that this is sought to be achieved through provisions like Section 26, which were preserved in the RTE Act as originally enacted. It is submitted that the amendment of Section 2(d) of the RTE, enlarging the definition of "child belonging to disadvantaged group" to include CWSN has led to diminishing the already slim chances of the latter and a complete negation of the rights guaranteed under Section 26 of the PWD Act. It is argued that the 2012 amendment, even while seemingly protecting the rights of the CWSN through Section 3(3) in fact places them at a

disadvantage and at a worse position than they were before. Thus, argues the petitioner, the protection accorded by the enlarged definition of "children with disabilities" under the newly introduced Section 2(ee) is completely undercut by equating such children with those in disadvantaged groups. In other words, the net result would be that children with disabilities would have to compete for the same rights in respect of 25% quota earmarked under Section 12 (l) of the RTE Act by virtue of Section 2(d) in the Government, aided and unaided schools.

4. It is submitted that the RTE Act prior to the 2012 Amendment recognized the two distinct disadvantaged groups, i.e. child belonging to disadvantaged group (Section 2(d)) and children with disabilities (the *proviso* to Section 3(2) read with Section 3(1)) and protected the interests of the latter, by ensuring that the rights under the PWD Act were undisturbed. However, the impugned amendment to Section 2(d) forced an equation of the two groups (a) without any rational or reasonable basis and (b) which limited the otherwise broad-natured nature of rights given to CWSN.

5. Learned counsel submitted that Section 39 of the PWD Act mandates that all State, Central, and government aided or funded educational institutions ensure admission in respect of at least 3% of their intake in favour of CWSN. Section 26 universalized the rights of CWSN by directing the State to grant them access to free education. This right is special, and not subject to the limited regime under Section 39 – which applies to State institutions or establishments.

Counsel highlighted that the situation which existed between 2009 and 2012 enabled even unaided schools to admit into a certain percentage of their seats, CWSN who could be given attention, having regard to the nature and type of facilities and special educators in given schools/institution. The equation of EWS/DG with CWSN on the one hand, and the consequences of paragraph 14(b) of the LG's order on the other, deprive and even destroy these distinct rights.

6. Arguing that CWSN are distinctly recognized under the National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (hereafter referred to as the "1999 Act") (and the newly amended Section 2(ee) of the RTE Act), learned counsel submitted that their vulnerabilities are such that unless a separate regime is protected and assiduously enlarged, these distinct groups will never achieve the full extent of their rights. Learned counsel highlighted the lack of adequate initiative by the State and submitted that as long as this class of children are permitted full and meaningful access to education, their quality of life and citizenship rights would be hollow. It was also argued that this group or section of children are most often neglected and overlooked because of their invisibility, and that such children are the highest group of school dropouts.

7. Further, it is urged that some CWSN at an advanced or severe stage cannot be integrated into mainstream education as they have to be sent to special schools. However, schools leverage this to say that the child is not competent to clear his/her curricula thus attempting to

wean them out prematurely even though the PWD Act clearly guarantees CWSN the right to an education till the age of eighteen years. The petitioner also states that there are other disabilities like dyslexia, dysgraphia, attention deficit hyperactivity disorder which can only be identified in children of age 6-8 years who are part of mainstream education and do not show positive signs of cognitive stimulus. It is argued that these disabilities need to be seen in an inclusive light and the schools must cater to children with all such disabilities, rather than concentrating one particular disability to one particular school or sowing the seeds of discrimination under the garb of discretion. Practically as well, this would seem unworkable as the concentration of schools in Delhi would suggest that such children would have to travel far and beyond if this division of schools on basis of disability is made.

8. The petitioner submits that all schools must therefore provide for CWSN, as the right to inclusive education is a right guaranteed to them under the PWD Act and according to the UN Convention on the Rights of Persons with Disabilities. In that vein, it is urged that all schools must keep 3% seats for CWSN and also at the same time upgrade their infrastructure and preparedness to handle such children. The UN Convention guarantees to them non-discrimination on the basis of their disability. Moreover, learned counsel urges that the Constitution also guarantees to the citizens of India non-discrimination and ensures equality to all.

9. It is submitted that in the LG's order dated 27th November 2007, which was in force and implemented by GNCT prior to the order of 18th December, 2013 by Clause 14, used to provide discretion to the schools to adopt criteria on the basis of which students would be admitted to schools. Consequently, schools were making provision to admit children with disabilities by allocating 5-10 points or by reserving 3-5% seats for CWSN. Annexure B of the writ petition provides details on the arrangements of 43 such unaided schools. However, the LG's order of 2013 altered this regime altogether. Clause 14 presently reads:

> *"14(a) xxx xxxxxx xxxxxx*
>
> *14(b) The total number of seats for admission to a class at entry level (below six years of age) of the school shall be divided into four parts:*
> *(i) 25% seats for Economically Weaker section and disadvantaged group as defined under the Right to Education Act, 2009 (except for minority schools.*
> *(ii) 05% seats as Staff Quota: for the wards of the staff/employees of the school. The unfilled seats of the staff quota shall spill over to open seats.*
> *(iii) 05% girl's quota for co-ed schools: The seats for 5% girl's quota shall be filled through draw of lots out of all the registered girl applicants residing within 6 k.m. radius. The remaining applicants shall be considered for admission as per the parameters/criteria and points for open seats.*
>
> *(iv) Open seats: The remaining seats which are not covered under above three categories.*
>
> *The admission to open seats shall be made only on the*

basis of fixed parameters and points as prescribed hereunder

Sl no.	*Parameters/Criteria*	*Points*
1	*Neighbourhood up to 6 km*	*70*
2	*Sibling studying in school*	*20*
3	*Parent Alumni of school*	*05*
4.	*Inter-State Transfer case*	*05*
	TOTAL	*100*

In case seats remain vacant/unfilled, same shall be filled by draw of lots. The schools are not allowed to fix additional points other than the points specified above."

10. The stipulation of the points system in the LG's order of 2013 has divested schools of the discretion to allocate points for CWSN. In addition, since CWSN are now within the "disadvantaged group" as defined under the RTE Act, schools cannot even reserve a percentage of seats for CWSN (as they used to when the LG's original order was in force). Consequently, since the 25% quota for EWS/DG is filled in by a lottery system for the 4000 odd applications received by each school, the probability of a child with special needs (out of an average of 15 applicants per school) being selected in the common draw is negligible.

11. Dealing with the 3% reservation under Section 39 of the PWD Act and the need to harmonize it with the 25% quota earmarked under the RTE Act, the petitioner submits that using the total seats criteria to

give effect to the 3% quota as a whole from the total number of intake of all the private schools would not return optimal results with respect to reservation for CWSN. This, it is argued, is because as of today as many as 90% of schools have no or very limited facility to take a child with special needs on board to provide him/her with integrated/inclusive education. Therefore, the 3% quota having regard to the total intake could lead to skewed results, until and unless the representation is reduced proportionally to the number of seats of the particular school in question. Underscoring that education to CWSN is a highly specialized area, for which only some schools possess the necessary facilities, the ideal method might be to have a 3% reservation in all private schools out of the total number of seats offered by that school. It is argued that this could be the method which could most practically and legally be worked out to the benefit of CWSN as they have a direct shot at being selected by a school out of a selection *inter se* between CWSN only without discrimination. It is argued that children from EWS/DG do not necessarily possess cognitive learning disabilities. They are, however, a victim of their social circumstance. CWSN on the other hand may have cognitive learning disabilities and are therefore, a victim of their own reality. In no way can a child from EWS/DG be compared to a CWSN. It is therefore argued that Article 14 of Constitution of India, which enshrines the principle of equality among equals, does not permit this clubbing of CWSN with EWS/DG.

12. It is further argued that in terms of Section 2(i) of the PWD Act, it would be desirable that disabilities as defined in that enactment, which lists out 7 disabilities which are a mix of physical and cognitive disorders, be read with the 1999 Act. It is stressed that, essentially, the present proceeding is with respect to identified/notified cognitive learning disabilities which include cerebral palsy, Down's syndrome, Asperger's syndrome, autism, and physical disabilities (vision hearing and speech impairment). These disabilities are primarily the ones which can be identified in children of age 3 years. These are also the disabilities which are identified by subsequent 1999 Act.

13. It is argued that allocation of points on the basis of the neighbourhood criteria itself, as required by the impugned order, would result in exclusion of CWSN because not all CWSN live or reside in the vicinity of schools that cater to such disabilities or conditions. Recollecting that the schools had been given latitude in that regard in the LG's 2007 order, in that admissions were made based on the medical reports and those of therapists, learned counsel submitted that this distinctive aspect sets apart CWSN as a distinct group altogether, and not merely as a sub-group of those with social disadvantages. For this, learned counsel relied on the observations in *Social Jurist, A Civil Rights Group* v. *Govt. of NCT of Delhi*, W.P.(C) 4618/2011, decided by this Court on 05.09.2012.

14. It was lastly argued that CWSN may not necessarily be able to pass out from schools as their cognitive learning capabilities are limited and they, therefore, cannot compete with other children in that

respect. In that sense, it could be said that CWSN should be seen in a different and rather sensitive light and not in that of competing to merely occupy and fill seats. CWSN usually attend special classes with special educators; a child with special needs may also require assistance and longer time for meals. However, the time they spend with other children in a mainstream set-up goes a long way in including them in society. It is urged that this also sensitises the other children on how to care for them and accept them without any preconditions. The petitioner also argues that certain CWSN who have cognitive limitations have to be weaned out from school around the age of 14-16 years to facilitate their entry to a special school and pick up vocational training, so that they may be self-reliant in the future and do not have to depend on others. In light of this, it is extremely essential that such children with special needs are not denied an opportunity to assimilate into mainstream education at the earliest stage possible so that they may develop to the fullest extent, within their already limited scope for development. It is only certain cases of children with vision impairment, dyslexia, dysgraphia, minor autism, cerebral palsy and asperger's syndrome, which do not affect the cognitive abilities of a child, who pass out of school as per the prescribed syllabus.

15. Arguing in terms of Chapter V of the PWD Act and Section 26, it is urged that a child with special needs is guaranteed access to free education till the age of eighteen years in an appropriate environment. This entails that CWSN cannot be discriminated against in matters of

education till he/she attains the age of eighteen years in an environment that supports the specific learning needs of such children. Further, it is argued that as per Section 26(b), there arises an obligation to ensure that such children shall be integrated in normal schools. Likewise, in Chapter VI of the PWD Act and in particular Sections 33 and 39 thereof, disabled persons have reservations in government departments/establishments and in government educational institutions and other institutions receiving aid from the government to the extent of 3%. It is submitted that if CWSN are not allowed to take advantage of this inclusive education guarantee at the school stage, which begins at pre-primary stage, they would never be in a position to take advantage of the other benefits of the PWD Act, especially related to employment where they have a statutory reservation. Thus, it is argued that the entire object of full participation of differently abled persons in national life would be defeated if they are screened and discriminated at the primary education stage itself.

16. In support of the submissions, learned counsel relied on the judgments reported as *Anamol Bhandari (Minor) Through his Father/Natural Guardian* v. *Delhi Technological University*, 2012 (131) DRJ 583, and *National Federation of the Blind* v. *Union of India and Ors.*, 156 (2009) DLT 446, DLT 102 (DB).

Contentions of the GNCT:

17. The GNCT has, through the course of these hearings, maintained its stand outlined in the affidavit handed over to the Court on 28th March, 2014. It submits that under the provisions of Section

2(n)(iii) and 2(n)(iv), read with Section 12(1) of the RTE Act, children belonging to EWS and DG, as defined in the enactment, which now includes children with disability, have been granted 25% quota earmarked for them. It is urged that, statutorily, quota for CWSN stands inbuilt within the 25% quota earmarked for children belonging to EWS and DG. The GNCT argues that Section 39 in Chapter VI of the PWD Act mandates 3% reservation for persons with disability in Government and Government aided Schools *only*. The mandate does not go further. In these schools, there is no bar to admit CWSN even beyond 3% of the seats. The GNCT further notes that as per statistics of 2013-14, a total of 11.80% of the seats in Government aided schools in pre-primary classes were filled up by CWSN. It is further stated that the LG's 2013 order has been challenged by the Action Committee for Private Unaided Schools to the extent of admissions of seats under Open Category (i.e. 65% of total seats) and also in other similar petitions. These connected matters, the Court is informed, are being heard on a regular basis before another Bench of this Court.

18. GNCT argues that the order dated 18th December, 2013, directing a uniform point system for admissions in pre-primary classes in private unaided recognised schools of Delhi, was issued with the intent to make the admission process in these schools transparent and systematic. No reservation or weight was given to CWSN because this category of the children was, subsequent to the amendment of the RTE Act in 2012, statutorily clubbed within the 25% quota earmarked for EWS and DG categories under the provisions of RTE Act. Thus, it is

argued that while CWSN were given the right to get free education under the disadvantaged group category in terms of RTE (Amendment) Act, 2012, they were bracketed with other disadvantaged groups and cannot seek to separate themselves. Moreover, it was argued that CWSN under 'disadvantaged group' category may also apply for the remaining 75% seats, as a girl disabled child may apply against 5% quota meant for girls, against 5% staff quota and also against 65% open seats (in terms of that order). It is submitted that since the said provision under Section 12(1)(c) to provide 25% free ship in private unaided schools under RTE Act was enacted through an act of Parliament, the GNCTD submits that it cannot aside 3% seats within the 25% seats earmarked for EWS and DG categories for admission of CWSN in private unaided recognised schools. It argues, moreover, that the PWD Act does not have any provision for reservation of seats for CWSN in private unaided recognised schools and thus, any stipulation of reservation in these schools requires an amendment to the PWD Act.

19. The GNCT further states that the issue of whether a school falling under the definition of Section 2(n) of the RTE Act, 2009 could apply the rule of reservation and allot a specified percentage/number of seats to Scheduled Caste and Scheduled Tribe candidates within the 25% EWS/DG quota under Section 12(1)(c) of the RTE Act was considered by a Division Bench of this Court in WP (Civil) No.4194 of 2011 and WP (Civil) No.801 of 2012 – *Jatin Singh* v. *Kendriya Vidyalaya Sangathan* and *Social Jurist, A Civil Rights*

Group v. *Kendriya Vidyalaya Sangathan*, respectively. In those cases, the Court by its judgment passed on 9th November, 2012, held that carving out an "*extent of 22.5% of total seats for SC/ST out of 25% seats reserved for children belonging to disadvantaged group and children belonging to economically weaker section is illegal and contrary to the provisions of the said Act*." The GNCT argues that this judgment implies that further reservation of seats for any category within the 25% seats meant for EWS/ DG category under RTE Act 2009 cannot be made.

20. The GNCT asserts also that in none of the aided or government aided schools does the percentage of CWSN exceed 1.65% of the total children admitted in the schools except in one of them i.e. Directorate of Education aided Schools. From the data available with it, the GNCT states that the 3% minimum reservation in every school is not needed on account of a lack of such students.

21. As far as special facilities extended in the schools of the GNCT is concerned, it is submitted that the profile of each identified CWSN enrolled in government schools is maintained for providing the facilities. It is pertinent to mention here that special schools for visually impaired, leprosy cured, hearing and speech impaired, etc. are run and managed by Department of Social Welfare Department, GNCT. It is stated that the Directorate of Education does not run any exclusive schools to educate CWSN. Under the *Sarva Shiksha Abhiyan* ("SSA"), it is submitted that CWSN have been given special importance. The key thrust of the SSA is on providing inclusive

education to all CWSN in general schools. SSA ensures that every child with special needs, irrespective of kind, category and degree of disabilities is provided quality inclusive education. The GNCT seeks to highlight that by its order dated 30th November, 2009, a direction was issued to all the concerned that no disabled child should face any problem in admission to the Government school and every effort should be undertaken to provide barrier free access/educational environment to CWSN and that they should be considered for admission at any time during the academic year and not be denied admission in any Government and aided schools.

22. The GNCT further submits that it has directed managements of all unaided private schools to appoint special educators to educate the CWSN admitted in their schools. Here, mention is made to an order dated 14th March, asking all the private unaided schools to furnish the information in respect of the facilities available in schools for the CWSN with special reference to the nature of disabilities. To expedite the collection of data, the GNCT claims that it has created an online module to this effect.

23. Furthermore, the GNCT submits that all the recognised private, unaided schools are not equipped with the appropriate facilities to educate all kinds of CWSN. However, children with locomotor disabilities or other CWSN who could be easily accommodated with the general children can be admitted in these schools. The GNCT states, interestingly, in its note that:

"However, the unaided recognised private schools which have the facilities to educate the specific disabled children i.e. deaf and dumb, blind, autism, mental retardation, etc. may be allowed to admit such children within the quota of 75% meant for the General Category to the extent of percentage/number of such children which they wish."

Analysis and Conclusions

24. Beginning with the question of *who* are the persons with disability, the provisions of the PWD Act, especially Section 2 (i), (b), (l), (n), (o), (q), (r), and (u) are conclusive, and the Court need not delve into this issue in much detail here.

25. Rather, the most important provision in the present context is Section 26 which occurs in Chapter V, i.e., "Education". The provision reads as follows: -

"26. Appropriate Governments and local authorities to provide children with disabilities free education, etc. – The appropriate Governments and the local authorities shall –

(a) Ensure that every child with a disability has access to free education in an appropriate environment till he attains the age of eighteen years;

(b) endeavour to promote the integration of students with disabilities in the normal schools;

(c) promote setting up of special schools in Government and private sector for those in need of special education, in such a manner that children with disabilities living in any part of the country have access to such schools;

(d) *endeavour to equip the special schools for children with disabilities with vocational training facilities."*

26. The next enactment which is relevant is the 1999 Act. It defines autism in Section 2 (a)., cerebral palsy in Section 2(c), mental retardation in Section 2(g), and multiple disabilities in Section 2(h).

Further, Section 2(j) defines 'persons with disabilities' in the following terms:

> "*… means a person suffering from any of the conditions relating to autism, cerebral palsy, mental retardation or a combination of any two or more of such conditions and includes a person suffering from severe multiple disability.*"

27. Turning next to the RTE Act, prior to the 2012 amendment, Section 2(d) defines a 'child belonging to disadvantaged group' as one belonging to the Scheduled Castes, the Scheduled Tribes, the socially and educationally backward class or such other group having disadvantage owing to social, cultural, economical, geographical, linguistic, gender or such other factor, as may be specified by the appropriate Government, by notification. By the 2012 amendment to the RTE brought into force in August, 2012, a child with disability is also included within the category of 'disadvantaged group' under Section 2(d). This amendment also inserted the definition of a child with disability in the following terms:

> "*(ee) "child with disability" includes, -*
>
> *(A) a child with "disability" as defined in clause (i) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996);*
>
> *(B) a child, being a person with disability as defined in clause (j) of section 2 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (44 of 1999);*

(C) *a child with "severe disability" as defined in clause (o) of section 2 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (44 of 1999)."*

28. Section 2 (e) of the RTE Act remained unamended. It stands to define 'a child belonging to weaker section' as:

> *"... belonging to such parent or guardian whose annual income is lower than the minimum limit specified by the appropriate Government, by notification."*

Section 3 subsequently spells out the right of the every child to free and compulsory education. Originally, Section 3 (2) contained a *proviso* which dealt specifically with children suffering from disabilities and protected their right to pursue free and compulsory education in accordance with provisions of Chapter V of the Disabilities Act. That proviso was deleted by the 2012 amendment. Section 3(3) was introduced however and reads as follows:

> *"A child with disability referred to in sub-clause (A) of clause (ee) of section 2 shall, without prejudice to the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996), and a child referred to in sub-clauses (B) and (C) of clause (ee) of section 2, have the same rights to pursue free and compulsory elementary education which children with disabilities have under the provisions of Chapter V of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995."*

29. Next, Chapter IV of the RTE Act outlines the duties and obligations of schools to provide free and compulsory education. It pertinently reads as follows:

> *"12. Extent of school's responsibility for free and compulsory education - (1) for the purposes of this Act, a school, -*
> *(a) specified in sub-clause (i) of clause (n) of section 2 shall provide free and compulsory elementary education to all children admitted therein;*
> *(b) specified in sub-clause (ii) of clause (n) of section 2 shall provide free and compulsory elementary education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent;*
> *(c) specified in sub-clauses (iii) and (iv) of clause (n) of section 2 shall admit in class I, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion:*
> *Provided further that where a school specified in clause (n) of section 2 imparts pre-school education, the provisions of clauses (a) to (c) shall apply for admission to such pre-school education.*
>
> *(2) The school specified in sub-clause (iv) of clause (n) of section 2 providing free and compulsory elementary education as specified in clause (c) of sub-section (1) shall be reimbursed expenditure so incurred by it to the extent of per-child-expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed:*
> *Provided that such reimbursement shall not exceed per-child-expenditure incurred by a school specified in sub-clause (i) of clause (n) of section 2:*

Provided further that where such school is already under obligation to provide free education to a specified number of children on account of it having received any land, building, equipment or other facilities, either free of cost or at a concessional rate, such school shall not be entitled for reimbursement to the extent of such obligation.

(3) Every school shall provide such information as may be required by the appropriate Government or the local authority, as the case may be."

30. It is evident from a reading of these various enactments that there are several complex intercepts, which spell out distinct rights:

(1) The PWD Act defines and categorises seven kinds of disorders or conditions as "disabilities".

(2) The 1999 Act meant to cater to specific conditions such as cerebral palsy, mental retardation and multiple disabilities, in turn defines two other categories autism and mental retardation. Section 2 (h) defines multiple disabilities with reference to the definitions under the PWD Act. Section 2 (o) of the 1999 Act defines disabilities with 80% or more of one or more multiple disabilities to be a "severe disability" for its purposes.

(3) A child with disability – for the purposes of RTE Act – is wide enough to cover a child with "disability" under the PWD Act, a child being a "person with disability" under the 1999 Act as well as a child with "severe disabilities". This is evident from the newly inserted Section 2 (ee) of the RTE Act.

(4) Before the 2012 amendment, the RTE Act by Section 3 – even while spelling out that all children have the right to free and compulsory education – stated through the *proviso* to Section 3 (2)

that children with disabilities as defined under the PWD Act would have the right to pursue free and compulsory education "*in accordance with provisions of Chapter V*" of the PWD Act.

(5) The 2012 amendment deleted the *proviso* but in essence retained the same stipulation by enacting Section 3(3) and thus enlarging the scope with reference to the categories which had not been included earlier, i.e., children with autism, mental retardation and multiple disabilities in terms of the 1999 Act. The character and content of these rights remained unchanged as is clear from the retention of the expression "*shall ... have the same rights to pursue free and compulsory elementary education which children with disabilities have under provisions of Chapter V of the Persons with Disabilities .... Act, 1995*."

(6) All schools defined by Section (2) (n) (i) of the RTE Act, owned or controlled by the appropriate government or local authority are obliged to provide free and compulsory elementary education to all children admitted by virtue of Section 12 (1) (a). In other words, all government schools and those established by local authorities are *bound* to provide admission and free education to all children who apply for it including those with any kind of disability falling under Section 2 (ee).

(7) Schools covered by Section 2(n)(ii), i.e., aided by the appropriate government or local authorities are duty bound to admit and give free and compulsory elementary education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum

of twenty-five per cent. In other words, such government aided or local authorities aided schools have to admit at least to the extent of 25% of their intake – a figure having regard to the proportion of the grants they receive, towards free and compulsory education of children from disadvantaged groups. For example, if the institution receives 90% aid, in proportion of its annual expenditure, it is bound to admit to the extent of 90% of its intake students freely without any reservation or admission. Here, too, the right of CWSN to free and compulsory education is *not* conditional upon the existence or otherwise of any quota.

(8) Section 12 (i) (c) of the RTE Act obliges *private* schools, i.e., those which covered under Section 2(n)(iii) and unaided schools under Section 2(n)(iv) to admit "*to the extent of at least 25% of the strength of that class*" children belonging to weaker section and disadvantaged groups in the neighbourhood and provide free and compulsory elementary education till completion.

(9) It is also important to note that whilst the RTE Act deals with education between the ages of 6-14, i.e. Class I, the PWD Act also envisages education prior to the age of 6, i.e. pre-primary classes. There is no incongruity in the scope of the two enactments as suggested by the petitioners. In the context of entry level classes, i.e. Class I and pre-primary, Section 12 of the RTE clearly obviates any notion of two regimes, by stipulating that "*where a school ... imparts pre-school education, the provision of clauses (a) to (c) shall apply for admission to such pre-school education.*" Thus, in recognition of the fact that there is a single-point entry for children, either through pre-

school or Class I, there is no disparity between the regimes under the PWD Act and the RTE Act as regards admission of CWSN to pre-primary or primary education.

31. Having provided this background, the first question that arises in this case concerns the extent of rights of CWSN in relation to education. The answer is to be found in the PWD Act, which, significantly, was not amended either at the time of enactment of RTE Act or in 2012. There are two distinct entitlements under the PWD Act. First, a right is conferred under Section 39 to admission of CWSN who are "persons with disabilities" in all government established and government aided institutions. This is clear from the language of that provision. This Court notes that while Section 39 belongs to Chapter VI of the Disabilities Act titled 'Employment', the Supreme Court in *All Kerala Parents' Association of the Hearing Impaired* v. *State of Kerala*, 2002 (7) SCALE 198 has clarified that a plain reading of Section 39 shows that it relates to reservation in admissions for students and not in government employment, thus overruling contrary precedent emerging from decisions of various High Courts in the country. The second, and most important point concerns the duty of the State to ensure that each child with "disability" (as defined under the PWD Act) "*has access to free education in an appropriate environment till he attains the age of eighteen years*". This clear and unambiguous prescription is found in Section 26(a). This obligation is *absolute in its terms* and, crucially, is not contingent upon fulfilment of other criteria, such as being certified with a disability of forty percent or more, or setting up of schools for

those with special needs or augmenting capacity in that regard etc. The corresponding nature of the right of CWSN *to* free education, till the age of eighteen, is significant. This right was protected and recognized in *proviso* to Section 3(2) of the RTE as enacted in 2009, and continues to be protected even now, after the 2012 amendment, by virtue of Section 3(3) of the RTE Act. This is a *sequitur*, an inevitable inference, flowing from the specific allusion to the "*same rights*" which CWSN have "*to pursue free and compulsory elementary education which children with disabilities ... under provisions of Chapter V of the Persons with Disabilities ... Act, 1995.*" Parliament could not have meant anything other than the right under Section 26 of the PWD Act, because of two simple reasons: *first*, there is no other provision under that Act entitling CWSN to free and compulsory education, and *second*, Section 26 is located under Chapter V of the PWD Act, which is preserved by the RTE Act. Moreover, the intention to save rights in another enactment cannot be ascribed to Parliament if such other enactment does not contain such rights to begin with. Rather, it coheres that Article 26 prescribes the right to education, which was legitimately preserved at the time of enacting the RTE Act.

32. Indeed, a close analysis of the provisions of the PWD Act with respect to educational rights of CWSN reveals that the Parliament always intended that the children covered by that enactment were entitled to free and compulsory education till they attain the age of 18 years, by virtue of Section 26. The wide nature of this right is underlined by the fact that it is not subject to a minimum or maximum

quota of any kind whatsoever. Whilst the addressee of this right is the State, unlike the RTE Act, which vests rights in individuals, the *content* of the obligation upon the State cannot, in any way, be diluted. Any such reading would render Section 26 hollow, as mere rhetoric. This is neither the meaning that appears from the text of Section 26, which is clear and without qualification in its mandate to "*ensure that every child with a disability has access to free education*", nor its context to ensure the inclusion of CWSN into society through education. In addition, Section 39 – which is located in Chapter VI – and mandates a minimum 3% quota for "persons with disabilities" in government and government-aided educational institutions cannot in any manner be read as limiting the right under Section 26. To hold that Section 39 exhausts the legal obligation under Section 26 would be to conflate two independent sections, and render the latter hollow. Such an interpretation cannot be countenanced. Rather, Section 39 is only *one* of the measures that contributes to the broader directive of Section 26, leaving the State to work out other mechanisms to achieve the stated and mandatory end. Moreover, in the opinion of this Court, the two provisions operate independently, in separate fields though there is a common and limited overlap. *First*, Section 26 mandates that the State shall ensure access to free education in an appropriate environment to "children with disabilities". Section 39 on the other hand mandates a minimum 3% quota for "persons with disabilities". A "person with disability" under Section 2(t) of the PWD Act is defined as a "person suffering from not less than forty percent of any disability as certified by a medical authority". A "child with disability" on the

other hand is not defined under the PWD Act, and thus must refer to any child with a "disability" (as defined in 2(i) of the PWD Act) of any extent/degree. Consequently, the scope of the duty imposed upon the State under Section 26 is wider, and owed to a wider category of people. *Second*, whilst Section 26(a) is concerned with universal compulsory free education for every disabled child till he or she attains 18 years, Section 39 only talks of reservations of not less than 3% in government and government-aided institutions. In other words, Section 39, in essence, covers higher education, in respect of persons with disabilities who cannot claim right to free and compulsory education. In those institutions that cater to higher and professional education, the quota of 3% is mandated. This aspect is clear from the original Section 3(2) – with its *proviso* – as well as the amended provision, i.e. Section 3(3). Both of them protect and preserve the pre-existing rights under Chapter V of the Disabilities Act, without making any reference to rights under Chapter VI (within which Section 39 is located). So viewed, in the opinion of this Court, the extent of the right under Section 26 of the PWD Act – through Section 3(3) of the RTE Act, cannot, in any manner, be said to be constrained by the inclusion of CWSN in the definition of "child belonging to disadvantaged group" under Section 2(d) of the RTE Act. To concede the GNCT's argument on this aspect would be to admit that Parliament, through the amendment of 2012, intended and achieved a dilution of what existed before the enactment of RTE and even thereafter between 2009 and 2012. Clearly that interpretation is unacceptable and, therefore, rejected.

33. Further, this conclusion is bolstered by another crucial legal finding that the Parliament intended to treat children with disabilities as a distinct and separate category, requiring special attention. Though included in the category of 'disadvantaged group' – with which CWSN share the common trait of being disadvantaged – the reasons for such disadvantage and the action to be taken to remedy such disadvantage are completely distinct. These disadvantages are not merely social or economic, such that access to education in itself can remedy the situation, but rather, go further, in that disabled persons require special attention in order to cross the barriers that they face. This categorization of children with disability, thus, stands distinct from others mentioned in the *broader* category of 'disadvantaged group'. This classification of disabled persons are a distinct category was, in fact, supported by this Court in *All India Confederation of the Blind* v. *Govt. of NCT of Delhi and Ors.*, 123 (2005) DLT 244, in holding that "*the Act is only a means, for furthering the classification made in favour of persons with disabilities ...*"

34. The reason for recognizing disabled persons as a distinct category for action is clear from the PWD Act. This Court notes that the PWD Act was enacted under Article 253 of the Constitution of India pursuant to Beijing Declaration of 1993. Recognizing this fact, the distinction – which, as a matter of classification under Article 14 is important in this case – is recognized in that Declaration, which finds express mention in the Statement of Objects and Reasons of the PWD Act itself, which reads:

> *India is a signatory to the said Proclamation and it is necessary to enact a suitable legislation to provide for the following: (i) to spell out the responsibility of the State towards … education … of persons with disabilities … (iii) to remove any discrimination against person with disabilities in the sharing of development benefits, vis-à-vis, non-disabled persons.*

Thus, the real issue – as it appears from the PWD Act *itself* – and which justifies the distinct category of disabled persons in the context of State action lies in the exclusion of disabled persons from development benefits (i.e. education) as compared to non-disabled persons. This classification – that receives Parliamentary recognition – must operate in this case.

35. The reason for this is not far to seek. Children with disabilities, especially those who are subject to multiple or severe disabilities or those covered by the 1999 Act, are an invisible minority incapable of self-advocacy. The State's obligation to affirmatively provide for their education – as a gateway to their empowerment and participation as full citizens, therefore, stands on a higher footing. The declaration of law by the Supreme Court in *Indra Sawhney* v. *Union of India (UOI) and Ors.*, 1992 (Supp.) 3 SCC 217, that such affirmation is permissible even under Articles 14 and 15(1) and is not confined within the express terms of Articles 15(3) or 15(4) is decisive in this regard. Even prior to *Indra Sawhney* (supra), the Supreme Court had recognized the need to make such provisions and held the existence to such affirmative content in Article 15(1) in *Jagdish Saran* v. *Union of India*, AIR 1980 SC 820. Therefore, the enactment of Section 26 in the PWD Act of 1995 is to be viewed as a resolve to evolve the

mandate of ensuring full participation of persons with disabilities and their empowerment for the realization of their rights under the Constitution

36. This Court is of the opinion that the formulation and understanding of law in this judgment does not in any manner conflict with the previous rulings on the subject. *Anamol Bhandari (Minor)* (supra) stated that the extent of disadvantage suffered by CWSN is equal to those "*belonging to SC/ST categories and therefore, as per the Constitutional mandates, they are entitled to at least the same benefit of relaxation as given to SC/ST candidates.*" (emphasis supplied) As a result, the Court held that "*the provision giving only 5% concession in marks to PWD candidates as opposed to 10% relaxation provided to SC/ST candidates is discriminatory and PWD candidates are also entitled to same treatment.*" Thus, at the very least, CWSN cannot be placed at a disadvantage compared to non-disabled children. In this context, the Court notes that whilst the issue in *Anamol Bhandari* (supra) concerned the relaxation of minimum standards to *all* (SC/ST and disabled persons), the present case concerns admission to *limited* seats. In such a case, bracketing CWSN with other 'disadvantaged groups' – under the terms of the 2013 order – substantially diminishes their *relative* chances. This relative disadvantage compared to other non-disabled persons, which is the very issue sought to be remedied, is in fact perpetuated by this classification. Thus, granting parity in respect of educational benefits in this case translates to a distinct classification. Indeed, in *National*

Federation of the Blind v. *Union of India*, (2009) DLT 446 (DB), the Court stressed upon the need to purposively interpret provisions of the PWD Act as well, holding that:

> "*16. The Disabilities Act was enacted for protection of the rights of the disabled in various spheres like education, training, employment and to remove any discrimination against them in the sharing of development benefits vis-à-vis non-disabled persons. In the light of the legislative aim it is necessary to give purposive interpretation to Section 33 with a view to achieve the legislative intendment of attaining equalization of opportunities for persons with disabilities.*"

Similarly, the decisions in *Govt. of India through Secretary and Anr.* v. *Ravi Prakash Gupta and Anr.*, 2010 (7) SCC 626 and *Union of India (UOI) and Anr.* v. *National Federation of the Blind and Ors.*, 2013 (10) SCC 772 consider the nature of rights recognized under the PWD Act, as well as the duty of the courts to give effect to them, through a liberal – though ultimately textual – interpretation of the statute.

37. Moreover, the Court notes that this stance is also represented in the National Policy for Persons with Disabilities, released by Central Government on 10th February, 2006 states, *inter alia*, that:

> "*II B. Education for Persons with Disabilities*
>
> *20. Education is the most effective vehicle of social and economic empowerment. In keeping with the spirit of the Article 21A of the Constitution guaranteeing education as a fundamental right and Section 26 of the Persons with Disabilities Act, 1995, free and compulsory education has to*

be provided to all children with disabilities up to the minimum age of 18 years. According to the Census, 2001, fifty-one percent persons with disabilities are illiterate. This is a very large percentage. There is a need for mainstreaming of the persons with disabilities in the general education system through Inclusive education.

21. Sarva Shiksha Abhiyan (SSA) launched by the Government has the goal of eight years of elementary schooling for all children including children with disabilities in the age group of 6-14 years by 2010. Children with disabilities in the age group of 15-18 years are provided free education under Integrated Education for Disabled Children (IEDC) Scheme.

22. Under SSA, a continuum of educational options, learning aids and tools, mobility assistance, support services etc. are being made available to students with disabilities. This includes education through an open learning system and open schools, alternative schooling, distance education, special schools, wherever necessary home based education, itinerant teacher model, remedial teaching, part time classes, Community Based Rehabilitation (CBR) and vocational education."

38. The above discussion demonstrates that the constitutional and statutory underpinnings of the right of CWSN and the mandate for an adequate response on the State's part to take timely as well as effective measures to fulfil them.

39. Here, it would be necessary to discuss the content of the entitlements created under the RTE Act as well as the PWD Act, in the context of the GNCT's argument that a sub-division or earmarking of admission separately for CWSN within the 25% quota for EWS/DG in unaided recognized schools. The advent of the RTE Act – with the

obligation cast on all schools to admit children from disadvantaged groups – is the fulfilment of the larger duty of the State to operationalize Article 21A of the Constitution. In one sense, the 25% quota earmarked for children from EWS/DG is a public resource which has to be filled in accordance with the mandate of Section 12, i.e. State and local authority established schools are to provide free access to all students, regardless of their backgrounds (because of Articles 14 and 15 (1) of the Constitution of India); those receiving aid will have to provide free education to the extent aid is proportionate to the annual expenditure with a minimum of 25% to those from EWS/DG; and private, unaided schools have to provide free compulsory education to children from EWS/DG (as defined in Section 2 (d) and 2(e) of RTE Act) to the extent of 25%. This is stating the obvious. Yet, what appears to have caused confusion is the inclusion of CWSN in the definition of children from disadvantaged groups (in the amended Section 2(d)). Whilst the definition of children from "weaker section" remains unchanged – and the definition of "children with disability" has been enlarged – by reason of Section 2 (ee), the grouping of these two otherwise distinct categories can have serious implications. The GNCT argues that because of the judgment in *Jatin Singh*, (supra) a stipulation that unaided schools should admit CWSN in the 25% quota to the extent of 3% would be impermissible.

40. This is incorrect. The question before the Court in *Jatin Singh* (supra) was whether a specified number of seats could have been allotted to SCs and STs in the 25% quota reserved for EWS/DG under Section 12(1)(c) of the RTE Act. In the facts of that case, 15% of the

seats (6 seats) in the 25% quota (10 seats) had been earmarked for SC, 7.5% for ST (3 seats) and the remaining 2.5% (1 seat) for other members of EWS/DG outside of the SC/ST category i.e. non creamy layer OBC, economically weak section, children with disability etc. This sub-classification was challenged on the ground that it was unconstitutional for being discriminatory and contrary to the provisions of the RTE Act. This Court reasoned that neither the definition of "disadvantaged group" nor Section 3 "*make any classification among the children as to their entitlement to the benefit of the Act*". Consequently, while applying Section 12(1)(c) of the RTE, the school should consider all EWS/DG category students without further sub-dividing the quota of 25% between groups. The Court further held:

> "*18. A further argument is advanced to sustain the stand that the classification was made keeping in mind Article 15 of the Constitution of India. Clause (1) of Article 15 of the Constitution mandates that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. However, an exception is carved out by virtue of Clause (4) of Article 15 to empower the State to make any special provision for the advancement of any socially and educationally backward classes of citizens or for the SC and ST. In order to give effect to the said provision, there must be a special provision made by the State. Except the guidelines, which are in the nature of prospectus for admission is produced, no other enactment making any special provision in terms of Clause (4) of Article 15 of the Constitution is shown. Even otherwise, a provision could be made for the advancement of any socially and educationally backward classes of citizens or for the SC and ST in respect of seats not covered under*

Section 12(1)(c) of the Act, which is special provision for children. In fact, Clause (4) of Article 15 of the Constitution does not make any difference between children or adult insofar as empowering the State from making special provision for of any socially and educationally backward classes of citizens or for the SC and ST and in terms of the Act, it specifically makes the children entitled for admission to school.

19. The above discussion would show that though the reservation is permissible as provided under Clause (4) of Article 15 of the Constitution, that reservation cannot be made applicable to 25% of the seats earmarked for the children falling under the definition of Clauses (d) and (e) of Section 2 read with Section 12(1)(c) of the Act. Of course, it is not as if the school cannot have a clause to reserve the seats for the benefit of SC and ST candidates, as such reservation is permissible in respect of remaining 75% of the seats. On the contrary, at the guise of invoking Clause (4) of Article 15 of the Constitution of India, the school cannot carve out certain percentage of the seats out of 25% earmarked for the children falling under Section 12(1)(c) and reserve for SC and ST candidates." (emphasis supplied)

41. This Court however is of the opinion that the 25% quota earmarked for EWS/DG in Section 12(1)(b) and (c) was made pursuant to the logic of Article 15 of the Constitution. In other words, the quota for the children falling within the categories defined in Sections 2(d) and (e) of the RTE Act were delineated in pursuance of the discretionary powers of the State under Article 15(3), (4) and (5) of the Constitution. This being the case, it would be incumbent upon the State to ensure that all children falling within Sections 2(d) and (e) of the RTE Act stand an equal chance at being included within the 25% earmarked for these categories. At the very least, all the groups

falling within Sections 2(d) and 2(e) must be ensured a chance to be beneficiaries of a reservation commensurate to the nature of their disadvantage. Not permitting this by leaving the selection into the EWS/DG categories to an open lottery could very well be exclusionary in that the quota could predominantly be filled in by economically weaker section candidates, thus leaving no seats for SC/ST candidates. This equally probable hypothetical would do violence to the constitutionally mandated reservations under Article 15(4). The reasoning in *Jatin Singh* (supra) that Article 15(4) merely enables reservations and that for reservations under that Article, a separate statutory sanction is necessary, is incorrect. Contrary to the import of that decision, Article 15(1)-(4) enables the State to legislate, and create classifications, through an enactment (in this case, the RTE Act), without imposing any further requirement of an *independent* sanction under Article 15(4).

42. At this juncture, it is pertinent here to recognise the different natures of disadvantage faced by each of the groups falling within Sections 2(d) and (e). The disadvantage sought to be compensated through reservations for SCs and STs is the social/educational backwardness due to historical societal discrimination, resulting in the incapacity to compete from the same starting point with those groups that were not so disadvantaged. These reservations are thus meant to bring on to a level playing field by bridging the deficit in capacities between SC/ST/socially and educationally backward classes of people and those who fall within the so called "open category". On the other hand, the disadvantage sought to be compensated with reservations for

women/persons with disability is the societal barrier likely to be faced by these groups. Here, it is well possible that some women/persons with disability are able to achieve a barrier free state of being, due to social/educational forwardness of the social groups/demographics they belong to and, to that extent, are able to compete on a level playing field. These reservations are thus meant to ensure representation of these categories of people in educational institutions/establishments to a certain proportion.

43. In recognition of these distinct disadvantages, reservations on the basis of SC/ST and OBC are vertically delineated categories while reservations on the basis of gender and disability are horizontally delineated categories. As recognised in *Indira Sawhney* (supra):

> *"… all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes [(under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped (under Clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations - what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to Clause (1) of Article 16. The persons selected against the quota will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the*

percentage of reservations in favour of backward class of citizens remains - and should remain - the same."

44. The mechanism for working out the "interlocking of reservations" was elaborated in *Rajesh Daria* v. *Rajasthan Public Service Commission*, (2007) 8 SCC 785, in which the Court held as follows:

> *"7. … Social reservations in favour of SC, ST and OBC under Article 16(4) are 'vertical reservations'. Special reservations in favour of physically handicapped, women etc., under Articles 16(1) or 15(3) are 'horizontal reservations'. Where a vertical reservation is made in favour of a backward class under Article 16(4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their numbers will not be counted against the quota reserved for the respective backward class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under Open Competition category. [Vide - Indira Sawhney (Supra), R.K. Sabharwal v.MANU/SC/0259/1995 : State of Punjab [1995]2SCR35 , Union of India v.MANU/SC/0113/1996 : Virpal Singh Chauvan AIR1996SC448 and Ritesh R. Sah v.MANU/SC/0363/1996: Dr. Y.L. Yamul [1996]2SCR695]. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for scheduled castes in order of merit and then find out*

the number of candidates among them who belong to the special reservation group of 'Scheduled Castes-Women'. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of scheduled caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. Let us illustrate by an example:

If 19 posts are reserved for SCs (of which the quota for women is four), 19 SC candidates shall have to be first listed in accordance with merit, from out of the successful eligible candidates. If such list of 19 candidates contains four SC women candidates, then there is no need to disturb the list by including any further SC women candidate. On the other hand, if the list of 19 SC candidates contains only two woman candidates, then the next two SC woman candidates in accordance with merit, will have to be included in the list and corresponding number of candidates from the bottom of such list shall have to be deleted, so as to ensure that the final 19 selected SC candidates contain four women SC candidates. [But if the list of 19 SC candidates contains more than four women candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess women candidate on the ground that 'SC-women' have been selected in excess of the prescribed internal quota of four." (emphasis supplied)

45. In other words, the quota for women is considered to be fulfilled if the number of women entrants *by order of merit* (across the

open category as well as the other vertical categories like SC/ST/OBC) matches the percentage stipulated for the women's quota. On the other hand, SC/ST/OBC entrants qualifying by way of merit are not counted within the percentage stipulated for the quota for these categories. While this Court is conscious of the fact that the concept of merit has no relevance in the context of nursery admissions, the logic of categorizing some groups horizontally and not vertically remains intact all the same.

46. Reservations in vertical blocks/silos for different groups of people, each mutually exclusive of the other as in *Jatin Singh* (supra), would, in the opinion of this Court, be unmindful of the distinct kinds of disadvantage experienced by the various groups. To not permit interlocking of reservations by clubbing "children with disability" within the definition of "disadvantaged group", a vertical silo, would result in both an over-classification and under-classification. Inclusion of children with disability in a vertical category like EWS/DG is an over-classification in that it diminishes significantly, the chances of the child with disability at being selected in a draw of lots comprising other candidates from EWS/DG. The fact that this inclusion amounts to complete exclusion from being considered in the open category leads to an under-classification in that it ignores those children with disability who can afford to avail of private schooling in *private schools that are willing to offer* appropriate infrastructure, educators and a barrier free environment for education of children with disabilities.

47. The consequences of failing to provide for some form of sub-classification are serious, if not dangerous. The lottery system, or any other points directed admission plan, can well exclude *all* or a substantial number of SC/ST or disabled candidates, on a bland application of the income criteria. Whilst there is no doubt that all these groups have been placed together as "disadvantaged" group, in Section 2 (d), the distinct nature of the problems faced by each of them is recognized even statutorily. Section 12, in setting apart at least 25% of the admission, thus comprehends three distinct groups, each of which is statutorily mandated and one group among which is constitutionally sanctioned under Article 15 (4). The larger goal of ensuring education to each of these sections might be better served by mandating a minimum quota or minimum number of seats for admissions, available for at least some obvious vulnerable groups known to have a history of labouring under social barriers (SC/ST, disabled children). If the State is not permitted that leeway, the guarantee of Article 15 (4) – in the case of SC/ST children- and the guarantee of Section 26 read with Section 39 of the Disabilities Act (the latter provision, to the extent it applies to government institutions) could be rendered an illusion, a paper right.

48. It appears that the Court in *Jatin Singh* (supra) was moved by the specific situation as reflected by the numbers of seats earmarked for each category. Since the 25% EWS/DG quota had to be filled with only 10 seats, the Court seems to have been compelled to strike down the sub-classification as a disproportionately small number of seats i.e. 1 seat, was left over for a non-SC/ST candidate. However, in the

opinion of this Court, *Jatin Singh* (supra) cannot be used to support the general proposition that a reservation within a reservation is illegal.

49. This Court is of opinion that the GNCT cannot seek to disclaim the ability to design a quota (in exercise of its powers to make a reservation policy), as it sought to argue in this case, that is mindful of the distinction between the disadvantage faced by children with disabilities and children belonging to SC/ST/economically weaker sections.

50. Accordingly, the result of the above discussion is as follows:

(1) The right to free, compulsory education to CWSN guaranteed by Section 26 of the PWD Act read with Section 3 (3) of the RTE Act is in no manner affected or diluted by the definition in Section 2 (d) of the RTE Act; consequently whilst making or ensuring admissions under Section 12 – to *any* category of schools, the State or its agencies, entrusted with the task are under a duty to give full and meaningful effect to Section 26. This would mean that the State necessarily has to ensure the admission *of all CWSN*.

(2) The State has the flexibility of directing segregation of the 25% quota set apart for persons from disadvantaged groups and weaker sections, to ensure widest representation of all such categories and at the same time, to safeguard against the possibility of only one of those categories securing admission in respect of the entire quota set apart for the purpose. Here, the neighbourhood principle in Section 12

has to be balanced judiciously with the right of the particular group.

(3) In the case of CWSN, on account of the imperative nature of Section 26 and its protection under Section 3(3) of the RTE, it is held that the neighbourhood principle cannot prevail over the need to admit CWSN if in a given case, the school is equipped to deal with or handle some or one kind of disability (blindness, speech impairment, autism etc). Insistence on the neighbourhood criteria in such cases would not only be retrograde, but destructive of the right guaranteed under Section 26 of the PWD Act. The state therefore has to tailor appropriate policies to optimise admission of CWSN in those unaided schools, in the first instance, which are geared and equipped to deal with particular disabilities, duly balancing with the dictates of the neighbourhood criteria.

Impugned Order of 18th December, 2013

51. The petitioner's submissions impugns paragraph 14(b) of the 2013 order on the ground that it positively restricts schools from devising criteria for special treatment, for the purpose of admission, of CWSN. The petitioner has given a list of 43 recognized unaided private schools (in Annexure B of the writ petition) equipped to cater to CWSN and the mode adopted by them to give additional recognition in the criteria adopted by them prior to the impugned notification. The introduction of the impugned order has resulted in

such schools being denied the choice of applying those special criteria, exclusively designed to admit CWSN.

52. This Court is therefore of the opinion that the petitioner's argument is merited and has to prevail. *First*, the imperative of Section 26 is that the Government has to ensure that *all CWSN* are given access to education till age 18. Such being the case, neither the neighbourhood criteria (based on a statutory stipulation in Section 12, RTE) nor the point based admission system, directed by the impugned order can be allowed to prevail over that obligation, which is underscored by Section 26 (b) to (d) as well as Section 27-29 of the PWD Act. This Court therefore has no hesitation in holding that the imposition of the neighbourhood criteria, in substitution of the previously existing discretion to admit CWSN allowed to unaided schools, is contrary to the provisions of Section 26 of the PWD Act read with Section 3(3) of the RTE Act. The neighbourhood criterion in Section 12 has to yield to the dictates of Section 26 of the PWD Act. *Second*, the neighbourhood principle – in Section 12 as well as the impugned order – operates, and can operate in the case of CWSN, on the presupposition that there are a sufficient number of schools in each neighbourhood equipped to cater to the needs of all kinds of CWSN in that neighbourhood. Indeed, this is not the case here. To relegate CWSN in favour of the neighbourhood criteria, when it is an admitted position that most neighbourhoods do *not* have schools that cater to CWSN, would amount to deliberately subverting Section 26 of the PWD Act, and the right of CWSN to an education under Article 21A of the Constitution, manifested through Section 3 of the RTE Act.

Indeed, till that stage is achieved, insistence of the neighbourhood principle or criteria would render the right under Section 26 of the PWD Act useless. Such an interpretation, which, *per force*, excludes a section of the population (and importantly, a section that deserves greater protection than most) cannot be countenanced. *Third*, the impugned order classifies CWSN with EWS and DG in deciding admissions to school, thus again ignoring the *distinct* classification of disabled persons vis-a-vis non-disabled persons, as explained above. For this reason as well, the impugned order of 18th December 2013 is illegal to the extent is brackets CWSN with other disadvantaged groups.

53. The Court has considered the nature of the right under Section 26, PWD Act, and Section 3, RTE Act. The content of the right must however reach the beneficiaries. Rights on paper have no meaning, and neither does this order of the Court if the infrastructure and will to act on the part of the GNCT does not match the needs of the day. In order to appreciate this problem, it is important to note the statistics available with the Court on the issue. Bereft of the context, the interpretation provided to the law is incomplete. Beginning with Delhi, the Census of 2011 finds that there are 22475 CWSN between the age group of 0-9 in NCT-Delhi. On breaking the number down, there are 8333 children between ages 0-4 and 14142 between ages 5-9. The population of Delhi, in total, is 16,753,235, and the number of children between the ages of 0-9 is 29117172, which means that the disabled children in Delhi looking for admission into a pre-primary level are 0.13% and 0.77% respectively of the total population and

children within their age-group, respectively. As a percentage, and as an absolute number, the issue that arises is of a great magnitude. This becomes abundantly clear from the statistics provided by the GNCT, concerning the number of public schools with the ability to cater to disabilities and the number of children currently enrolled out of the approximately 22475 that must be accommodated within the regime of Section 26. The following chart represents the figures presented by the GNCT to this Court as to the number of children with disabilities currently enrolled in Government owned and aided schools.

Percentage of Disabled Children Enrolled for the session 2013-14			
Management	**All disabilities**	**Enrolment**	**% age of Disability**
DoE	146	40952	0.35
DoE Aided	193	7068	2.73
DoE Unaided	868	221964	0.39
MCD	605	183156	0.33
MCD Aided	2	2016	0.1
MCD Unaided	39	50657	0.07
NDMC	11	4808	0.22
NDMC Aided	2	128	1.56
NDMC Unaided	0	992	0
DCB	1	507	0.2

54. This clearly demonstrates that the representation of CWSN, in relation to the total number of children at the primary level, is much lower than their representation in the population. This indicates that for every disabled child in school, there are many almost twice the number who are not enrolled. The problem becomes even more revealing if we look at statistics for the number of children enrolled in Government aided or owned institutions compared with the *capacity* of these school to admit CWSN. This is reflected in the following chart:

Data of Disabled Children Enrolled for the session 2013-14

Management	**Visually Impairment (Blindness)**		**Visually Impairment (Low-Vision)**		**Hearing Impairment**		**Speech Impairment**		**Locomotor Impairment**		**Mental Retardation**		**Learning Disability**		**Cerebral Palsy**		**Autism**		**Multiple Disability**		**All Disability**	
		Class		**Class**		**Class**		**Class**		**Class**		**Class**		**Class**		**Class**		**Class**		**Class**		**Class**
	PP	**1**	**PP**	**1**	**PP**	**1**	**PP**	**1**	**PP**	**1**	**PP**	**1**	**PP**	**1**	**PP**	**1**	**PP**	**1**	**PP**	**1**	**PP**	**1**
DoE	0	3	6	26	3	16	6	3	10	23	3	23	2	8	0	3	0	2	1	8	31	115
DoE Aided	5	34	10	19	74	40	0	4	0	3	0	1	0	1	0	0	0	1	0	1	89	104
DoE Unaided	7	5	48	59	65	51	47	19	27	20	144	24	51	97	20	8	65	22	51	38	525	343
MCD	1	26	8	68	4	29	11	59	19	120	4	89	11	70	1	9	1	1	3	71	63	542
MCD Aided	0	0	0	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	2
MCD Unaided	0	0	5	11	1	1	0	0	0	2	4	3	0	6	0	3	0	0	2	1	12	27
NDMC	0	0	1	0	0	0	0	3	0	1	0	1	0	3	0	0	0	1	0	1	1	10
NDMC Aided	0	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	2
NDMC Unaided	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
DCB	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	1
Total	82		261		285		153		222		299		249		44		93		177			
Stated Capacity	33		170		90		-		126		56		-		38		65		78			

56. The number of children enrolled with State owned or aided schools is presented in the second law column of the above chart, and the last column records the total number of seats available in those institutions, i.e. the capacity of those institutions for those specific disabilities. As a consistent trend, the number of children enrolled in these schools is much more than the number of seats available to cater to CWSN. In order for the education of CWSN to be effective, rather than merely counting attendance, the infrastructure and facilities in these schools must match-up to their intake. Clearly, that is not the case, even by the figures provided by the GNCT itself. The quality of education provided to these children comes into doubt, and absent any clear reporting mechanism, the issue is plunged into further darkness. This is keeping aside the fact that even considering the number of students enrolled (on paper), a majority are still excluded and are not enrolled even on paper.

57. The magnitude of the challenge becomes clear from these figures. Not only are our public institutions unable to cater to CWSN because of lack of adequate infrastructure, but moreover, there remains incoherence in the reporting itself. Despite the clear mandate of Section 26, not only can it not be said that all CWSN have access to education, but rather, a majority of CWSN are not in school, and even this fact cannot be attributed to exact figures, given the absence of a comprehensive and accurate reporting mechanism. The entire challenge is thus relegated to the background, without any attempt to

measure the statistics comprehensively, in order to pave the path forward.

58. The reading of Section 26, PWD Act and Section 3, RTE Act, preferred by the Court above must therefore be considered in the context of the facts and figures. The Court emphasises however that the content of the right does not depend upon the number of CWSN in Delhi. Every child – irrespective of numbers – is entitled to an education. The law exists to protect and empower all, whether a majority or minority, and indeed, in such cases, where the constituency being affected is routinely unable to voice its opinion, greater emphasis must be laid on ensuring that the State fulfils its mandate. Simply discussing the content of the right, divorced from the statistical background, however, would render the right ineffective, and one that exists only on paper. The mechanism through which this right is to be brought to fruition must consider the prevailing reality, and the facts and figures.

58. To place the Court's findings in context, the mandate of the State to provide education under Section 26, PWD Act read with Section 3, RTE Act is an obligation that must match the demand of education of CWSN and the supply, through public and private institutions. The figures provided by the GNCT make it apparent that Government owned or aided institution in Delhi do not – as of this moment – have sufficient capacity by themselves to cater to CWSN. Quite to the contrary, a closer reading of the statistics provided by the GNCT indicates that there are more CWSN admitted than the existing

capacity. The obligation cast upon the Government, along with a concomitant right of all CWSN, to have a right to education at the entry level, is currently a hollow promise. The infrastructure and mechanism to effect this right is as important as a statement of its content. In achieving the mandate imposed by Section 26, the State must bank on *all* available avenues and resources to reach that stated end. Clauses (b), (c) and (d) of Section 26 are best viewed as *means* to meet the obligation under clause (a), which is standalone and distinct. Given this, all CWSN must be admitted into public and private institutions that have the capacity to cater to them.

59. As regards public institutions, the mandate of Section 39, which provides for a 3% reservation, is one measure that is statutorily provided. This, however, does not and cannot exhaust the scope of Section 26. Unfortunately, the GNCT's stance today amounts to that. As is clear from the statistics, sufficient seats in public institutions are not available. If anything, these institutions' capacity has already been exceeded, in many cases by more than twice the available seats. Two avenues thus remain open for the State: either to augment the capacity to intake CWSN in public institutions by creating the necessary infrastructure, and alongside, the mandate that CWSN be admitted into private institutions with the capacity to cater them. The former is a matter of policy, and the Court does not propose to indicate the manner in which such infrastructure is to be created, but only indicate that the legal obligation upon the State under Section 26 of the PWD Act remains in danger of being unfulfilled in the absence of necessary

action. As regards the latter, the Court notes that Section 12 of the RTE is an enabling provision which permits – to the limited extent of 25% – State interference with private unaided institutions. Several private unaided institutions have the capacity to cater to CWSN, and through the prism of Section 12, RTE Act, the mandate of Section 26, PWD Act, is to be effected, notwithstanding the judgment in *Jatin Singh* (supra), as discussed above.

60. Accordingly, given the circumstances, and in view of the *legal* obligation under Section 26, PWD read with Section 3, RTE, what is essential is to match the demand for schools for CWSN with the supply of seats in educational institutions (public and private). In order to ensure that these legal rights are not frustrated, the Court proposes an admission and reporting mechanism for the admission of CWSN in primary and 1st grade, i.e. entry level classes.

61. The above mechanism shall be a single window clearance centre through which all CWSN application shall be routed. The Court accordingly directs the GNCT, through the Principal Secretary, Directorate of Education, to:

> (a) Create a list of all public and private educational institutions catering to CWSN. This list shall be created zone wise. It shall include full details as to the nature of disability the institutions are able to cater to, the facilities available, whether residential or day-boarding, and the contact details for the concerned authority in that institution in case of any clarifications.

(b) Create a Nodal Agency, under the authority of the Department of Education (DoE) GNCT, for the processing of all applications pertaining to admission of CWSN. This Nodal Agency shall structure a single form to be utilized by parents and guardians of CWSN for admissions into public and private institutions, including all relevant details required for the purposes of admission. Such forms shall be submitted to the Nodal Agency, which shall prescribe regulations for such process, and be forwarded to the concerned institutions. Any amendments or clarifications or modifications to the application, if the need arises, shall be made through the Nodal Agency. The ultimate decision, once made by the concerned institution, shall be conveyed to the parents/guardians through the Nodal Agency.

(c) The Nodal Agency shall keep a record (including a digital record) of all applicants and institutions, and collate statistics at the end of every admissions cycle. This shall include figures as to the number of applicants, the nature of their disability, place of residence (zone-wise); and as to the number of institutions, their location (zone-wise), the nature of disabilities they cater to and the number of available seats. Statistics as to the number of CWSN who have dropped out of school during the academic session shall also be collated, in coordination with the schools, at the end of every academic session. This list shall be duly forwarded to the Directorate of Education, which shall endeavour to investigate the reasons for

the withdrawal of the child, and assist in re-admission in the next admissions cycle, keeping in view the specific needs of the child.

(d) The Nodal Agency shall also prescribe a uniform mechanism and guidelines for the certification of CWSN by authorized persons.

(e) All applications for admission of CWSN to institution, if such admission is regulated by Section 12, RTE Act (Government owned, aided, or unaided private schools), shall be conducted through the Nodal Agency. Each such institution may nominate a liaison officer to the Nodal Agency, to ensure smooth functioning of the admissions process.

(f) If, at any point during the admissions cycle, any CWSN is unable to be placed in a school catering to his or her special needs, the matter shall be forthwith intimated to the Chief Commissioner of Persons with Disabilities, and the Principal Secretary, Directorate of Education, in order to ensure that the mandate under Section 26 to place the child is fulfilled.

(g) All details mandated to be collated in this order shall be made publicly available on main page of the website of the Directorate of Education, and other public locations, for the maximum dissemination.

(h) The Nodal Agency shall also provide – by itself or through other agencies – appropriate counselling facilities for parents and guardians, if requested by them. The facility of such a counselling shall be made known to all

parents/guardians approaching the Nodal Agency. Likewise, the Nodal Agency shall put in place a complaints mechanism and a mobile helpline to provide assistance.

62. This Court had, during the pendency of this petition, directed the GNCT to ensure that a certain number of seats are set aside in the pre-primary and primary admission processes to the 43 schools listed in Annexure B, as is seen by the interim orders made in these proceedings. Since those schools have the capacity to cater to the needs of CWSN, the GNCT shall, after appropriate inspection, design an appropriate admission mechanism to optimise the filling of those seats from amongst CWSN candidates, having regard to the facilities available in each school, the needs of the candidate, and to the extent possible, the neighbourhood criteria. To that extent, the respondents are directed not to give effect to the impugned order of 18th December, 2013. For the purpose of these directions, the mechanism indicated in paragraph 60 shall be adopted with suitable modifications and amendments. This procedure shall be adopted for the current year.

63. The emergence of the disability rights movement in several parts of the world, and location of the needs of persons (and children) with disabilities in the discourse within the larger canvass of civil rights, along with gender, minority groups and other marginalized sections' of societies, is a move away from the present, paternalistic model of disability rights. In the model known and practised within country, disability rights are viewed from a medical or charity perspective, where disability is a handicap one is born with. The social

model, on the other hand, views disability as the product of pre-existing barriers created by society. Education is therefore the first step for breaking down these barriers, which prevent full and meaningful participation of persons with disabilities in the processes of life and mainstream of society. Each person with disability is presently impeded in a world with barriers that need to be surmounted on a daily basis for mere functioning. Though a small minority (2.1% of the population), they deserve no less than the rights under the PWD Act and the RTE; these are to be given their fullest meaning and content. It is time all concerned stop viewing those with disabilities as ill and incomplete and instead help them take hold of their lives.

64. As a concluding note, this Court records its appreciation for learned counsel appearing for the petitioner, Mr. Aman Bhalla, Mr. Anshuman Sahni and Ms. Aastha Dhawan, for espousing this cause, and for their assistance to the Court. The Court also appreciates the role played by Senior Counsel Mr. Kirti Uppal in enabling these counsel to play an active and important role in these proceedings.

65. This Court notes that the judgment rendered above does not by itself lead to a fruition of the rights of CWSN under the PWD Act and the RTE Act. The Court is of the opinion that in the larger public interest, and to oversee the implementation of this judgment, and ultimately, the mandate of Section 26 of the PWD Act, the present proceedings should not be terminated. Instead, the proceedings should be kept alive, for suitable monitoring by this Court. Accordingly, the GNCT is directed to file an Action Taken Report, to report compliance

with the directions contained in this judgment, within four weeks from today. It is clarified that this judgment does not touch upon the validity of the order of 18th December for any other purpose impugned in proceedings pending before this Court. The matter shall be listed on 7th May, 2014 for appropriate hearing in this regard.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

APRIL 03, 2014