IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE THE CHIEF JUSTICE MR.S.MANIKUMAR

&

THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

WEDNESDAY, THE 05TH DAY OF AUGUST 2020 / 14TH SRAVANA, 1942

WP(C).No.15916 OF 2020

PETITIONER/S:

SAMASTHA NAIR SAMAJAM (SNS),
REP.BY ITS GENERAL SECRETARY,
KALYANI BUILDINGS, PADANAYARKULANGARA NORTH,
KARUNAGAPPALLY, KOLLAM DISTRICT.

BY ADV. SRI.R.SUNIL KUMAR

RESPONDENT/S:

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

2 **DIRECTOR OF GENERAL EDUCATION,**
DPI JUNCTION, JAGATHI,
THIRUVANANTHAPURAM-695 014.

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 05.08.2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"C.R"

JUDGMENT

Dated this the 5th day of August, 2020

S. Manikumar, CJ

Instant public interest litigation is filed by an association called 'Samastha Nair Samajam (SNS)', for a writ of mandamus directing respondents, to earmark 10% quota for economically weaker section, as provided under Article 15(6) of the Constitution of India, for the students, who apply for Higher Secondary course, for the year 2020-21. In support of the prayers sought for, petitioner has placed reliance on Article 15(6), introduced as per 103rd amendment to the Constitution, which reads thus:

> "6) nothing in this article or sub clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the state from making:-
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> a) any special provision for the advancement of any economically weaker section of citizen other than the class mentioned in clause (4) and (5) and
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> b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clause (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the state, other than minority educational institutions referred in clause (1) of article 30,

> which in the case of reservation would be in addition to the existing reservations and subject to the maximum of 10% of total seats in each category."

2. Petitioner has further contended that Exhibit-P2 prospectus has been issued without taking note of the Constitutional amendment and special provisions, in relation to other communities, as mentioned in ground (b).

3. Today, when the matter came up for admission, Mr. Antony Mukkath, learned Senior Government Pleader, submitted that Article 15(6), now introduced, is only an enabling provision and that Government of Kerala have not issued any notification providing 10% reservation for economically weaker section and, that too, in the matter of admission to Higher Secondary courses for the year 2020-21.

4. Accordingly, prospectus has been issued for admission of students, for the academic year 2020-21. Mr. R. Sunilkumar, learned counsel for the petitioner, submitted that if he is given sufficient time, he would produce the orders issued by the State Government.

5. Heard learned counsel for the parties and perused the materials on record.

6. From a bare reading of the amended clause (6) of Article 15, it is clear that, it is only a provision, enabling the State Government for

making any special provision for the advancement of any economically weaker section other than mentioned in clauses (4) and (5). Reference can be made to a decision of the Hon'ble Supreme Court in **Ajit Singh and others v. State of Punjab and others** [(1999) 7 SCC 209], wherein, while dealing with Articles 16(4) and 16(4-A) of the Constitution of India, the Hon'ble Apex Court, in paragraph Nos.28 to 31, held as under:

> "28. We next come to the question whether Article 16(4) and Article 16(4-A) guaranteed any fundamental right to reservation. It should be noted that both these articles open with a non obstante clause - *"Nothing in this Article shall prevent the State from making any provision for reservation...."* (emphasis supplied). There is a marked difference in the language employed in Article 16(1) on the one hand and Article 16(4) and Article 16(4-A) on the other. There is no directive or command in Article 16(4) or Article 16(4-A) as in Article 16(1). On the face of it, the above language in each of Articles 16(4) and 16(4-A) is in the nature of an enabling provision and it has been so held in judgment rendered by Constitution Benches and in other cases right from 1963.
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> 29. We may in this connection point out that the attention of the learned Judges who decided Ashok Kumar Gupta and Jagdish Lal was not obviously drawn to a direct case decided by a Constitution Bench in C.A.Rajendran v. Union of India which arose under Article 16(4). It was clearly

laid down by the five-Judge Bench that Article 16(4) was only an enabling provision, that Article 16(4) was not a fundamental right and that it did not impose any constitutional duty. It only conferred a discretion on the State. The passage in the above case reads as follows:

> "Our conclusion therefore is that Article 16(4) does not confer any right on the petitioner and there is no constitutional duty imposed on the Government to make a reservation for Scheduled Castes and Scheduled Tribes, either at the initial stage of recruitment or at the stage of promotion. In other words Article 16(4) is an enabling provision and confers a discretionary power on the State to make a reservation of appointments in favour of backward class of citizens which, in its opinion, is not adequately represented in the services of the State."
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> (emphasis supplied)

30. The above principle was reiterated in two three-Judge Bench judgments in *P&T Scheduled Caste/Tribe Employees' Welfare Assn. (Regd.) v. Union of India* and in *State Bank of India Scheduled Caste/Tribe Employees' Welfare Assn. v. State Bank of India*. In fact, as long back as in 1963, in *M.R. Balaji v. State of Mysore* (SCR at p. 474) which was decided by five learned Judges, the Court said the same thing in connection with Article 15(4) and Article 16(4). Stating that Articles 15(4) and 16(4) were only enabling provisions, Gajendragadkar, J. (as he then was) observed:

> "In this connection it is necessary to emphasise that Article 15(4) like Article 16(4) is an enabling provision, it does not impose an obligation, but merely leaves it to the discretion of the appropriate Government to take suitable action, if necessary."

> 31. Unfortunately, all these rulings of larger Benches were not brought to the notice of the Bench which decided *Ashok Kumar Gupta* and *Jagadish Lal* and to the Benches which followed these two cases. In view of the overwhelming authority right from 1963, we hold that both Articles 16(4) and 16(4-A) do not confer any fundamental rights nor do they impose any constitutional duties but are only in the nature of enabling provisions vesting a discretion in the State to consider providing reservation if the circumstances mentioned in those articles so warranted. We accordingly hold that on this aspect *Ashok Kumar Gupta, Jagdish Lal* and the cases which followed these cases do not lay down the law correctly."

7. The abovesaid decision has been reiterated by the Hon'ble Supreme Court in **Bir Singh v. Delhi Jal Board and Others** [(2018) 10 SCC 312].

8. In State of Kerala, there is an Act called Kerala Education Act, 1958, which governs admissions and appointments in both, the Government and other recognized institutions.

9. No special provision has been pointed out by the learned counsel for the petitioner providing reservation for economically weaker section in the society as per the 103rd Constitution amendment. As stated *supra,* Article 15(6) is only an enabling provision.

10. On the aspect as to when mandamus can be issued, it is useful to refer a few decisions.

(i) In **State of Kerala v. A. Lakshmi Kutty** reported in (1986) 4 SCC 632, the Hon'ble Supreme Court held that, a Writ of Mandamus is not a writ of course or a writ of right but is, as a rule, discretionary. There must be a judicially enforceable right for the enforcement of which a mandamus will lie. The legal right to enforce the performance of a duty must be in the applicant himself. In general, therefore, the Court will only enforce the performance of statutory duties by public bodies on application of a person who can show that he has himself a legal right to insist on such performance. The existence of a right is the foundation of the jurisdiction of a Court to issue a writ of Mandamus.

(ii) In **Comptroller and Auditor General of India v. K. S. Jegannathan**, reported in AIR 1987 SC 537 - (1986) 2 SCC 679, a Three-Judge Bench of the Hon'ble Apex Court referred to Halsbury's Laws of England 4th Edition, Vol. I, Paragraph 89, about the efficacy of mandamus:

> "89. Nature of Mandamus.-- .... is to remedy defects of justice; and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy, for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

(iii) In **Raisa Begum v. State of U.P.**, reported in 1995 All.L.J. 534, the Allahabad High Court has held that certain conditions have to be satisfied before a writ of mandamus is issued. The petitioner for a writ of mandamus must show that he has a legal right to compel the respondent to do or abstain from doing something. There must be in the petitioner a right to compel the performance of some duty cast on the respondents. The duty sought to be enforced must have three qualities. It must be a duty of public nature created by the provisions of the Constitution or of a statute or some rule of common law.

(iv) Writ of mandamus cannot be issued merely because, a person is praying for. One must establish the right first and then he must seek for the prayer to enforce the said right. If there is failure of duty by the authorities or inaction, one can approach the Court for a mandamus. The said position is well settled in a series of decisions.

(a) In **State of U.P. and Ors. v. Harish Chandra and** Ors., reported in (1996) 9 SCC 309, at paragraph 10, the Hon'ble Apex Court held as follows:

> "10. ...Under the Constitution a mandamus can be issued by the court when the applicant establishes that he has a legal right to the performance of legal duty by the party against whom the mandamus is sought and the said right was subsisting on the date of the petition...."

(b) In **Union of India v. S.B. Vohra** reported in (2004) 2 SCC 150, the Hon'ble Apex Court considered the said issue and held that,- 'for issuing a writ of mandamus in favour of a person, the person claiming, must establish his

legal right in himself. Then only a writ of mandamus could be issued against a person, who has a legal duty to perform, but has failed and/or neglected to do so."

(c) In **Oriental Bank of Commerce v. Sunder Lal Jain** reported in (2008) 2 SCC 280, at paragraphs 11 and 12, the Hon'ble Apex Court held as follows:-

> "11. The principles on which a writ of mandamus can be issued have been stated as under in The Law of Extraordinary Legal Remedies by F.G. Ferris and F.G. Ferris, Jr.:
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> > "Note 187.- Mandamus, at common law, is a highly prerogative writ, usually issuing out of the highest court of general jurisdiction, in the name of the sovereignty, directed to any natural person, corporation or inferior court within the jurisdiction, requiring them to do some particular thing therein specified, and which appertains to their office or duty. Generally speaking, it may be said that mandamus is a summary writ, issuing from the proper court, commanding the official or board to which it is addressed to perform some specific legal duty to which the party applying for the writ is entitled of legal right to have performed.
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> > Note 192.- Mandamus is, subject to the exercise of a sound judicial discretion, the appropriate remedy to enforce a plain, positive, specific and ministerial duty presently existing and imposed by law upon officers and others who refuse or neglect to perform such duty, when there is no other adequate and specific legal remedy and without which there would be a failure of justice. The chief function of the writ is to compel the performance of public duties prescribed by statute, and to keep subordinate and inferior bodies and tribunals exercising public functions within their jurisdictions. It is not necessary, however, that the

duty be imposed by statute; mandamus lies as well for the enforcement of a common law duty.

Note 196.- Mandamus is not a writ of right. Its issuance unquestionably lies in the sound judicial discretion of the court, subject always to the well-settled principles which have been established by the courts. An action in mandamus is not governed by the principles of ordinary litigation where the matters alleged on one side and not denied on the other are taken as true, and judgment pronounced thereon as of course. While mandamus is classed as a legal remedy, its issuance is largely controlled by equitable principles. Before granting the writ the court may, and should, look to the larger public interest which may be concerned-an interest which private litigants are apt to overlook when striving for private ends. The court should act in view of all the existing facts, and with due regard to the consequences which will result. It is in every case a discretion dependent upon all the surrounding facts and circumstances.

Note 206.--.....The correct rule is that mandamus will not lie where the duty is clearly discretionary and the party upon whom the duty rests has exercised his discretion reasonably and within his jurisdiction, that is, upon facts sufficient to support his action."

12. These very principles have been adopted in our country. In **Bihar Eastern Gangetic Fishermen Cooperative Society Ltd. v. Sipahi Singh and others**, AIR 1977 SC 2149, after referring to the earlier decisions in *Lekhraj Satramdas Lalvani v. Deputy Custodian-cum-Managing Officer, AIR 1966 SC 334; Dr. Rai Shivendra Bahadur v. The Governing Body of the Nalanda College, AIR 1962 SC 1210 and Dr. Umakant Saran v. State of Bihar,*

AIR 1973 SC 964, this Court observed as follows in paragraph 15 of the reports :

> "15. ..... There is abundant authority in favour of the proposition that a writ of mandamus can be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of the officer to discharge the statutory obligation. The chief function of a writ is to compel performance of public duties prescribed by statute and to keep subordinate Tribunals and officers exercising public functions within the limit of their jurisdiction. It follows, therefore, that in order that mandamus may issue to compel the authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance. .... In the instant case, it has not been shown by respondent No. 1 that there is any statute or rule having the force of law which casts a duty on respondents 2 to 4 which they failed to perform. All that is sought to be enforced is an obligation flowing from a contract which, as already indicated, is also not binding and enforceable. Accordingly, we are clearly of the opinion that respondent No. 1 was not entitled to apply for grant of a writ of mandamus under Article 226 of the Constitution and the High Court was not competent to issue the same."

(v) When a Writ of Mandamus can be issued, has been summarised in *Corpus Juris Secundum*, as follows:

> "Mandamus may issue to compel the person or official in whom a discretionary duty is lodged to proceed to exercise such discretion, but unless there is peremptory statutory direction that the duty shall be performed mandamus will not lie to control or review the exercise of

> the discretion of any board, tribunal or officer, when the act complained of is either judicial or quasi-judicial unless it clearly appears that there has been an abuse of discretion on the part of such Court, board, tribunal or officer, and in accordance with this rule mandamus may not be invoked to compel the matter of discretion to be exercised in any particular way. This principle applies with full force and effect, however, clearly it may be made to appear what the decision ought to be, or even though its conclusion be disputable or, however, erroneous the conclusion reached may be, and although there may be no other method of review or correction provided by law. The discretion must be exercised according to the established rule where the action complained has been arbitrary or capricious, or based on personal, selfish or fraudulent motives, or on false information, or on total lack of authority to act, or where it amounts to an evasion of positive duty, or there has been a refusal to consider pertinent evidence, hear the parties where so required, or to entertain any proper question concerning the exercise of the discretion, or where the exercise of the discretion is in a manner entirely futile and known by the officer to be so and there are other methods which it adopted, would be effective."
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> (emphasis supplied)

10. Though several grounds were raised by the petitioner, we are of the view that he has not made out any *prima facie* case for ordering notice to the respondents.

Accordingly, writ petition is dismissed. Liberty is given to the petitioner, to file fresh writ petition, if there is substantive cause.

Sd/-

S.MANIKUMAR
CHIEF JUSTICE

Sd/-
SHAJI P.CHALY
JUDGE

DG

APPENDIX

PETITIONER'S/S EXHIBITS:

EXHIBIT P1	**TRUE COPY OF THE REGISTRATION CERTIFICATE OF PETITIONER ORGANISATION AND ALONG WITH TRANSLATION.**
EXHIBIT P2	**TRUE COPY OF THE PROSPECTUS FOR THE ADMISSION TO THE HIGHER SECONDARY SEATS FOR THE YEAR 2020-21 AND ALONG WITH TRANSLATION.**