Vikas Sankhala & Ors Etc vs Vikas Kumar Agarwal & Ors Etc on 18 October, 2016

Equivalent citations: AIR 2016 SUPREME COURT 5265, AIR 2017 SC (CIVIL) 321

Author: A.K. Sikri

Bench: R.K. Agrawal, A.K. Sikri

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 3545 – 3549 OF 2016

VIKAS SANKHALA & ORS. ETC.	.....APPELLANT(S)	
VERSUS		
VIKAS KUMAR AGARWAL & ORS. ETC.	.....RESPONDENT(S)	

W I T H

CIVIL APPEAL NOS. 3550-3555 OF 2016

CIVIL APPEAL NOS. 3556-3559 OF 2016

CIVIL APPEAL NO. 3560 OF 2016

CIVIL APPEAL NO. 3561 OF 2016

CIVIL APPEAL NO. 3562 OF 2016

CIVIL APPEAL NOS. 3563-3566 OF 2016

CIVIL APPEAL NO. 3567 OF 2016

CIVIL APPEAL NO. 3568 OF 2016

CIVIL APPEAL NO. 3569 OF 2016

CIVIL APPEAL NO. 3570 OF 2016

J U D G M E N T

A.K. SIKRI, J.

The Statement of Objects and Reasons of the Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as the 'RTE Act') recognises one of the most profound underlying principle contained in the Constitution, viz. the crucial role of universal elementary education for strengthening the social fabric of democracy through provision of equal opportunities to all has been accepted, since inception of our Republic. Other, and equally significant principle that it recognises, is that, in order to ensure equal opportunities to all citizens, it is necessary that elementary education is provided to one and all. Keeping in view this spirit, obligation was imposed upon the State, as per Article 41, read with Article 45, of the Constitution to make effective provisions for securing the right to education, among other. Thus, it is one of the Directive Principles of State Policy enumerated in the Constitution that the State shall provide free and compulsory education to all children. In order to make it a reality, this Court in the case of Unni Krishnan, J.P. & Ors. v. State of Andhra Pradesh & Ors.[1] stretched the limits of Article 45 by reading right to free education as a fundamental right of children upto the age of 14 years so as to enable the children up to the age of 14 years to receive the education as a matter of right. Law Commission also supported it by making recommendation[2] to the Parliament to make suitable amendment in the Constitution. Realising its constitutional commitment, the Parliament obliged, and Article 21-A was added vide the Constitution (Eighty Sixth Amendment) Act, 2002 in the following manner:

> Article 21-A. Right to education. – The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine." Simultaneously, Article 45 of the Constitution was also substituted with the following Article:
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> "Article 45. Provision for early childhood care and education to children below the age of six years. – The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years." Notwithstanding the aforesaid provisions in the Constitution and significant spatial and numerical expansion of elementary schools in the country, goal of universal education continued to allude us. It was found that number of children, particularly children from disadvantaged groups and weaker sections, who drop out of school before completing elementary education, remain very large. It was also noticed that the quality of learning achievement is not always entirely satisfactory even in the case of children who complete elementary education. Having regard to the aforesaid harsh realities, the Parliament enacted the RTE Act with following objects in mind:
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> "(a) that every child has a right to be provided full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards;
>
> (b) 'compulsory education' casts an obligation on the appropriate Government to provide and ensure admission, attendance and completion of elementary education;
>
> (c) 'free education' means that no child, other than a child who has been admitted by his or her parents to a school which is not supported by the appropriate Government,

shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education;

(d) the duties and responsibilities of the appropriate Government, local authorities, parents, schools and teachers in providing free and compulsory education; and

(e) a system for protection of the right of children and a decentralized grievance redressal mechanism." It hardly needs to be emphasized that for turning the provision of every child to have free and compulsory education into reality, not only sufficient number of schools are required with all necessary facilities and infrastructure, adequate and qualified teaching staff shall also be needed to fulfill this noble purpose. It is for this reason that apart from other provisions in the RTE Act, provisions like Sections 23 to 27 are inserted in the said Act to cater this requirement.

For the purpose of present appeals, it is not necessary to refer to each of these provisions. As we are concerned with the educational and other qualifications that are needed for appointment of the teaching staff, the provision directly touching upon this aspect is Section 23 of the RTE Act, which reads as under:

"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, authorised 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, teachers shall be such as may be prescribed." Since minimum qualifications are to be laid down by an academic authority authorised by the Central Government by notification, such an authority which is so authorised by the Central Government is the National Council for Teacher Education (for short, 'NCTE'). Thus, NCTE is competent to lay down the minimum qualifications which a person needs to possess to make him eligible for appointment as a teacher.

NCTE fulfilled this obligation in the form of Notification dated August 23, 2010, published on August 25, 2010 in the Gazette of India, whereunder minimum qualifications for appointment as teachers were laid down. Apart from other educational qualifications prescribed therein, the said Notification also mandates passing of Teacher Eligibility Test (for short, 'TET') and reads as follows:

> "Pass in the Teacher Eligibility Test (TET), TO BE CONDUCTED BY THE APPROPRIATE Government in accordance with the Guidelines framed by the NCTE for the purpose." As is clear from the above, such a TET is to be conducted by the appropriate State Government, i.e. respective State Governments, though in accordance with the guidelines framed by NCTE for this purpose. It may also be mentioned at this stage that passing of the said TET is a mandatory condition without which a candidate is not eligible to participate in the recruitment process for appointment as a teacher. NCTE also formulated the guidelines, which were forwarded by it to the Secretaries/ Commissioners of Education of State Government/Union Territories vide its letter dated February 11, 2011. In these guidelines, it was specified that the minimum pass percentage of TET is 60. At the same time, it enabled the State Governments to give concessions to persons belonging to SC/ST, OBC, differently abled persons etc. 'in accordance with their extant reservation policy'. Para 9 of these guidelines stipulating the aforesaid conditions reads as under:
>
> "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." In para 9, the extent of percentage to which the relaxation could be granted in the qualifying marks for TET was not stipulated and it was mentioned that the State Governments could give such concessions in accordance with their extant reservation policy.

Para 3 mentions about the training which was to be undergone by a person. It would be apposite to reproduce this para as it has some bearing for the purposes of the instant appeals. The same is as under:

> "3. Training to be undergone. – A person –
>
> (a) with B.A./B.Sc. with at least 50% marks and B.Ed. qualification shall also be eligible for appointment for Class I to V up to 1st January, 2012, provided he undergoes, after appointment, an NCTE recognised 6 month special programme in

Elementary Education.

(b) with D.Ed. (Special Education) or B.Ed. (Special Education) qualification shall undergo, after appointment, an NCTE recognised 6 month special programme in Elementary Education." Subsequently, vide Notification dated July 29, 2011, the aforesaid letter dated February 11, 2011 was amended. It, inter alia, prescribed that relaxation up to 5% in the qualifying marks to the candidates belonging to reserved categories could be accorded.

New para 3 of the Notification dated February 11, 2011, substituted in place of original para 3, is to the following effect:

"III. For para 3 of the Principal Notification the following shall be substituted, namely:

(i) Training to be undergone. – A person –

(a) with Graduation with at least 50% marks and B.Ed. qualification with at least 45% marks and 1 year Bachelor in Education (B.Ed.), in accordance with the NCTE (Recognition Norms and Procedure) Regulations issued from time to time in this regard, shall also be eligible for appointment to Class I to V up to 1st January, 2012, provided he/she undergoes, after appointment as NCTE recognized 6 month Special Programme in Elementary Education;

(b) With D.Ed. (Special Education) or B.Ed. (Special Education) qualification shall undergo, after appointment an NCTE recognised 6 month Special Programme in Elementary Education.

(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." This amendment has given rise to another incidental but connected issue, viz. whether 5% relaxation relates to the pass marks which are to be attained in TET exam? We shall advert to this and other questions, falling for our determination, at the appropriate stage. Since we are now stating the events leading to the dispute, let us complete this narration of facts, here.

After the issuance of the Notification dated February 11, 2011 by the NCTE, the State Government herein, i.e. the State of Rajasthan, issued the letter dated March 23, 2011 to the concerned authorities conveying its decision to grant relaxation in minimum pass marks in the TET to reserved category candidates in the following manner:

> "(a) 10% to persons belonging to SC, ST, OBC, SBC and all women belonging to the general category.
>
> (b) 15% to all women belonging to SC, ST, OBC, SBC and widowed and divorced women.
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> (c) 20% to persons covered under the definition of "persons with disability" under clause (t) of Section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995." As per the aforesaid communication dated March 23, 2011 of the State Government, candidates belonging to SC/ST, OBC, SBC and women belonging to General category were to be given 10% relaxation in pass marks in TET.

Thus, those belonging to these categories who secured 50% marks were treated as having qualified TET. They were allowed to appear in the selection process which was undertaken thereafter some time in June 2012 and results thereof were declared in August 2012. Many such persons were found eligible and selected at different districts in the State of Rajasthan. They were given appointment orders and were also issued joining orders.

At this stage, many candidates belonging to the General category filed writ petitions in the High Court of Rajasthan challenging their selection on the ground that minimum percentage for passing TET was 60% and, therefore, all those candidates belonging to the reserved categories who secured less than 60% in TET could not be declared as having passed TET and were, therefore, ineligible to participate in the selection process. Ultimately, the learned Single Judge of the High Court decided all these writ petitions vide common judgment dated October 06, 2012 thereby partly allowing the said writ petitions and holding that the order dated March 23, 2011 of the State Government could not be allowed to stand as the relaxation/concession in qualifying marks was not legal or valid. It was also held that as per para 9 of the guidelines contained in letter dated February 11, 2011 issued by the NCTE, concession could be given to persons belonging to SC/ST, OBC, differently abled persons, etc. only 'in accordance with their extant reservation policy' and insofar as the State of Rajasthan is concerned, it could not show any "extant" reservation policy warranting this concession. The State Government challenged the said decision by filing appeals before the Division Bench. Likewise, persons belonging to reserved categories who had been selected and their selection set aside by the learned Single Judge, also preferred appeals. In all, 29 appeals were filed which have been decided by a common judgment dated July 02, 2013 by the Division Bench of the High Court. Though the Division Bench did not agree with some of the reasons given by the learned Single Judge, it dismissed all the appeals by given its own reasons. It is in this backdrop that the State Government as well as the selected candidates belonging to the reserved category have felt aggrieved by the impugned decision making the same subject matter of the present appeals.

Some developments which have taken place after the filing of various special leave petitions may also be noted at this stage.

Vide order dated July 26, 2013, this Court's order in SLP(C) No. 23508 of 2013 stayed the operation of the impugned judgment for three months. In the meanwhile, State of Rajasthan started fresh process for recruitment of teachers by advertisement dated September 04, 2013 (subject to decision of this Court). District-wise written examination was held for recruitment of the year 2013 for total 20,000 posts. The reserved category candidates who had passed TET in 2011 with relaxations as per State policy dated March 23, 2011, applied in the recruitment of 2013. During the pendency of the matter before this Court, appointments were made by the respective local bodies with respect to recruitment of 2012 giving relaxation in accordance with the State policy dated March 23, 2011 and also allowing migration as per policy dated May 11, 2011 subject to decision of this Court.

The participants of reserved category candidates in recruitment process of 2012 and 2013 preferred SLP(C) No. 31109 of 2014 wherein this Court issued notice and allowed the appellant Nos. 8 to 13 belonging to 2013 recruitment, to file SLP. In March, 2015, result declared with regard to recruitment of 2013 giving relaxation in accordance with State policy dated March 23, 2011. However, appointments are not given to reserved category candidates availing relaxation although seats have been kept vacant. Moreover, migration to general seats was not allowed. The appellant in SLP(C) No. 31109 of 2014 belonging to 2013 recruitment moved I.A. No. 14 of 2015 seeking direction to the State to prepare merit list of 2013 recruitment in the same manner as done in 2012 recruitment giving benefit of relaxation and migration. In fact, after 2011, TET was again conducted by the State in 2012. The reserved category candidates who had passed TET with relaxations in 2011 did not appear in 2012 TET since they were declared pass in 2011 TET itself otherwise they would have availed the opportunity to improve their TET scores by appearing in TET in 2012.

We may point out at the outset that insofar as issue of concession/relaxation in TET is concerned, it has three facets, viz:

> (i) whether relaxation in passing marks for TET was validly given by the State Government in its letter dated March 23, 2011 and all such candidates belonging to the reserved categories can be treated as having passed TET on obtaining marks as per relaxed standards?
>
> (ii) whether no relaxation of any nature could be given by the State Government and, therefore, it was incumbent upon the persons belonging to reserved categories as well to secure 60% marks in TET to treat them as qualifying the said TET?
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> OR
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> (ii) relaxation to the extent of 5% was permissible, as provided by NCTE vide its amendment Notification dated July 29, 2011 and, therefore, those who secure 55% or above could be treated as successful in TET?

Insofar as General category candidates are concerned, who were the writ petitioners in the High Court, they maintained that minimum qualifying marks were 60% in the absence of any extant reservation policy granting such concession. According to them, the State Government could not

produce any such policy before the High Court and even before us and it was accepted that there was no such policy.

Insofar as candidates belonging to the reserved categories are concerned, they are divided into two groups. Many of these candidates got 55% and above in TET. They argued that as far as concession given by the State Government as per its decision dated March 23, 2011 is concerned, the same is not warranted and relaxation up to 5% only could be given in view of the amendment Notification dated July 29, 2011. On this premise, they want to oust all those candidates who have secured less than 55% marks in TET with the plea that reserved category candidates belonging to their group (those who secured 55% or more marks in TET) be treated as eligible and posts meant for reserved categories be filled up accordingly. It may be mentioned that many candidates in their group are below in merit list drawn after the selection than those reserved category candidates who secured less than 55% marks in TET and, therefore, are not selected. If the other group is excluded from the selection as ineligible, candidates from this group may succeed in getting the berth. So their endeavour is to oust such other group with marks lesser than 55% in TET so that they are able to get in. On the other hand, those candidates from reserved categories who have secured less than 55% marks in TET but are found eligible in terms of relaxation give vide the State Government's decision dated March 23, 2011 and have emerged successful in the selection have taken the position that the said relaxation given by the State Government is valid and legal.

We may also pointed out at this stage itself that the State Government has stood by its decision dated March 23, 2011.

There is yet another issue which was raised in the High Court by the writ petitioners (candidates belonging to general category) and has been decided by the High Court in their favour. As there is challenge to the findings on that issue as well in these appeals, we would like to spell out the said issue with necessary details.

It so happened that many candidates who belonged to reserved category got higher marks than the last candidates from the general category who was selected for the appointment in the said recruitment process. In terms of its various circulars, which we shall refer to at the appropriate stage, such reserved category candidates who emerged more meritorious than the general category candidates were allowed to migrate in general category. Effect thereof was that these candidates though belonging to reserved category occupied the post meant for general category. According to the writ petitioners (respondents herein), it was impermissible as these reserved category candidates got selected after availing certain concessions and, therefore, there was no reason to allow them to shift to general category. The High Court has accepted this plea treating the relaxation in pass marks in TET as concession availed by the reserved category candidates in the selection process.

Before we advert to the detailed submissions made by the respective categories of the parties, it would be appropriate to discuss the manner in which the Division Bench of the High Court has rendered the impugned decision.

IMPUGNED JUDGMENT After taking note of the respective contentions of different parties appearing before it, the High Court pointed out that there were two peripheral issues which needed a decision before adverting to the central issue about the legality of the concession granted by the State Government. The selected candidates had challenged the maintainability of writ petitions on twin grounds, namely, non-impleadment of necessary parties and estoppel. After discussing these preliminary issues, the Court brushed aside these contentions of the non-writ petitioners. It is not necessary to dwell into the same as these contentions were not repeated before us.

While taking up the primary issue involved, the High Court referred to the Statement of Objects and Reasons contained in the RTE Act and pointed out that the avowed objective for enacting the said Act is to guarantee full time elementary education of satisfactory and equitable quality to every child. It remarked that the statute is edificed on 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 a provision of inclusive elementary education to all. Free and compulsory education of satisfactory quality thus, is the salubrious mission of this enactment. Thereafter, the High Court referred to Section 23 of the RTE Act and further pointed out that the NCTE is the academic authority, as envisaged in Section 23(1) of the RTE Act, statutorily empowered to stipulate the minimum qualifications for appointment of a teacher. Further, power to relax such minimum qualifications has been reserved with the Central Government in terms of Section 23(2) of the RTE Act. It, then, referred to the notification dated August 23, 2010 issued by the NCTE under Section 23(1) of the RTE Act laying down minimum qualifications for a person to be eligible for appointment as a teacher in Class I to Class VIII in a School (which have already been taken note of) followed by another letter dated February 11, 2011 of the NCTE to the Secretaries and Commissioners of the State Governments/ UTs and thereby circulating its guidelines conducting the TET by appropriate Government as required by its notification dated August 23, 2010. The High Court pointed out that reading of this letter dated February 11, 2011 would reveal the abiding predication to ensure against dilution of quality in such recruitment, and instead, to secure induction of teachers possessed of essential aptitude and ability to meet the challenges of teaching at the primary and upper primary levels. While reiterating the mandate of a pass in the TET to be a norm of eligibility, rationale therefore was enumerated as under:

> (i) it would bring national standards and benchmark of teacher quality in the recruitment process;
>
> (ii) it would induce teacher education institutions and students from these institutions to further improve their performance standards;
>
> (iii) it would send a positive signal to all stakeholders that the Government lays special emphasis on teacher quality.

Conspicuously, thus, the essence of the TET was to infuse a qualitative content in the recruitment process and thus, set a national benchmark for the sake of uniformity in the level of elementary education in the country. It prescribed 60% or more marks in TET as pass marks with liberty granted to the Governments to give concessions to persons belonging to SC/ST, OBC, differently

abled persons etc. in accordance with extant reservation policy.

The High Court, then, pointed out that none of the parties had challenged the competence of NCTE either to issue guidelines dated February 11, 2011 to conduct the TET or to vest a discretion in the State Government to grant relaxation as contemplated therein i.e. in accordance with the "extant" reservation policy. The High Court, thereafter, discussed letter dated March 23, 2011 issued by the State Government giving concession to the extent of 10%/15%/20% to different reserved categories but without disclosing any reference to the extant reservation policy of the Government. The High Court ultimately found, as already pointed out above, that the State Government could not deduce any such reservation policy and, thus, held that in the absence of such a policy, the State Government could not have granted the concession, as was done vide letter dated March 23, 2011.

Coming to notification dated July 29, 2011 which was issued by the NCTE in exercise of its power under Section 23(1) of the RTE Act, amending its earlier notification dated August 23, 2010, the High Court proceeded to discuss as to whether relaxation upto 5% in qualifying marks contained therein was relatable to TET. This question had arisen for consideration because of the reason that writ petitioners belonging to general category had argued that vide said notification dated July 29, 2011 paragraph 3 of the principal notification dated August 23, 2010 was substituted and the context of the said paragraph 3 was totally different. After juxtaposing unamended paragraph 3 and amended paragraph 3, the High Court pointed out that paragraph 3 of the notification dated August 23, 2010 dealt exclusively with the aspect of NCTE recognised six months special programme in elementary education by way of training of persons with qualifications mentioned therein after appointment. Thus, there was neither any comprehension nor any provision for reservation or relaxation of marks. Only academic qualifications with minimum percentage of marks was referred to. Therefore, concession of 5% in the qualifying marks pertained to the percentage of marks in the qualifying examination of Senior Secondary/graduation etc. and had no nexus with the pass marks in the TET.

The High Court further pointed out that in terms of letter dated March 23, 2011 issued by the State Government (which was passed on NCTE notification dated March 29, 2011 for giving relaxation qua academic qualifications) reserved category candidates availed second relaxation qua their academic qualifications. In this manner, they stood doubly advantage and the impact of such relaxation had bearing on ultimate assessment on merit.

Insofar as validity of the action of the State Government in permitting those reserved category candidates who had secured more marks than the last candidate selected in the general category, to be counted against unreserved category post, is concerned, the discussion of the High Court can be divided in two parts. The High Court referred to certain circulars on the subject which were issued before the selection process had commenced, these are circulars dated June 17, 1996, March 04, 2002 and June 24, 2008. As per these circulars, only those reserved category candidates who have not taken any concession (like that of age, etc.) were entitled to compete against unreserved vacancies and be counted against them. The High Court held that since concession was availed of by the reserved category candidates in getting relaxation in TET pass marks, the migration to general category post was not admissible in terms of aforesaid circulars.

The High Court further noted that circular dated May 11, 2011 was issued in supersession of earlier circular dated March 04, 2002 which permitted reserved category candidates to be counted against unreserved category vacancies if in the selection they have secured more marks than the marks obtained by the last unreserved category candidate, who is selected, irrespective of the fact as to whether they availed special concessions or not. The High Court held that since this circular was issued after the initiation of selection process vide advertisement dated March 30, 2011 it could not be applied to the said selection.

On the aforesaid basis, migration of such reserved category candidates, though emerged as more meritorious in the selection process than the last candidate selected in the general category, are not permitted to migrate to the general category.

In conclusion, by the impugned judgment, the Division Bench dismissed the appeals thereby upholding the direction of the learned single Judge in setting aside the results of RTET 2011 to the extent of participation of reserved category candidates benefited by relaxation granted to them by the State Government in excess of its extant reservation policy. It directed recasting of results by declaring those reserved candidates as ineligible and unsuccessful in the RTET 2011 who had secured less than 60% marks in TET.

ISSUES TO BE DECIDED The history of events, right upto the decision of the High Court, gives a clear glimpse of the questions of law that need to be determined by this Court. At this juncture, we would like to formulate these issues, as under:

> i) Whether policy of the State as reflected in its letter dated March 23, 2011 deciding to give relaxation ranging from 10% to 20% in TET marks to different reserved categories as mentioned therein is valid in law?
>
> ii) Whether NCTE notification dated July 29, 2011, which amends paragraph 3 of its earlier guidelines/notification dated February 11, 2011, provides 5% relaxation to the reserved category for passing TET?

If so, whether it would be applicable to the reserved categories in the State of Rajasthan as well?

iii) Whether reserved category candidates, who secured better than general category candidates in recruitment examination, can be denied migration to general seats on the basis that they had availed relaxation in TET?

We would like to answer this question first as it will have some implications and bearing on Issue No. 1 formulated by us above.

The poser here is as to whether NCTE has made any provision providing relaxation in the passing marks for reserved category candidates? In order to find an answer, the documents which are to be scanned through, on which both sides rested their submissions, are: (i) Notification dated February 11, 2011 containing guidelines; and (ii) amendment thereto incorporated vide notification dated July

29, 2011, both issued by NCTE. Insofar as guidelines dated February 11, 2011 are concerned, they pertain to conducting TET under the RTE Act, 2009. Covering letter to these guidelines mentions that vide notification dated August 23, 2010, NCTE had laid down the minimum qualifications for a person to be eligible for appointment as a Teacher in Class I to Class VIII. One of the essential qualification prescribed therein was that such a person should pass the TET which will be conducted by the appropriate Government in accordance with the guidelines framed by the NCTE. It is in that behalf that guidelines in question are framed and circulated. Para 3 of these guidelines mentions the rationale for including the TET as minimum qualification. Though it is already extracted, for the purpose of cohesiveness, we reproduce it here again:

> "(i) It would bring national standards and benchmark of teacher quality in the recruitment process;
>
> (ii) It would induce teacher education institutions and students from these institutions to further improve their performance standards;
>
> (iii) It would send a positive signal to all stakeholders that the Government lays special emphasis on teacher quality." Para 4 states that such TET examination may be conducted by a suitable professional body designated by the appropriate Government for this purpose (Here, the State Government had designated Central Board of Secondary Education (CBSE), Ajmer as the professional body to conduct such an examination). Para 5 prescribes the conditions which are to be fulfilled by persons to become eligible for appearing in the TET, reads as under:
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> "(i) A person who has acquired the academic and professional qualifications specified in the NCTE Notification dated 23rd August, 2010.
>
> (ii) A person who is pursuing any of the teacher education courses (recognised by the NCTE or the RCI, as the case may be) specified in the NCTE Notification dated 23rd August, 2010.
>
> (iii) The eligibility condition for appearing in TET may be relaxed in respect of a State/UT which has been granted relaxation under sub-section (2) of Section 23 of the RTE Act. The relaxation will be specified in the Notification issued by the Central Government under that sub-section." Para 6 gives the structure and content of TET. Para 7 prescribes that there would be two papers of the TET, one for a person who intends to be a teacher from Class I to Class V and other would be for a person who intends to be a teacher for Classes VI to VIII. The details of nature and standards of questions in Paper I and Paper II are also prescribed in this para. Para 8 mentions that question papers have to be bilingual i.e. in language(s) as decided by the appropriate Government as well as in English language. Thereafter comes para 9 which prescribes the qualifying marks and reads as under:

> "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." For our purposes, it is not necessary to take note of other paras of the said guidelines.

Vide notification dated July 29, 2011, some amendments were made in the aforesaid guidelines dated February 11, 2011. What is relevant is that amendment was made to para 3 of notification/guidelines dated February 11, 2011 which was substituted with the following amended para:

> "III. For para 3 of the Principal Notification the following shall be substituted, namely:
>
> (i) Training to be undergone. – A person –
>
> (a) with Graduation with at least 50% marks and B.Ed. qualification with at least 45% marks and 1 year Bachelor in Education (B.Ed.), in accordance with the NCTE (Recognition Norms and Procedure) Regulations issued from time to time in this regard, shall also be eligible for appointment to Class I to V up to 1st January, 2012, provided he/she undergoes, after appointment as NCTE recognized 6 month Special Programme in Elementary Education;
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> (b) With D.Ed. (Special Education) or B.Ed. (Special Education) qualification shall undergo, after appointment an NCTE recognised 6 month Special Programme in Elementary Education.
>
> (ii) Reservation Policy:
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> Relaxation up to 5% in the qualifying marks shall be allowed to the candidates belonging to reserved categories, such as SC/ST/OBC/PH." It is the amended sub-para (ii) of para 3 which has become the bone of contention as it stipulates that relaxation upto 5% in the qualifying marks is to be allowed to candidates belonging to reserved categories. Relying on this amendment, it is the contention of respondents belonging to general category as well as those respondents who belonged to reserved category but secured more than 55% marks in TET that NCTE has stipulated 5% relaxation for TET examination, as it pertains to the said examination. As a

consequence, the action of the State Government granting relaxation for more than 5% is impermissible. On the other hand, argument of the appellants who belonged to reserved category and are beneficiary of relaxation provided by the State Government vide its letter dated March 23, 2011 is that the relaxation provided in the aforesaid amended para 3 has no relation whatsoever with TET and on the contrary, it relates to the qualifying marks in graduation and B.Ed. etc. We find merit in the contention of the appellants and do not agree with the respondents that the provision for relaxation upto 5% in qualifying marks at all relates to TET. In the first instance, it is to be noted that insofar as qualifying marks for TET are concerned, they are prescribed in para 9 of the guidelines dated February 11, 2011. There is no amendment to the said para. Amendment is incorporated in para 3 of the principal notification dated February 11, 2011 which we have already reproduced above. Original para 3 gives the rationale for including TET as a minimum qualification. Though, it is not understood as to why that para is substituted by the aforesaid amended para vide notification dated July 29, 2011. Be that as it may, a reading of amended para 3 clearly brings out that it incorporates two aspects. First aspect touches upon the training to be undergone by a person and this training can be undergone by those persons who have certain specified marks in graduation and D.Ed. (Special Education) or B.Ed. (Special Education). Training is for 6 months duration i.e. 6 months special programme in elementary education. Insofar as persons having graduation and B.Ed. qualification are concerned, minimum marks in the graduation or B.Ed. are also prescribed. It is stipulated that graduation should be with at least 50% marks and B.Ed. qualification with at least 45% marks. However, those who have done D.Ed. (Special Education) or B.Ed. (Special Education), no minimum marks in obtaining those qualifications are prescribed. What follows is that person who is graduate with B.Ed. qualification, he/she should have minimum 50% marks in graduation and 45% marks in B.Ed. qualification. It is in this context second aspect of the amended provision in sub-para (ii) of para 3 mentions about 'Reservation Policy' and allows relaxation upto 5% in qualifying marks. This relaxation is, therefore, clearly relatable to marks in graduation and B.Ed. qualification, meaning thereby insofar as reserved category candidates such as SC/ST/OBC/PH are concerned, they will be treated as qualified to undergo the training in case they pass graduation with minimum 45% marks and B.Ed. qualification with minimum 40% marks. We are clear in mind that this relaxation of 5% does not relate to TET at all. Had it been so, this notification dated July 29, 2011 would have amended para 9 and, particularly, sub-para (a) of para 9 which deals with concessions to reserved category candidates that has not happened and is left intact.

We may mention that High Court in the impugned judgment has also read the said amended para 3 in the same manner we have interpreted. We affirm the view of the High Court on this specific aspect. We would like to reproduce the following discussion from the judgment of the High Court wherein additional reasons for arriving at this particular conclusion are given:

> "...This view is fortified by the letter No. F.No.61-1/2011/NCTE/N&S dated 1.4.2011 of the NCTE addressed, amongst others, to all Secretaries and Commissioners of the State Governments/UTs clarifying that following the issuance of the notification dated 23.8.2010, it had received representations from the State Government and other stakeholders that in respect of SCs/STs etc. relaxation upto 5% in the qualifying marks should be allowed, since such relaxation is permissible by the NCTE for admission in various teacher education courses. Referring to the minimum marks in the notification dated 23.8.2010, in senior secondary (or its equivalent) or in B.A./B.Sc., it was elucidated that following its meeting held on 16.3.2011 it was decided that relaxation upto 5% in such qualifying marks would be available to SCs/STs etc., in accordance with the extant policy of the State Government /UTs and other school managements. There is no reference of such relaxation to pass marks in the TET. This accommodation of the NCTE, by way of concession of 5% marks qua the academic qualifications, is also evident from the provisions of the National Council for Teacher Education (Recognition Norms & Procedure) Regulations, 2009 (hereinafter referred to as '2009 Regulations') and the norms and standards for various education courses as specified in the Appendices thereto and referred to in the course of arguments on its behalf. The explanation of the NCTE with regard to the nature of the relaxation granted under the caption "reservation policy" traceable to paragraph 3 of the principal notification dated 23.8.2010 with reference amongst others to the 2009 Regulations cannot be ignored or discarded." Thus, our answer to Question No. 2 is that insofar as NCTE is concerned, it has not provided any provision for relaxation in TET examination for reserved category candidates but has left it to the State Governments to do the needful in this behalf, as per para 9 of guidelines dated February 11, 2011 which remains unaltered.

In view of our foregoing discussion pertaining to Question No.2, it becomes clear that as far as relaxation in passing TET is concerned, same is governed by para 9 of notification dated February 11, 2011. However, before we deal with the said para in particular, we need to recapitulate the salient facts and features in brief followed by submissions of learned counsel for the parties in this behalf.

It is the common case of the parties that passing of TET is an essential qualification, which is a condition precedent for appointment as a teacher for Class I to VIII. It is in terms of qualifications letter prescribed by the NCTE in its notification dated August 23, 2010 read with February 11, 2011. It may be mentioned in this behalf that in the notification dated August 23, 2010, NCTE laid down minimum eligibility qualifications for a person to be a teacher for Class I to VIII. As per Clause 1(i) and (ii), 45% to 50% marks are required in academic qualification including Senior Secondary/BA-B.Sc. This very notification, vide sub-clause (b) of Clause (9) (i) and (ii), stipulates another eligibility condition, i.e. passing TET which needs to be conducted by the respective Governments in accordance with guidelines framed by NCTE. There was no provision providing relaxation to reserved category insofar as academic qualifications, i.e. Senior Secondary or graduation etc., are concerned. As far as TET is concerned, it was to be guided solely by the guidelines to be issued by NCTE. Clause (3) prescribes nature of the training to be undergone and minimum marks required in BA/Bsc./B.Ed. It was followed by notification dated February 11, 2011

which prescribes 60% or more marks in TET as pass/qualifying marks. At the same time, it laid down that insofar as persons belonging to SC/ST, OBC, differently abled persons etc. are concerned, State Government may consider giving concessions to them in accordance with their extant reservation policy. It also required the States to give weightage to TET score in carrying out the recruitment of teachers. It is in pursuance to the said clause (9) of notification dated February 11, 2011 that the State Government issued communication dated March 23, 2011 deciding to give relaxation in TET ranging from 10% to 20% to different reserved categories.

As pointed out above, the State Government could not show any such policy which existed prior to the issuing communication dated March 23, 2011 regarding concession to be given to the reserved category persons. That has become the reason for the High Court to hold that there was no “extant” policy of the State Government for giving relaxation to reserved category candidates. This approach of the High Court is criticised by the appellant and the argument which is raised before us is that the decision contained in letter dated March 23, 2011 itself is a policy decision and should be treated as the 'extant policy'.

Mr. Ashwini Mata, learned senior advocate appearing in certain appeals representing reserved category candidates, elaborated the aforesaid contention by arguing that the interpretation of clause 9(a) of guideline dated February 11, 2011 is required to be interpreted while taking various aspects in mind i.e. the examination of TET are being conducted every year; certificates of having passed TET is valid upto maximum 7 years; and further that recruitment process is not conducted every year. The later part of clause 9 of guidelines deals with the recruitment process of teachers. In this view of matter, at the time of recruitment process the School Management (Govt., Local Bodies, Govt. aided and unaided) were being given liberty to consider such a reserved category candidates as per prevailing, alive reservation policy in regard to concession in TET qualifying marks. He submitted that the dictionary defines 'extant' as 'alive; prevailing at point of time'. Therefore, there is a marked difference between the word 'existing' from the word 'extant' as the word 'extant' is used for any point of time. It may be for past, present or future, whereas word 'existing' is used only in presenti. Relaxation under State Government etc. were in relation to their respective applicable policies at the point of recruitment. His emphasis was that the expression “in accordance with their extant reservation policy” appearing Clause 9(a) of the Guidelines dated February 11, 2011, relates to the dominant underlying policy of reservation at the time of taking the TET exam which is a preclude to the conduct of the common recruitment test. He also argued that if the interpretation of the High Court regarding Clause 9(a) of the Guidelines dated February 11, 2011 is upheld this would lead to the conclusion that State is forever precluded to carry out any modification in the extent of relaxations to reserved categories or modify the reserved categories after February 11, 2011 which the State is otherwise obliged to do under Article 16(4) and 15(4) of the Constitution. State is not empowered but duty bound to make reservations and relaxations under changing socio-economic scenario. Mr. Mata, on this basis, questioned the interpretation propounded by the High Court as apparently ultra vires the Constitution.

Ms. Aishwarya Bhati who appeared for few other such reserved category candidates added to the aforesaid submission by arguing that in fact letter dated March 23, 2011 was not a new policy nor did it grant relaxation to persons who were otherwise not eligible for reservation. She pointed out

that this letter was completely in accord with the existing reservation policy prevalent in the State of Rajasthan as per notification dated July 31, 2009 which prescribes 49% reservation in all Government services to persons belonging to specified categories. According to her, in consonance with the said reservation policy, letter dated March 23, 2011 only prescribes specific percentage of concessions. She further submitted that this was categorical stand of State Government in the High Court.

She pointed out that the counsel for the State had also informed this Court, at the time of arguments, that for recruitment of Grade III teachers after RTET, 2011 the factual statistics were as follows:

Total posts advertised	-	39544
Total selections made	-	37317
Selections made without concessions (it includes 5621 candidates of reserved category who had not taken concession)	-	23978
Selections made with concessions	-	13339

According to her, the specific statement on Affidavit by the State as well as the aforesaid figures, make it writ large that concession granted by State Government vide its letter dated March 23, 2011 was in complete conformity with clause 9(a) of the guidelines dated February 11, 2011. The NCTE has also supported this interpretation of clause 9(a) of its guidelines, both before the High Court as well as this Court.

Insofar as State Government is concerned, apart from justifying its decision to give concession in passing marks of TET, the learned counsel appearing for the State also controverted the plea of the general category candidates on the outcome of the selection process. It was pointed out that number of candidates belonging to general category or the candidates who has passed the TET examination on merit and have been finally selected and appointed is more than 60% even when as per the State Reservation Policy, 49% seats are earmarked for candidates belonging to different reserved categories. It is also pointed out that the concession in TET passing marks is accorded even to women, irrespective of the fact whether they belong to general category or reserved category. Thus, out of 13339 candidates who became eligible to participate in the selection process after getting concession in TET pass marks, more than 2000 ladies from general categories have also been benefited. This is apart from hundreds of widowed and divorced women belonging to general category who have been selected after availing concession in pass marks in TET examination.

On the other hand, learned counsel for the respondents representing general category candidates submitted that in the absence of any extant policy operating at the time when letter dated March 23, 2011 was issued, there could not have been relaxation by that letter. The reasoning given by the High Court in the impugned judgment whereby this plea is accepted is referred to and relied upon by these counsel. In this behalf, it was submitted that the impugned judgment of the Division Bench records the following facts:

(i) Both before the Single Judge and Division Bench, the State had admitted that there was no extant policy.

(ii) The NCTE had contended that 5% relaxation provided by its notification of July 29, 2011 was only towards qualifying marks (academic qualifications) and not for the TET.

(iii) Out of 40,000 posts of teachers, only 20% of the candidates belonging to the General category have been selected as a consequence of the above flawed measures.

It was further submitted that there was no extant reservation policy of the State of Rajasthan which was admitted not only before the High Court but this Court as well and the so-called policy submitted before this Court was inapplicable as it dealt with percentage of seats and did not relate to pass marks in the examination. It was also emphasised that NCTE guidelines dated February 11, 2011 aim to provide national standards and a uniform bench mark. Therefore, all candidates, whether belonging to general or reserved category, were required to pass TET with minimum 60% marks, at least in the absence of extant policy of a particular State.

We have considered the respective submissions of the learned counsel for the parties appearing before us and also gone through the reasons given in the impugned judgment. We may state at the outset that Notification dated July 31, 2009 of the State Government pertains to the reservation in all government services and does not deal with the subject at hand. The outcome hinges upon the interpretation that is to be given to para 9(a) of guidelines dated February 11, 2011, specifically the meaning that is to be ascribed to “extant policy”.

First thing that has to be borne in mind is that after prescribing 60% pass marks in the TET examination, provision for relaxation is made in same para 9 giving liberty to the school management (Government, local bodies, Government aided and unaided) to consider giving concessions to different kinds of reserved categories mentioned therein 'which has to be in accordance with their extant reservation policy'. This brings out one important feature. NCTE has nowhere mandated that there cannot be relaxation in pass marks in TET examination for reserved category candidates or that the standard would remain uniform irrespective of the fact as to whether a person belongs to general category or any of the reserved categories insofar as this examination is concerned. On the contrary, specific authorisation is given to grant special concessions. It, thus, accepts in principle that relaxed standard for passing TET can be prescribed by laying down a policy in this behalf. In fact, there is no challenge to this permissive provision. All that is argued by general category candidates is that there is no such “extant policy”, meaning thereby if there is such a policy, the action of the State Government would be justified.

In fact, it hardly needs to be emphasised that the Government may prescribe relaxed standards for such reserved categories, as it is in conformity with the spirit of the constitutional provisions contained in Articles 15 and 16 read with Articles 38, 39(a) and 46 of the Constitution, which are enabling provisions permitting the State to make special provisions and provide relaxed standards for persons belonging to Scheduled Castes, Schedule Tribes and socially and educationally backward

classes.

Keeping in mind the aforesaid ethos of the Constitution, we proceed to interpret clause 9(a) of notification dated February 11, 2011 which permits concessions to be given to certain clauses 'in accordance with their extant reservation policy'. The question here is as to whether it was necessary that there had to be an “existing” policy before the State Government issued its letter dated March 23, 2011 or laying down of such a policy in communication dated March 23, 2011 itself, may be for the first time, would fulfill the requirement of “extant policy”. We do not find any condition in clause 9(a) for 'pre-existing' reservation policy. On the contrary, the provision only mentions that if there is a reservation policy providing concessions to the persons belonging to SC/ST, OBC, differently abled persons etc., concessions can be given in accordance with the said policy. Even if there was no such policy in existence as on the date when NCTE issued guidelines dated February 11, 2011, it would not mean that State Governments are precluded from formulating such reservation policy even thereafter. Para 9(a) uses the expression 'extant' reservation policy and not 'pre-existing' reservation policy. Mr. Mata, learned senior advocate is right in submitting that a holistic reading of para 9 of the guidelines would mean that at the time of recruitment process, the school managements were being given liberty to consider and provide for concessions to reserved category candidates in TET qualifying marks. Thus, it becomes clear that the word 'extant' means which remains or survives. To give a practical interpretation to clause 9 of guidelines dated February 11, 2011, the phrase 'extant reservation policy' should be read to mean the policy surviving at the time of TET examination or at the most at the time of recruitment. Any other interpretation of the said phrase would be totally impracticable and would deprive the State for taking a decision to give relaxation to reserved category candidates. Such interpretation cannot be applied thereby seizing the powers of the State in recognising reserved categories and to give relaxations and to modify them from time to time with changing socio-economical conditions. The advertisement issued by the local authorities for the recruitment of teachers in 2012 as well as in 2013 specifically contains clause 7(b) that the candidate is required to be passed in TET conducting by State of Rajasthan in accordance with the guiding principals issued by NCTE. In our opinion this would meet the requirement of 'extant reservation policy' of the State.

It is a matter of record, which is taken note of the High Court also, such relaxation has been granted by various State Governments and respondents State is not only State. However, one observation made by the High Court needs serious consideration. It is pointed out that except for the State of Andhra Pradesh, no other State has granted such wide range of concessions as the State of Rajasthan did in its letter dated March 23, 2011. This is an aspect which needs to be looked into and needs to be reconsidered by the States inasmuch as very high percentage of relaxation may amount to compromising with quality which may not be conducive to maintaining standards of education. However, we are not tinkering with the extant of relaxation given in letter dated March 23, 2011 because of the reason that on that basis, two recruitment tests have been conducted and candidates who have been selected are now teaching for last number of years. However, for future selections in this behalf, we impress upon the State Government to consider this aspect and bring the relaxations within reasonable limits.

The exhortation of the High Court in the impugned judgment that the noble purpose contained in RTE Act can be achieved by providing free and compulsory education of satisfactory quality, cannot be doubted. Indeed it is a salubrious mission of the RTE Act which not only guarantees full time elementary education to every child upto 14 years of age, but also the quality of education which is satisfactory and equitable. The High Court is also right in remarking that in order to impart quality education, we need those teachers who are processed of essential aptitude and ability to meet the challenged of teaching at the primary and upper primary levels. No doubt, these are important considerations to achieve the laudable objects. For this purpose, if passing of TET examination is treated as minimum essential qualification for a person to be eligible for appointment as primary teacher, that cannot be countenanced. However, when it comes to giving concession to certain reserved category candidates insofar as passing marks in TET is concerned, such a provision by itself will not affect the teaching quality. All said and done, Section 23(2) of the RTE Act itself recognises the power for relaxing the minimum qualifications required of a person to be eligible for appointment as primary teacher. When it comes to the question of giving relaxation in passing marks in TET, different outlook and glance stands attracted. Here comes the question of taking affirmative action for the upliftment of the Scheduled Castes, Scheduled Tribes and Other Backward Communities/Classes.

Going by the scheme of the Constitution, it is more than obvious that the framers had kept in mind social and economic conditions of the marginalised section of the society, and in particular, those who were backward and discriminated against for centuries. Chapters on 'Fundamental Rights' as well as 'Directive Principles of State Policies' eloquently bear out the challenges of overcoming poverty, discrimination and inequality, promoting equal access to group quality education, health and housing, untouchability and exploitation of weaker section. In making such provisions with a purpose of eradicating the aforesaid ills with which marginalized section of Indian society was suffering (in fact, even now continue to suffer in great measure), we, the people gave us the Constitution which is transformative in nature. Vision depicted therein was to aim at achieving agaratarian society. Professor Upendra Baxi brings out this transformative feature of the Indian Constitution, so brilliantly, in the following words:

> “To be sure, the Indian Constitution frontally addresses millennial wrongs such as untouchability; indeed, the constitution is transformative on this normative register. It is historically the first modern constitution not merely to declare constitutionally unlawful the practice of discrimination on the ‘grounds of untouchability’ (Article 23 and 24). A unique feature of these provisions consists in the creation of constitutional offence, even to the point of derogation of the design and detail of Indian federalism because Article 35 empowers a parliamentary override over the legislative of the states within the Indian union. How many we understand in the Indian case the differential reconstitutions of memories of ancient wrongs as providing the very leitmotif of constitutional change compared with the organization of collective amnesia concerning the Partition Holocaust? Does this question to all matter in any understanding of Indian Constitution now at work?

True, transformative constitutionals texts and contexts remain the very last sites for language of love, gift, belonging and care.[3] Professor Baxi identifies three 'C's of constitutionalism[4]. C1 is the text of Constitution, C2 is the constitutional law which is the official interpretation (namely, the way it is interpreted by the courts) and C3, in the conventional sense invites attention to the normative theory or ideological core or even the 'spirit of constitutions'. The task of transformating the constitutionalism is primarily that of the Courts, particularly the Apex Court, while enforcing the provisions of the Constitution. It is for this reason that this Court has always interpret the text of the Constitution in such a way that 'spirit' of the constitution is realised.

Examined in the aforesaid context, when our Constitution envisages equal respect and concern for each individual in the society and the attainment of the goal requires special attention to be paid to some, that ought to be done. Giving of desired concessions to the reserved category persons, thus, ensures equality as a levelling process. At jurisprudential level, whether reservation policies are defended on compensatory principles, utilitarian principles or on the principle of distributive justice, fact remains that the very ethos of such policies is to bring out equality, by taking affirmative action. Indian Constitution has made adequate enabling provisions empowering the State to provide such concessions. This was so eloquently stated in State of Madhya Pradesh & Anr. v. Kumari Nivedita Jain & Ors.[5] as under:

"26. It cannot be disputed that the State must do everything possible for the upliftment of the Scheduled Castes and Scheduled Tribes and other backward communities and the State is entitled to make reservations for them in the matter of admission to medical and other technical institutions. In the absence of any law to the contrary, it must also be open to the Government to impose such conditions as would make the reservation effective and would benefit the candidates belonging to these categories for whose benefit and welfare the reservations have been made. In any particular situation, taking into consideration the realities and circumstances prevailing in the State it will be open to the State to vary and modify the conditions regarding selection for admission, if such modification or variation becomes necessary for achieving the purpose for which reservation has been made and if there be no law to the contrary. Note (ii) of Rule 20 of the Rules for admission framed by the State Government specifically empowers the Government to grant such relaxation in the minimum qualifying marks to the extent considered necessary ..... The relaxation made by the State Government in the rule regarding selection of candidates belonging to Scheduled Castes and Scheduled Tribes for admission into Medical Colleges cannot be said to be unreasonable and the said relaxation constitutes no violation of Article 15(1) and (2) of the Constitution. The said relaxation also does not offend Article 14 of the Constitution. It has to be noticed that there is no relaxation of the condition regarding eligibility for admission into Medical Colleges. The relaxation is only in the rule regarding selection of candidates belonging to Scheduled Castes and Scheduled Tribes categories who were otherwise

qualified and eligible to seek admission into Medical Colleges only in relation to seats reserved for them..." Likewise, a Constitution Bench of this Court in M. Nagaraj & Ors. v. Union of India & Ors.[6] felt it necessary to make following remarks: "Equality of opportunity has two different and distinct concepts. There is a conceptual distinction between a non-discrimination principle and affirmative action under which the State is obliged to provide a level- playing field to the oppressed classes. Affirmative action in the above sense seeks to move beyond the concept of non-discrimination towards equalising results with respect to various groups. Both the conceptions constitute "equality of opportunity"." We would also like to reproduce an emotive, but at the same time constitutionally justified, discourse in Dr. Jagadish Saran & Ors. v. Union of India[7]. This Court, speaking through Justice Krishna Iyer, highlighted the constitutional mandate of providing equal opportunity to every member of the society, including the oppressed classes, in the following words of wisdom:

"16. The primary imperative of Articles 14 and 15 is equal opportunity for all across the nation to attain excellence and this has burning relevance to our times when the country is gradually being 'broken up into fragments by narrow domestic walls' in politics, economics and education, undoing the founding faith of an undivided integrated India by surrender to lesser appeals and grosser passions. What is fundamental, as an enduring value of our polity, is guarantee to each of equal opportunity to unfold the full potential of his personality. Anyone anywhere, humble or high, agrestic or urban, man or woman, and whatever his religion or irreligion, shall be afforded equal chance for admission to any secular educational course or school for cultural growth, training facility, speciality or employment. "Each according to his ability", is of pervasive validity, and it is a latent, though radical, fundamental that, given propitious environments, talent is more or less evenly distributed and everyone has a prospect of rising to the peak. Environmental inhibitions mostly "freeze the genial current of the soul" of many a humble human whose failure is 'inflicted", not innate. Be it from the secular perspective of human equality or the spiritual insight of divinity in everyone, the inherent superiority cult with a herren-volk tint, is contrary to our axiom of equality. That is why "equal protection of the laws" for full growth is guaranteed, apart from "equality before the law". Even so, in our imperfect society, some objective standards like common admission tests are prescribed to measure merit, without subjective manipulation or university-wise invidiousness. In one sense, it is a false dilemma to think that there is rivalry between equality and excellence, although superficially they are competing values. In the long run, when every member of the society has equal opportunity, genetically and environmentally,' to develop his potential, each will be able, in his own way, to manifest his faculty fully. The philosophy and pragmatism of universal excellence through universal equal opportunity is part of our culture and constitutional creed.

> 17. This norm of non-discrimination, however, admits of just exceptions geared to equality and does not forbid those basic measures needed to abolish the gaping realities of current inequality afflicting "socially and educationally backward classes" and "the Scheduled Castes, and the Scheduled Tribes". Such measures are rightly being taken by the State and are perfectly constitutional as the State of Kerala v.N.M. Thomas [(1976) 2 SCC 310] has explained. Equality and steps towards equalisation are not idle 'incantation' but actuality, not mere ideal but real, life.
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> 39. If equality of opportunity for every person in the country is the constitutional guarantee, a candidate who gets more marks than another is entitled to preference for admission. Merit must be the test when choosing the best, according to this rule of equal chance for equal marks. This proposition has greater importance when we reach the higher levels of education like post-graduate courses. After all, top technological expertise in any vital field like medicine is a nation's human asset without which its advance and development will be stunted. The role of high grade skill or special talent may be less at the lesser levels of education, jobs and disciplines of social inconsequence, but more at the higher levels of sophisticated skills and strategic employment. To devalue merit at the summit is to temporise with the country's development in the vital areas of professional expertise. In science and technology and other specialised fields of developmental significance, to relax lazily or easily in regard to exacting standards of performance may be running a grave national risk because in advanced medicine and other critical departments of higher knowledge, crucial to material progress, the people of India should not be denied the best the nation's talent lying latent can produce.

If the best potential in these fields is cold-shouldered for populist considerations garbed as reservations, the victims, in the long run, may be the people themselves. Of course, this unrelenting strictness in selecting the best may not be so imperative at other levels where a broad measure of efficiency may be good enough and what is needed is merely to weed out the worthless.

40. Coming to brass tacks, deviation from equal marks will meet with approval only if the essential conditions set out above are fulfilled. The class which enjoys reservation must be educationally handicapped. The reservation must be geared to getting over the handicap. The rationale of reservation must be in the case of medical students, removal of regional or class inadequacy or like disadvantage. The quantum of reservation should not be excessive or societally injurious, measured by the overall competency of the end-product viz. degree-holders. A host of variables influence the quantification of the reservation. But one factor deserves great emphasis. The higher the level of the speciality the lesser the role of reservation. Such being the pragmatics and dynamics of social justice and equal rights, let us apply the tests to the case on hand." It hardly needs to be emphasised that the State has a legitimate and substantial interest in ameliorating or eliminating where feasible, the disabling effects of identified discrimination. It is a duty cast upon the State, by the Constitution, to remedy the effects of "societal discrimination". Provision for relaxation in TET pass marks has to be

looked into from this angle which is in tune with the constitutional philosophy. After all it only ensures that such candidates belonging to reserved category become eligible for appointment as primary teachers. On the other hand, when it comes to selection process such reserved category candidates have to compete with general category candidates wherein due regard for merit is given. Therefore, only those candidates belonging to reserved category who are found meritorious in selection are ultimately appointed. We are of the opinion that in this manner the two constitutional goals, that of rendering quality education on the one hand and providing "equality of opportunity" to the unprivileged class on the other hand, are adequately met and rightly balanced.

We, thus, do not agree with the interpretation that is given by the High Court and answer Question No. 1 holding that relaxation prescribed in letter dated March 23, 2011 in pass marks in TET examination for different reserved categories mentioned therein is legal and valid in law.

The policy decision was contained in letter dated May 11, 2011 issued by the State Government thereby allowing migration of reserved category candidates to general category who had secured better than general category candidates in recruitment examinations. This has been criticised by the High Court and held to be invalid on the ground that this was done by circular dated February 11, 2011 which was issued after the recruitment process started with the issuance of advertisement dated March 30, 2011 and, therefore, it was impermissible to change the norms after the recruitment process had been initiated.

In this behalf, the High Court has referred to Circular No. F-7(2) DOP/A- II/96 dated June 17, 1996 of the Government of Rajasthan whereby decision was conveyed that the candidates belonging to SC/ST and OBC who gets selected fulfilling the conditions of eligibility regarding age limit and attempts prescribed for general candidates can be placed on general merit list and those who get placement in the merit list as a result of special concession given to them in terms of age and attempts should not be considered as the general candidates but should be considered against reserve vacancies. The High Court further noted that later circular No. F.7(1) DOP/A-2/99 dated March 04, 2002 issued on the same subject reiterated the aforesaid position. Yet again, vide Circular No. F.15(24) DOP/AII/75 dated June 24, 2008, it was clarified that only those reserved category candidates who have not taken any concessions (like that of age, etc.) can compete against non-reserved vacancies and be counted against them. It also clarified that women, persons with disabilities, sportspersons, in-servicemen are counted against their respective category, even if they are suitable for selection against non-reserved or open competition vacancy/post. However, if any remaining candidate of these categories after providing the vacancies/posts reserved for them are more meritorious than the last person of the open competition category, such candidate will be selected even if it leads to selection of more candidates than that provided by virtue of reservation. On the basis of the aforesaid circulars, the High Court commented that only those reserved category candidates were entitled to be migrated to general quota if they complete with availing any special concessions in terms of age, attempts and otherwise except concession regarding fee. However, this norm was changed by impugned Circular No. F.7(1)DOP/A-II/99 dated May 11, 2011 which was issued in supersession of the earlier circular dated March 04, 2002 and permitted reserved category candidates to be counted against unreserved category vacancies if in the selection they had secured more marks than the marks obtained by the last unreserved category candidate who is selected,

irrespective of the fact that as to whether they avail special concessions or not. As pointed out above, the High Court has held that since this change in norms took place after the initiation of selection process vide advertisement dated March 30, 2011, the circular dated May 11, 2011 was not applied as the aforesaid move/amendment in selection norms was impermissible as held by this Court in K. Manjusree v. State of Andhra Pradesh & Anr.[8] The learned counsel appearing for reserved category candidates/appellants submitted that passing of TET examination is just one of the eligibility criteria and cannot be treated as part of the recruitment process and, therefore, cannot be counted as given relaxation or concession availed by the reserved category candidates. On that basis, it was sought to argue that even if circular dated May 11, 2011 is ignored, as per the policy contained in earlier circulars, those reserved category candidates who had secured more marks than the last candidate selected in the general category, were entitled to be counted against unreserved category posts. It was also pointed out that insofar as recruitment process is concerned, weightage of 20% of TET marks was given in the final score. This flat weightage of 20% of TET marks given to all candidates irrespective of the categories to which they belong provided a level playing field. In this manner, those candidates who had secured more marks in TET were placed at advantageous positions by giving the said weightage. The other effect was that those candidates in reserved category who had secured less marks than 60% and became eligible to participate in the selection process by virtue of concession in the eligibility criteria of TET pass marks, naturally got less marks under this head. Therefore, as far as recruitment process is concerned, no such benefit had accrued to the reserved category candidates. It was also argued that principle of estoppel would apply as the general category candidates did not challenge the recruitment process including the advertisement and filed the writ petitions only after they found themselves to be unsuccessful on declaration of the results of the recruitment. Reference in this behalf is made to the judgment in the case of Vijendra Kumar Verma v. Public Service Commission, Uttarakhand & Ors.[9] It was further pointed out that during the pendency of the matter before this Court, appointments were made by the respective local bodies with respect to recruitment of 2012 giving relaxation in accordance with the State policy dated March 23, 2011 and also allowing migration as per policy dated May 11, 2011 subject to the decision of this Court. The participants of reserved category candidates in recruitment process of 2012 and 2013 preferred SLP (C) No. 31109 of 2014 wherein this Court issued notice and allowed the appellant Nos. 8 to 13 belonging to 2013 recruitment to file SLP. In March, 2015, result declared with regard to recruitment of 2013 giving relaxation in accordance with State policy dated March 23, 2011. However, appointments are not given to reserved category candidates availing relaxation although seats have been kept vacant. Moreover, migration to general seats was not allowed. The appellants in SLP (C) No. 31109 of 2014 belonging to 2013 recruitment, moved I.A. No. 14 of 2015 seeking direction to the State to prepare merit list of 2013 recruitment in the same manner as done in 2012 recruitment giving benefit of relaxation and migration. In fact, after 2011, TET was again conducted by the State in 2012. The reserved category candidates who had passed TET with relaxations in 2011 did not appear in 2012 TET since they were declared pass in 2011 TET itself. Otherwise, they would have availed the opportunity to improve their TET scores by appearing in TET in 2012.

The learned counsel for the general category candidates, on the other hand, maintained that TET was a part of recruitment process and relaxation in passing marks in that examination amounted to giving concession to reserved category candidates and after availing such concession they were not

entitled to migrate to general category. It was also submitted that insofar as decision of the State contained in letter dated May 11, 2011 is concerned, it was rightly held by the High Court that norms could not be changed after the selection process has started.

Having regard to the respective submissions noted above, first aspect that needs consideration is as to whether relaxation in TET pass marks would amount to concession in the recruitment process. The High Court has held to be so on the premise that para 9(a) dealing with such relaxation in TET marks forms part of the document which relates to the recruitment procedure. It is difficult to accept this rationale or analogy. Passing of TET examination is a condition of eligibility for appointment as a teacher. It is a necessary qualification without which a candidate is not eligible to be considered for appointment. This was clearly mentioned in guidelines/notification dated February 11, 2011. These guidelines pertain to conducting of TET. Basic features whereof have already been pointed out above. Even para 9 which provides for concessions that can be given to certain reserved categories deals with 'qualifying marks' that is to be obtained in TET examination. Thus, a person who passes TET examination becomes eligible to participate in the selection process as and when such selection process for filling up of the posts of primary teachers is to be undertaken by the State. On the other hand, when it comes to recruitment of teachers, the method for appointment of teachers is altogether different. Here, merit list of successful candidates is to be prepared on the basis of marks obtained under different heads. One of the heads is marks in TET. So far as this head is concerned, 20% of the marks obtained in TET are to be assigned to each candidate. Therefore, those reserved category candidates who secured lesser marks in TET would naturally get less marks under this head. We like to demonstrate it with an example. Suppose a reserved category candidate obtains 53 marks in TET, he is treated as having qualified TET. However, when he is considered for selection to the post of primary teacher, in respect of allocation of marks he will get 20% marks for TET. As against him, a general candidate who secures 70 marks in TET shall be awarded 14 marks in recruitment process. Thus, on the basis of TET marks reserved category candidate has not got any advantage while considering his candidature for the post. On the contrary, “level playing field” is maintained whereby a person securing higher marks in TET, whether belonging to general category or reserved category, is allocated higher marks in respect of 20% of TET marks. Thus, in recruitment process no weightage or concession is given and allocation of 20% of TET marks is applied across the board. Therefore, the High Court is not correct in observing that concession was given in the recruitment process on the basis of relaxation in TET.

Once this vital differentiation is understood, it would lead to the conclusion that no concession becomes available to the reserved category candidate by giving relaxation in pass marks in TET insofar as recruitment process is concerned. It only enables them to compete with others by allowing them to participate in the selection process. In this backdrop, irrespective of circular dated May 11, 2011, the reserved category candidates who secured more marks than marks obtained by the last candidate selected in general category, would be entitled to be considered against unreserved category vacancies. However, it would be subject to the condition that these candidates have not availed any other concession in terms of number of attempts, etc., except on fee and age.

In Jitendra Kumar Singh & Anr. v. State of Uttar Pradesh & Ors.[10], this Court has very categorically held that relaxations given in educational qualifications etc. making a person eligible to

participate in selection process would not be treated as availing benefits in the recruitment/employment and the benefits envisaged have to be those which have direct relation to recruitment/employment and are relatable to the jovial relationship of employer and employee. It is also clarified that such benefits must occur from and should be post 'level playing field'. We would like to reproduce the following discussion from the said judgment touching upon the aforesaid aspects:

> "48. In view of the aforesaid facts, we are of the considered opinion that the submissions of the appellants that relaxation in fee or age would deprive the candidates belonging to the reserved category of an opportunity to compete against the general category candidates is without any foundation. It is to be noticed that the reserved category candidates have not been given any advantage in the selection process. All the candidates had to appear in the same written test and face the same interview. It is therefore quite apparent that the concession in fee and age relaxation only enabled certain candidates belonging to the reserved category to fall within the zone of consideration. The concession in age did not in any manner tilt the balance in favour of the reserved category candidates, in the preparation of final merit/select list.
>
> 49. It is permissible for the State in view of Articles 14, 15, 16 and 38 of the Constitution of India to make suitable provisions in law to eradicate the disadvantages of candidates belonging to socially and educationally backward classes. Reservations are a mode to achieve the equality of opportunity guaranteed under Article 16(1) of the Constitution of India. Concessions and relaxations in fee or age provided to the reserved category candidates to enable them to compete and seek benefit of reservation, is merely an aid to reservation. The concessions and relaxations place the candidates on a par with general category candidates.

It is only thereafter the merit of the candidates is to be determined without any further concessions in favour of the reserved category candidates.

xx xx xx

75. In our opinion, the relaxation in age does not in any manner upset the "level playing field". It is not possible to accept the submission of the learned counsel for the appellants that relaxation in age or the concession in fee would in any manner be infringement of Article 16(1) of the Constitution of India. These concessions are provisions pertaining to the eligibility of a candidate to appear in the competitive examination. At the time when the concessions are availed, the open competition has not commenced. It commences when all the candidates who fulfill the eligibility conditions, namely, qualifications, age, preliminary written test and physical test are permitted to sit in the main written examination. With age relaxation and the fee concession, the reserved candidates are merely brought within the zone of consideration, so that they can participate in the open competition on merit. Once the candidate participates in the written examination, it is immaterial as to which category, the candidate belongs. All the candidates to be declared eligible had participated in the

preliminary test as also in the physical test. It is only thereafter that successful candidates have been permitted to participate in the open competition." It is stated at the cost of repetition that provision of giving 20% marks of TET score was applied to all candidates irrespective of the category to which he/she belongs and, therefore, no concession or relaxation or advantage or benefit was given in this behalf which could disturb the level playing field and tilt advantage in respect of reserved category candidate. On the contrary, the reserved category candidates who had secured less marks in TET examination are given lesser marks in the recruitment process on the application of the formula of allocating 20% marks of TET score. Question No. 3 is answered accordingly.

These appeals are accordingly allowed in the manner indicated in this judgment, effect whereof would be as under:

> (a) Those reserved category candidates who secured pass marks on the application of relaxed standards as contained in the extant policy of the Government in its communication dated March 23, 2011 to be treated as having qualified TET examination and, thus, eligible to participate in the selection undertaken by the State Government.
>
> (b) Migration from reserved category to general category shall be admissible to those reserved category candidates who secured more marks obtained by the last unreserved category candidates who are selected, subject to the condition that such reserved category candidates did not avail any other special concession. It is clarified that concession of passing marks in TET would not be treated as concession falling in the aforesaid category.

All these appeals are disposed of accordingly. No order as to cost.

.....J. (A.K. SIKRI) .....J. (R.K. AGRAWAL) NEW DELHI;

OCTOBER 18, 2016.

(1993) 1 SCC 645 [2] Report No. 165 of the Law Commission of India Chapter 1: Preliminary notes on transformative constitutionalism from Transformative Constitutionalism: Comparing the apex courts of Brazil, India and South Africa: by Oscar Vilhena, Upendra Baxi and Frans Viljoen (editors); South Asian Edition 2014 [4] Though in the aforesaid Chapter, he has expanded it to 8 'C's, other 'C's are different facets to C2. He elaborates these 'C's as under.

"Understanding the 'transformative' in BISA and related comparative constitutional studies (COSOG) contexts entails further division of C2 beyond the official (of authoritative) interpretation by others. Via.C4, I designate practices of non official interpretation from the learned professions, including public intellectuals and social and human rights movements. CS designates all persons in

a dominant position- 'corporate' 'financial', 'market' and 'consumer' citizens- who especially contest C2 to advance their own strategic interest. C6 comprises interpretive praxes emanating from the voice of human and social suffering of the rightless or the worst-off citizens and persons who claims the human 'right to have rights [This is a favorite notion of Hannah Arendt. See, for a recent analysis, W Hamacher 'The right to have a rights (four- and- a half remarks)' (2004) 103 South Atlantic Quarterly 343. See also FI michelman 'Parsing a "right to have rights" '(1996) 3 Constellations 200.] C6 often stands articulated by communities of resistance- for short here, on the power of social movements and human rights struggles. For C6 interpretive praxes to have any substantive impact on constitutional law (C2) the hospitable figuration of activists justices remains necessary; perhaps, this is best named as a distinctive C7.

At the same time, we also need to consider C8- the constituted powers to suspend constitutions in the state of within- notion emergency often named as ' armed rebellion', or external threats most poignantly manifest in the contemporary grammars and rhetoric of 'wars on terror'.

[5] (1981) 4 SCC 296 [6] (2006) 8 SCC 212 [7] (1980) 2 SCC 768 [8] (2008) 3 SCC 512 [9] (2011) 1 SCC 150 [10] (2010) 3 SCC 119