

## Vikas Kumar Agrawal and Vs State of Rajasthan and Others

**Court:** Rajasthan High Court (Jaipur Bench)

**Date of Decision:** Oct. 6, 2012

**Acts Referred:** Right of Children to Free and Compulsory Education Act, 2009 "Section 23, 23(1)

**Citation:** (2013) LabIC 1908

**Hon'ble Judges:** Munishwar Nath Bhandari, J

**Bench:** Single Bench

**Advocate:** Vigyan Shah, Ram Pratap Saini, Sunil Kumar Jain, H.P. Singh, S.S. Sunda, Ashwani Chobisa, Akhil Simlote, Kuldeep Aswal, Vijay Pathak, M.I. Abbasi, Manoj Bhardwaj, Rajneesh Gupta, Jeetendra Kumar Sharma, Mukesh Kumar Goyal, Anil Kumar Sharma, Hem Singh Rathore, Vinod Goyal, Mukesh Kumar Verma and S.S. Mahla, for the Appellant; S.N. Kumawat, A.A.G., Anant Bhandari, G.C., Vinod Kumar Gupta, Gajender Sharma, Kuldeep Aswal, Omveer Singh Saini, R. Bochalya, Amit Jindal, Raghunandan Sharma and Shantaun Sharma, for the Respondent

### Judgement

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Munishwar Nath Bhandari, J.

These writ petitions pertain to selection to the post of Teacher Grade-III Level-I & II. Three issues have

been raised by the petitioners in these writ petitions, which are formulated as under:--

(i) Whether a candidate belonging to the reserve category is eligible for the appointment to the post of Teacher Grade-III, if he is not possessing

60% marks in RTET as per qualification prescribed by the NCTE. The relaxation of 5% marks is given to the reserve category thereafter vide

notification dated 29.7.2011, therefore, a candidate not possessing 55% marks in RTET is rendered eligible?

(ii) Whether a candidate taken concession in qualifying marks of RTET can migrate from reserve category to open category?

(iii) Whether the order of the State Government dated 23.3.2011 can operate contrary to notification dated 29.7.2011?

2. Aforesaid issues are required to be examined in the light of the following facts, which are summarized in brief:-

After making elementary education as a fundamental right, the Right of Children to Free and Compulsory Education Act, 2009 (for short "the Act

of 2009") was enacted. The aforesaid Act of 2009 provide standards and norms for free education at the elementary level. Section 23 of the Act

of 2009 gives authority to the Central Government to notify academic authority to provide minimum qualification for appointment as a teacher. The

National Council for Teacher Education (for short "the NCTE") was notified as academic authority, which issued notification on 23-8-2010 to

provide minimum qualification for appointment to the post of Teacher Grade-III, Level-I & II wherein Teachers Eligibility Test Certificate (in short

"the TET") is one of the qualification. Subsequent to the aforesaid, guidelines were issued on 11.2.2011 for TET. A notification dated 29.7.2011

was, therefore, issued to substitute certain provisions in the principal notification dated 23.8.2010.

3. It is stated that minimum passing marks for TET is 60% as per guidelines dated 11.2.2011. The State Government accordingly held TET, but

candidates securing even less than 60% marks were also declared pass to make them eligible for appointment to the post of Teacher Grade-III,

Level-I & II. It was by giving relaxation up to 20% marks in Rajasthan TET by the State Government vide their order dated 23.3.2011. The State

Government had no authority to lower down standard of TET by providing concession or relaxation in passing marks to reserve category and even

if such authority was given, it should have been as per the existing reservation policy and not to formulate a new policy. The State Government,

however, formulated new policy on 23.3.2011 wherein concession in qualifying marks in RTET was given to reserve category up to 20% marks. It

was beyond the competence of the State Government as minimum qualification was to be provided under the Act of 2009 for which only Central

Government is authorized to nominate academic authority. It was pursuant to Section 23 of the Act of 2009, NCTE was nominated as an

academic authority to provide minimum qualification for appointment to the post of Teacher Grade-III. The NCTE is not having authority to further

delegate powers to relax qualification for appointment to the post of Teacher. If NCTE has further delegated authority on the State Government,

then it is in violation of Section 23 of the Act of 2009.

4. The respondent State Government after holding RTET, issued advertisement for the post of Teacher Grade-III. Therein, relaxation of 5% marks

in required qualification was provided for reserve category candidates. The NCTE issued a notification on 29.7.2011. As per notification,

relaxation of 5% marks in required qualification was given to reserve category such as SC/ST, OBC & PH. It is for the reason that qualification

was prescribed with required marks therein. Once notification was issued on 29.7.2011, State Government had no authority to provide relaxation

beyond what has been given by NCTE having competence to do so. Accordingly, concession in passing marks of RTET beyond 5% is not legally

sustainable and any candidate selected for the post of Teacher Grade-III without confirming the required percentage of the marks in RTET should

be rendered ineligible.

5. The counsel for petitioners have referred para 3(1) of the guidelines dated 11.2.2011 issued by the NCTE to show that it was to provide

national standard and benchmark of teacher quality in the recruitment process. The purpose of the guidelines was to keep same standard and

quality of teacher throughout the country. Even in the opening para of guidelines, NCTE had come out with the object to provide quality in the

recruitment of teacher without dilution. Therefore, emphasis was to ensure that persons recruited as teachers possess essential aptitude and ability

to meet challenge of teaching at the primary and upper primary level. The State Government has diluted the standards for appointment contrary to

the object of NCTE.

6. It is further contended that even as per Clause 9 of the guidelines, the concession to the reserve category would be as per extant reservation

policy i.e. policy already existing, but respondents framed new policy to provide concession, which was not under their competence. The

respondents thus committed illegality while holding candidates to be eligible for appointment to the post of Teacher Grade-III, even if they are not

possessing 55% marks in RTET. To show that the guidelines of NCTE has been universally applied, illustration of the various State Governments"

policy has been given where concession in marks has not been provided beyond 5%. A reference of the judgment of the Punjab & Haryana High

Court in the case of Shabir Khan and another v. The State of Punjab and others, Civil Writ Petition No. 21387 & 21347 of 2011 decided on

29.02.2012, has also been given.

7. So far as second issue is concerned, it is submitted that migration of the reserve caste to open category cannot be permitted, if benefit of

concession has been taken during the course of selection. It is submitted that reserve caste candidates have been given relaxation and concession in

fee, age and even in qualification like lower standard of passing of B.Ed., BSTC etc. Now, they have been allowed to migrate to open category

though issue aforesaid has already been settled by this Court in the case of Madan Lal v. State of Rajasthan and others, S.B. Civil Writ Petition

No. 15152/2011 and 24 cognate petitions decided on 27.4.2012. The respondents may accordingly be restrained to migrate reserve category

candidate who has taken concession or relaxation in the selection to the post of Teacher Grade-III.

8. Learned Additional Advocate General, Mr. S.N. Kumawat and learned counsel appearing for NCTE and private respondents representing

those having less than 55% marks in RTET, on the other hand, supported the action of the State Government. It is submitted that as per Section

23 of the Act of 2009, NCTE was given authority to provide minimum qualification. A notification for the aforesaid was issued on 23.8.2010. The

NCTE thereafter issued guidelines for TET on 11.2.2011 and therein while mandating requirement of 60% marks in TET, State Governments

were authorized to provide concession as per extant reservation policy. In view of the guidelines issued, Government of Rajasthan issued their

reservation policy for RTET vide order dated 23.3.2011. Therein, concession from 10% to 20% in passing marks has been given to the reserve

category. In view of the concession of marks, those reserve category candidates who passed out RTET with relaxed standard became eligible for

appointment to the post of Teacher Grade-III. Subsequent notification of NCTE dated 29.7.2011 does not provide or touch the required

qualification in RTET. Therein 5% relaxation towards reservation is for admission in B.Ed. & BSTC Course, thus it has no application, so far as

appointment to the post of Teacher Grade-III is concerned. The respondents accordingly selected eligible candidates as per their guidelines and

terms of the advertisement.

9. Coming to the second issue, it is submitted that any concession or relaxation given to the reserve category candidates before selection, permit

them to migrate in open category if they have secured higher marks. The restriction of the migration exists only, if some concession and relaxation is

given after initiation and during the course of selection. In the instant case, all relaxations and concessions are provided before initiation of the

selection, thus candidates belonging to reserve caste were rightly migrated to open category in view of higher percentage of marks, thus issue

raised by petitioners is not sustainable in the eyes of law.

10. I have considered the rival submissions made by learned counsel for parties and scanned the matter carefully.

11. Before dealing with the issues raised by the petitioners, it would be necessary to narrate that prior to the Act of 2009 rather constitutional

amendment, the qualification for the post of Teacher was to be prescribed by NCTE pursuant to the National Council for Teacher Education Act,

1993 (for short "NCTE Act, 1993") and regulations made thereunder. After the Act of 2009, the elementary education is now to be governed by

the aforesaid Act. Section 23 of the Act of 2009 provides terms and conditions of service of teachers. The aforesaid provision is relevant thus

quoted hereunder for ready reference:-

23. Qualifications for appointment and terms and conditions of service of teachers:-

(1) Any person possessing such minimum qualifications, as laid down by an academic authority, authorized by the Central Government, by

notification, shall be eligible for appointment as a teacher.

(2) Where a State does not have adequate institutions offering courses or training in teacher education, or teachers possessing minimum

qualifications as laid down under sub-section (1) are not available in sufficient numbers, the Central Government may, if it deems necessary, by

notification, relax the minimum qualifications required for appointment as a teacher, for such period, not exceeding five years, as may be specified

in that notification:

Provided that a teacher who, at the commencement of this Act, does not possess minimum qualifications as laid down under sub-section (1), shall

acquire such minimum qualifications within a period of five years.

(3) The salary and allowances payable to, and the terms and conditions of service of, teacher shall be such as may be prescribed.

12. Perusal of the provision quoted above reveals that Central Government is to authorize academic authority to lay down minimum qualification

for appointment as teacher. In view of Section 23(1) of the Act of 2009, a notification was issued by the Central Government nominating NCTE to

be an academic authority. The NCTE thereafter issued notification dated 23.8.2010 to provide minimum qualification for appointment of the

Teacher. Therein, one is required to possess qualification of TET to be conducted by the appropriate Government in accordance with guidelines

framed by NCTE. The NCTE thereafter framed guidelines on 11.2.2011 and opening para of the said guidelines is quoted hereunder for ready

reference:-

The implementation of the Right of Children to Free and, Compulsory Education (RTE) Act, 2009 requires the recruitment of a large number of

teachers across the country in a time bound manner. In spite of the enormity of the task, it is desirable to ensure that quality requirement for

recruitment of teachers are not diluted at any cost. It is therefore necessary to ensure that persons recruited as teachers possess the essential

aptitude and ability to meet the challenge of teaching; at the primary and upper primary level.

13. Perusal of para quoted above shows that guidelines was to focus essential aptitude and ability to meet the challenges of teaching at the primary

and upper primary level across the country. Para 3(i) of the said notification provides efforts to bring national standards and benchmark of teacher

quality, thus it becomes clear that efforts of NCTE is not only to have quality teachers but to keep it at national standards. Para 9 of the said

guidelines, is also relevant because both the parties have referred the aforesaid Clause, thus quoted as under:--

Qualifying marks--

9. A person who scores 60% or more in the TET exam, will be considered as TET pass. School managements (Governments, local bodies.

Government aided and unaided) --

(a) may consider giving concessions to persons belonging to SC/ST, OBC differently abled persons, etc. in accordance with their extant

reservation policy:

(b) should give weightage to the TET scores in the recruitment process; however, qualifying the TET would not confer a right on any person for

recruitment/employment as it is only one of the eligibility criteria for appointment.

14. Perusal of para quoted above reveals that qualifying marks in TET is 60% or more. Under sub-clause (a) of para 9, liberty is given to provide

concessions to the persons belonging to SC/ST, OBC and differently abled persons in accordance with their extant reservation policy. The State

Government granted relaxation in marks of TET from 10% to 20% for the reserve category candidates vide order dated 23.3.2011.

15. The first issue for my consideration is as to whether State Government can be empowered to formulate a new policy to provide concession to

the persons belonging to reserve category as per para 9(a) of the policy.

16. The minute examination of para 9(a) shows that concession can be given "in accordance with their extant reservation policy". The words "in

accordance with their extant reservation policy" mean policy already existing. The State Government, however, formulated a new policy

subsequent to guidelines to provide concession. In my opinion, guidelines issued by NCTE do not give liberty to formulate a new reservation

policy, but to give concession in accordance with extant policy thus, order dated 23.3.2011, passed by the State Government to provide

concession in RTET to reserve category is contrary to the guidelines.

17. The issue further is as to whether Section 23 of the Act of 2009 can be extended to authorize State Government to relax qualification provided

by the academic authority.

18. As per Section 23 of the Act of 2009, Central Government is given authority to nominate an academic authority to provide minimum

qualification for appointment of Teacher. The notification was issued by the Government of India nominating NCTE as an academic authority.

Once, authority was given to NCTE, question comes as to whether such authority can further delegate powers on the State Government for

providing relaxation in one of the required qualification for the post of Teacher Grade-III. As per notification issued by NCTE dated 23.8.2010,

one is required to pass TET. Subsequently, guidelines for TET was issued on 11.2.2011. Therein, minimum passing marks for TET is 60%. The

NCTE was not having competence to authorize or delegate powers on the State Government to provide concession therein. If further delegation is

allowed even for the purpose of concession as interpreted by the State Government, then Section 23 of the Act of 2009 is to be re-read so as to

authorize State Government to dilute the qualification. To pass TET is one of the qualification provided by the NCTE under their notification dated

23.8.2010. Once, TET is required to be qualified as per norms provided by NCTE. It is NCTE alone who is having competence to provide

required marks in the TET examination. It was done by them by issuing their guidelines on 11.2.2011. Therein 60% marks is required for TET A

further authority to others to dilute required marks for reserve category is contrary to the limited authority given to NCTE. The NCTE was careful

while issuing guidelines formulating para 9 (a). It provides concession in qualifying marks to reserve category in accordance to extant policy. It

seems to be to maintain existing reservation policy of the State and not to authorize State Government to formulate a new policy. The guidelines of

NCTE cannot be given interpretation, which goes contrary to Section 23 of the Act of 2009. If at all some concession to the reserve category is to

be given, NCTE alone can do it and subsequently done by it. It is necessary to indicate that on 29.7.2011 NCTE issued another notification to

substitute certain provisions for eligibility for appointment of Teachers. Therein, Clause (2) has been added which reads as under:-

(ii) Reservation Policy:

Relaxation up to 5% in the qualifying marks shall be allowed to the candidates belonging to reserved categories, such as SC/ST/OBC/PH.

19. Perusal of para quoted above, shows relaxation of 5% in qualifying marks for reserve categories. There cannot be overlapping relaxation.

According to learned counsel for NCTE, such concessions are provided for admissions in B.Ed, and BSTC course.

20. I fail to understand aforesaid argument because notification issued by the NCTE on 29.7.2011 is in reference to Section 23 of the Act of 2009

and said provision does not authorise NCTE to provide minimum qualification for admission in B.Ed, and BSTC course, but authorized to provide

minimum qualification for appointment of teachers. The argument made by NCTE is thus without understanding and taking proper interpretation of

the Act of 2009 and their jurisdiction. In view of the discussion made above, the State Government was not authorized to issue new reservation

policy by its order dated 23.3.2011 more so when no such authority exists u/s 23 of the Act of 2009.

21. What is the effect of notification dated 29.7.2011 issued by the NCTE to provide 5% concession in qualifying marks.

The relaxation of 5% in qualifying marks is allowed by the NCTE vide its notification dated 29.7.2011 for appointment to the post of Teacher

Grade-III. The obvious effect of 5% concession to reserve category would be in the qualification provided to become eligible for appointment on

the post of Teacher. To clarify, if one is required to possess 50% marks in graduation, for reserve category, it would be 45% and same way for

TET, if one is required to possess 60% marks for reserve category, it would be 55%. With the notification dated 29.7.2011, confusion came to an

end and otherwise administrative order of the State Government cannot run contrary to the statutory notification of NCTE, which alone is having

authority to provide qualification for the post of Teacher. An administrative order cannot nullify gazette notification issued by the competent

academic authority i.e., NCTE and even guidelines provided of NCTE for TET are now to be governed and be regulated by their own notification

dated 29.7.2011. The benefit of 5% relaxation exists in favour of reserve category in qualifying marks. The notification dated 29.7.2011 applies

universally throughout India thus, irrespective of State and their extant policy, reserve category would be entitled for 5% relaxation in marks of the

qualification required for the post of Teacher Grade-III. It seems that for that reason alone while issuing advertisement in para 7(3), Government

had given benefit of 5% relaxation to reserve caste category in all required qualifications. Para 7(3) of the advertisement is quoted hereunder for

ready reference:-

(Vernacular matter omitted.... Ed.)

22. Perusal of the advertisement reveals 5% relaxation in favour of reserve category in qualification mentioned at paras 7(1) and 7(2) of the

advertisement. Para 7(1) has two parts namely (a) and (b) and same way para 7(2) has two parts namely (a) and (b). The concession of 5% is

allowed on all the qualifications provided in those paras which include even qualification of TET. If argument of the State Government is accepted

and para 7(3) is applied to the present selection, then it would mean that for RTET, required qualifying marks for different reserve category is with

the concession of 10%, 15% & 20% respectively and apart from that, they would be further entitled to 5% relaxation of marks as per para 7(3) of

the advertisement because paras 7(1)(b) and 7(2)(b) require qualification of RTET If para 7(3) of the advertisement is applied, then further

concession of 5% has to be given on all the qualifications provided in para 7(1) and para 7(2) of the advertisement thereby State Government is

trying to dilute the standards required across the nation and which was the focus of the NCTE while issuing the guidelines.

23. In view of the above also, I am of the firm opinion that intention of para 7(3) of the advertisement is to provide 5% relaxation in qualifying

marks of RTET which is 60%. If aforesaid interpretation is taken note of, then there would be no conflict in the guidelines issued by NCTE and

their notification dated 29.7.2011. Accordingly, no candidate of any reserve category would be treated as eligible if failed to secure 55% marks in

RTET for his appointment to the post of Teacher Grade-III. Aforesaid standards have been maintained by all the State Governments and

documents to that effect have been annexed with the writ petitions. The issue aforesaid is supported by the judgment of the Punjab and Haryana

High Court in the case of Shabir Khan (supra). Relevant paras 1 to 9 are quoted hereunder:-

1. This order disposes of the above noted two connected writ petitions. The facts are being taken from CWP No. 21387 of 2011.

2. The petitioners before this Court are members of the Other Backward Classes (OBC). They appeared for the Punjab State Teacher Eligibility

Test (PSTET) - 2011. The written examination was held on 3.7.2011. Petitioner No. 1 secured 88 marks while petitioner No. 2 secured 84

marks. Both were declared fail in TET Paper-II in the PSTET exam. The petitioners plead that they have been wrongly declared fail. They ought

to have been given relaxation of 5% as OBC candidates. If they qualify the examination they have a right of consideration for appointment as

Teachers to impart instructions to students from Class I to VIII in a school. The issue involved owes its genesis to the promulgation of the Right of

Children to Free and Compulsory Education Act, 2009 (for short RTE) enacted by the Government of India. Section 23 of the Act lays down

qualifications for appointment and terms & conditions of service of Teachers. Section 23 itself does not lay down the minimum qualifications for

being eligible for appointment as a Teacher but refers to such minimum qualifications as are laid down by an "Academic Authority" authorized by

the Central Government by a notification in this behalf.

3. The Central Government has issued a notification on 31.3.2010 authorizing the National Council for Teacher Education (NCTE) as the

"Academic Authority" to lay down the minimum qualifications with reference to Section 23 of the Act. In turn the NCTE has issued two

notifications dated 23.8.2010 and 29.7.2011 laying down minimum qualifications of a person to be become eligible for appointment as a teacher

for Classes I to VIII. A candidate in order to become eligible for appointment as a teacher in a school is required in terms of these notifications to

pass the Teacher Eligibility Test (TET) to be conducted by the "appropriate Government" in accordance with the guidelines framed by the NCTE

for the purpose. What is material for the present case is that the NCTE in its notification has provided relaxation of 5% in the qualifying marks for

candidates belonging to reserved categories such as SC/ST/OBC/PH. This reservation policy is incorporated in the notification dated 29.7.2011

(P-3). The respondent-State of Punjab is the designated "appropriate Government" with respect to its State charged with responsibility of

conducting PSTET -2011. The holding of the test was delegated and entrusted by the Department of School Education, Government of Punjab to

the State Council of Education, Research and Training (for short "SCERT"), Punjab, Chandigarh-respondent No. 4. It is the SCERT, Punjab that

published the guidelines for the PSTET (P-5). The passing of the PSTET confers no right of recruitment or employment. It is only one of the

eligibility criteria for consideration for appointment. The PSTET guidelines require a score of 60% or more in the examination to be considered as

"pass". This score would give a right to a candidate to compete for appointment in schools run by Government, Local Bodies and aided and

unaided institutions throughout the land. The guidelines, however, lay down that, the States ""(a) May consider giving concessions to persons

belonging to SC/ST. OBC. differently abled persons etc. in accordance with their extant reservation policy:"". This condition in the guidelines brings

out the dichotomy between the decision of the "Academic Authority"- NCTE (P-3) and the guidelines of the "appropriate Government" ("Punjab

Government in the present case) (P-5). While NCTE grants relaxation up to 5% in the qualifying marks, the guidelines stultify it by saying that State

Government may consider it in accordance with its extant reservation policy. NCTE uses the word ""shall"" while the guidelines use the word ""may"".

It is broadly this issue, which has to be resolved in the present case. In case, the relaxation is given to the petitioners of 5% they would have to be

declared pass in the PSTET.

4. Before this Court proceeds further in its attempt to resolve the issue a few crucial dates would be absolutely necessary to be kept in view. The

PSTET examination process started on 11.2.2011. The matter of grant of relaxation up to 5% in the qualifying marks for "SCs/STs etc" in

accordance with the extant policy of the State Governments/UTs and other school managements was considered by the NCTE in its meeting held

on 16.3.2011. wherein it was decided to grant the relaxation up to 5%.

5. The decision taken is contained in NCTE letter dated 1.4.2011. It is recorded therein that NCTE had received representations from State

Governments and others stakeholders i.e. in respect of "SCs/STs etc" that relaxation up to 5% marks should be allowed, since such relaxation is

permissible by the NCTE for admission in various Teacher Education Courses. To continue with the narration of important dates, the examination

was conducted on 3.7. 2011. Thereafter, notification dated 29.7.2011 (P-3) was issued by the NCTE in exercise of powers conferred by Section

23(1) of the 2009 Act etc. laying down the reservation policy in para (III)(2)(i). which reads as follows:

Relaxation up to 5% in the qualifying marks shall be allowed to the candidates belonging to reserve categories, such as SC/ST/OBC/PH.

6. The notification dated 29.7.2011 substitutes para 3 of the "Principal Notification dated 23.8.2010". The principal notification dated 28.3.2010

has been placed on record as Annexure P-2. It speaks of no relaxation or reservation.

7. On notice being issued, the respondents have put in appearance and replies on behalf of respondent Nos. 1, 3 & 4 have been filed by way of

counter-affidavit of Deputy Director, O/o Director State Council of Educational Research and Training, Punjab, Chandigarh. The respondents

have relied on their prospectus/guidelines and on the executive instructions dated 6/9.10.1964 (R-1) of the Punjab Government to contend that

relaxation of 5% marks in PSTET has been given only to SC candidates by the Government in terms of instructions (R-1) and since the petitioners

are OBCs they have no right of relaxation. The respondents urge that the notification Annexure P-3 dated 29.7.2011 which is relied upon by the

petitioners is subsequent to the date of PSTET held on 3.7.2011 and thus the notification cannot come to their aid. It is further stated that Ms.

Anita, Roll No. 20438 belongs to SC category, whereas the petitioner belongs to OBC category to which The benefit has not been extended by

the Government. Dismissal of the writ petition has, therefore, been prayed for.

8. I have heard the learned counsel for the parties at length and have perused the record available on the file with their able assistance.

9. Mr. Rahul Sharma, learned counsel for the petitioner submits that the final arbiter under the RTE Act, 2009 for minimum qualifications has been

delegated by the Central Government to the NCTE to lay down minimum qualifications of eligibility for appointment as a Teacher. He submits that

the minimum qualifications for eligibility would include relaxations, concessions and reservations. The NCTE for the first time decided on 5%

relaxation to ""SCs/STs etc."" on 16.3.2011. Therefore, the decision to grant relaxation was taken before the first advertisement was published for

holding the test. That advertisement was issued on 26.4.2011. Therefore, the Rules of the game had been laid down before the game started. The

examination was conducted on 3.7.2011. The Punjab Government was appointed as an appropriate Government only to conduct the Test in

accordance with the guidelines framed by the NCTE as evidenced by the letter of NCTE of 11.2.2011 (Annexure P-6). The letter dated

11.2.2011 (P-6) was issued to all State Governments enclosing guidelines for conducting TET. The guidelines appended to the 11.2.2011 letter of

NCTE laid down qualifying marks as follow:

Qualifying marks

9. A person who scores 60% or more in the TET exam, will be considered as TET pass. School managements (Government, local bodies,

Government aided and unaided) --

(a) may consider giving concessions to persons belonging to SC/ST, OBC, differently abled persons, etc., in accordance with their extant

reservation policy;

(b) should give weightage to the TET scores in the recruitment process; however, qualifying the TET would not confer a right on any person for

recruitment/employment as it is only one of the eligibility criteria for appointment.

10. However, subsequently on 16.3.2011, the council changed the rule when it decided to give relaxation of 5% to "SCs/STs" etc.

On 29.7.2011 the second notification was issued by NCTE substituting the reservation policy to be read into the principal notification. By

substitution, the 29.7.2011 notification would relate back to the principal notification dated 23.8.2010, which required the TET to be conducted

by the appropriate Government in accordance with the guidelines framed by the NCTE for the purpose and not the State Government guidelines,

which apparently appears to be the mistake the State Government has committed. In any case, I find it an acceptable argument that the 29.7.2011

notification should at least relate back to 16.3.2011, well before the process started on 1.4.2011 when letter Annexure P-4 was issued by NCTE

laying down fresh norms for teacher qualifications. Punjab Government appear to have picked up the un-amended/old guidelines (page 32 of the

paper book) and unwittingly or blindly planted them in the prospectus issued by the Director SCERT, Punjab, Chandigarh (at page 23 of the

paper book). When confronted with this situation, Mr. R.S. Chauhan, learned D.A.G., Punjab could not give any plausible answer, explanation or

reason to accept the stand of the State presented in its written statement based on the Punjab Government circular dated 6/7.10.1964 (R-1) that

such relaxation would not be available to OBCs. I find no justifiable ground to make any departure from the substitution notification dated

29.7.2011, which contains no riders so far as OBCs are concerned. I would agree with Mr. Sharma, learned counsel for the petitioner that the

combination ""SCs/STs etc."" would include OBCs as being part of ""etc."

24. Perusal of the paras quoted above reveals that benefit of relaxation of 5% is allowed in the qualifying marks of TET. The controversy was

decided by Punjab & Haryana High Court after taking into consideration the notifications issued by NCTE on 23.8.2010 and 29.7.2011 and the

guidelines dated 11.2.2011. In the State of Punjab only 5% relaxation was allowed to reserve category excluding OBC candidates, however, vide

the judgment referred to above, benefit of 5% relaxation in the marks in TET is allowed to the reserve category, thus notification dated 29.7.2011

is made applicable for grant of relaxation in the marks of TET. The second issue formulated is accordingly decided, holding that notification dated

29.7.2011 limits the concession to reserve category candidates to the extent of 5% only and the order of State Government cannot be allowed to

stand contrary to the statutory notifications issued by the NCTE.

25. It has been noticed by this Court that after notification of NCTE dated 23.8.2010, the guidelines for TET was issued on 11.2.2011. The State

Government thereupon issued the order dated 23.3.2011 to provide relaxation in the marks of RTET. It is relaxation of marks between 10-20%

for different reserve categories. The TET was conducted and result thereupon was declared as per notification of NCTE and the order of State

Government dated 23.3.2011. The NCTE thereupon issued notification on 29.7.2011 granting relaxation in qualifying marks in qualification to the

extent of 5% to the reserve category. The State Government issued advertisement with a condition that reserve category candidates would be

eligible for relaxation of 5% marks in qualification required for the post. As per notification of NCTE dated 23.8.2010 and the advertisement, one

is required to pass TET and this is even provided in the advertisement at Clause 7(1)(b) and Clause 7(2)(b). Now with the notification dated

29.7.2011, benefit of relaxation by 5% marks in qualification is allowed by NCTE and if it is applied to the present case then reserve category

candidates would be entitled for two concessions for the qualification of RTET. Firstly, pursuant to the order dated 23.3.2011 issued by the State

Government providing relaxation of 10% to 20% marks in RTET and now, by virtue of notification dated 29.7.2011 issued by NCTE, candidates

would be entitled to concession of 5% marks in qualification also, therefore, now there exists double concession to reserve category in passing

marks of TET, which is not permissible. In fact, concession or relaxation for same qualification can be given once only. If case of State of Punjab is

looked into, therein issue was dealt with by Hon'ble Punjab & Haryana High Court holding that 5% relaxation in qualifying marks of TET would

be permissible to all reserve categories pursuant to notification dated 29.7.2011. Thereby it becomes clear that concession of 5% marks given by

NCTE vide its notification dated 29.7.2011 applies even for the qualification of TET. Once notification was issued by the NCTE on 29.7.2011,

State Government should not have given effect to its order dated 23.3.2011, however, the State Government failed to consider aforesaid aspect

and now administrative order dated 23.3.2011 is running counter to statutory notification of NCTE dated 29.7.2011. In fact, administrative order

cannot be allowed to stand contrary to statutory notification.

26. The respondent State Government has failed to consider aforesaid aspect and notification of NCTE dated 29.7.2011 has been construed to

mean relaxation of 5% marks in other qualification like qualification of B.S.T.C., B.Ed., Senior Secondary or Graduation etc. as the case may be

for appointment at level-I & II for the post of Teacher Grade-III though notification dated 29.7.2011 provides relaxation of 5% marks to reserve

category for all the qualifications. In the aforesaid background, order issued by the State Government on 23.3.2011 cannot be allowed to stand

contrary to statutory notification of NCTE dated 29.7.2011, hence, it is set aside.

27. The issue to maintain qualify education pursuant to the Act of 2009 was considered by the Division Bench of this Court in the case of Sushil

Sompura and others v. State (Education) and others in D.B. Civil Writ Petition No. 3964/2011 along with 42 cognate petitions decided vide

judgment dated 20.05.2011. The issue therein was as to whether TET should be one of the required qualification. The argument was raised in

reference to rules applicable in the State of Rajasthan, which were not amended to make it as per NCTE's notification dated 23.8.2010. The

Division Bench made Following observations in its judgment referred to above:--

The legislation is anchored in the belief that the values of equality, social justice and democracy and the creation of a just and humane society can

be achieved only through provision of inclusive elementary education to all. The implementation of the Act of 2009 requires recruitment of large

number of teachers and it is desirable to ensure that qualify, requirement for recruitment of teachers are not diluted at any cost and thus, it is

necessary to ensure that persons recruited as teachers possess the essential aptitude and ability to meet the challenges of teaching at the primary

and upper primary level. Considering the provisions of the Act of 2009, aims and objects of the Act of 2009 and the purpose for which minimum

qualifications have been prescribed vide notification dated 23rd August, 2010, we find that prescription of minimum qualifications is with the

objective to ensure providing of quality education at primary and upper primary level. In the present scenario, there is high competition and

deterioration in the standard of education, washroom, growth of institutions without requisite infrastructure and keeping this aspect in mind, it has

been considered appropriate to ensure that the children, who are future of the Nation, are efficiently taught by the qualified incumbents and for that

if TET was prescribed, such prescription cannot be said to be illegal or arbitrary or impermissible at all, rather it would bring national standards and

benchmark of teacher quality in the recruitment process, it would induce teacher education institutions and students from these institutions to further

improve, their performance standards and it would convey positive message to all stakeholders that the Government lays special emphasis on

teacher qualify and ultimately, by recruiting highly qualified teachers, children would be benefited.

28. Perusal of para quoted above shows that quality required for appointment of teacher is not to be diluted at any cost. If observations made by

Division Bench are considered, then State Government's order dated 23.3.2011 providing relaxation of marks from 10% to 20% to the reserve

category in TET examination is nothing but to dilute the standards require for teachers" appointment. The State Government is otherwise not having

authority to dilute the standards of minimum qualification for which exclusive authority remains with NCTE and once NCTE has issued notification

dated 23.8.2010 to provide minimum qualification followed by notification on 29.7.2011 to provide relaxation in marks to the qualification for the

post of Teacher, any administrative order contrary to the statutory notification cannot sustain. This is more so when Section 23 of the Act of 2009

empowers only academic authority to provide minimum qualification and not the State Government which is not the academic authority herein. The

State Government has no authority to dilute or prescribe lower standards of marks in the minimum qualification otherwise provided by NCTE. The

guidelines issued by the NCTE has to be given proper interpretation so that it may not flout the mandate of Section 23 of the Act of 2009 and

subsequent notification issued to provide minimum qualification and relaxation of 5% marks therein. The guidelines are required to be given

interpretation so as to make it in consonance with the provisions referred to above.

29. In view of the discussion made above, order of the State Government dated 23.3.2011 cannot be allowed to stand and the issue aforesaid is

answered in favour of the petitioners.

30. So far as the other issue is concerned, a detail judgment exists in the case of Madan Lal (supra) and therein issue aforesaid has been dealt

minutely bifurcating the stages of selection. Therein, it has been held that prior to selection test, any concession or relaxation granted will allow a

candidate to migrate to open category if he has secured higher marks. If any concession or relaxation was given during the course of selection test,

then such a candidate would not be allowed to migrate in the open category.

31. In the instant case, if concession or relaxation in age and fee are given to the candidate to become eligible for selection to the post of Teacher

Grade-III, then reserve caste candidate would be eligible to migrate to open category if he has secured higher marks. However, a candidate would

not be allowed to migrate, if he has taken any relaxation or concession during selection. For illustration, if in the selection test, a candidate is

allowed concession in qualifying marks or granted any relaxation, then he would not be entitled to migrate to open category but if a candidate is

given concession or relaxation before selection test, then he would be eligible to migrate to open category.

32. In my considered opinion, the issue aforesaid should be decided on the same parameter as laid down in the case of Madan Lai v. State of

Rajasthan, S.B. Civil Writ Petition No. 15152/2011 decided on 27.4.2012.

33. With the aforesaid, all these writ petitions are partly allowed. This disposes of stay applications and all other applications also.