

*Before A. K. Sikri, Chief Justice & Rakesh Kumar Jain, JJ.*

**SHIVANI GUPTA, AND OTHERS—Petitioners**

*versus*

**STATE OF HARYANA AND OTHERS—Respondents**

**CWP No. 15929 of 2012**

December 21, 2012

*A. Constitution of India 1950-Art. 14, 226 & 309 - Writ Jurisdiction - Haryana State Education School Cadre (Group B) Service Rules, 2012 - Haryana State Education Lecturer School*

*Cadre (Group C) Service Rules, 1998 - School Teachers' Eligibility Test (STET) - Haryana Teachers Eligibility Test (HTET) - Exemption from - Amendment in 2012 Rules in this regard - Meant to benefit Guest Faculty Teachers (GFTs) recruited 2005 onward on 'per day per person basis'- Instructions dated 29.11.2005 - Regular teachers - Challenge to - History of previous litigation by GFTs to gain benefit of regularization having failed -Dual stance of Government - Note (i) in Appendix B and Transitional Rule 19-A of 2012 Rules inserted by Government to benefit GFTs and to circumvent mandate of Hon'ble Supreme Court in Mohinder Kumar's case and the Hon'ble High Court of Punjab and Haryana in Ashok Kumar's case - Held, such exemption, as a one time measure, not violative of Article 14 of Constitution of India nor suffers from any other illegality.*

*Held*, that our conclusion, after giving due consideration to the arguments of the learned counsel for the parties, is that attack on the validity of the rule is devoid of any merit and stands blunted when examined on the touchstone of legal principles. The rules do not have any blemish and the Note (i) in Appendix 'B' of the Rules, 2012, exempting Teachers with experience of four years from passing STET/HTET and B.Ed., as a one time measure, is not violative of Article 14 of the Constitution or suffers from any other illegality.

(Para 22)

*B. Note (i) Appendix B in Rules of 2012 - Validity of - provides relaxation to GFTs - Constitution of India 1950 - Art. 309 proviso - Rules framed thereunder have character of legislation - Statute cannot be questioned on ground of mala fides - Exception carved out in 2012 Rules only meant to make GFTs eligible for the post of regular teacher - Policy decision given statutory shape - Government has power to relax a particular provision to mitigate undue hardship in a particular case and to deal with a case in a just and equitable manner - Provision in 2012 Rules granting exemption/relaxation upheld*

*Held*, that it is clear from the above that the rules framed under proviso to Article 309 are not only having statutory character, such rules are given the character of legislation itself. Once this position is accepted,

the plea that the introduction of the aforesaid Note is mala fide, cannot be entertained, as a statute cannot be questioned on the ground of mala fides. Law, in this behalf, is well grounded by series of judgments of the Supreme Court.

(Para 30)

*Further held*, that the Courts have held that when there is a power to relax a particular provision, the Government can exercise such a power to mitigate undue hardship in any particular case and to deal with a case in a just and equitable manner. [See, J.C. Yadav vs. State of Haryana, AIR 1990 SC 857 and K.K. Khosla and another vs. State of Haryana and others, AIR 1990 SC 1069]. In the present case, the question of even exercising such a power does not arise as the provision is made in the rules itself which are legislative in nature. Thus, it is a policy decision which is given statutory shape.

(Para 33)

Previous litigation :

- (i) CWP 2743 of 2006 Balraj Singh v. State of Haryana, decided on 20.03.2006 : GFs to continue till regular recruitment made, but held not entitled to regular pay scale or regularization; SLP filed by State dismissed as not pressed on 10.02.2012;
- (ii) CWP 387 of 2007 Baldev Singh v. State of Haryana, dismissed on 30.08.2007, on the point of regularization;
- (iii) CWP 13045 of 2009 Ashok Kumar v. State of Haryana, decided on 06.04.2010: relaxation to GFs by Government vide instructions dated (02.12.2008 and) 02.03.2009 quashed; SLP 24882 of the 2010 Mohinder Kumar v State of Haryana, by GF, dismissed and judgment in Ashok Kumar's case upheld;
- (iv) CWP 6090 of 2010 (PIL) Tilak Raj v. State of Haryana: for filling up vacancies of regular teachers; decided on 30.03.2011; inter alia fixing deadline of 31.03.2012 for termination of services of GFs: CM by State for extension of time dismissed; SLP by the State decided on 30.03.2012;

Anupam Gupta, Senior Advocate with Angel Sharma, Advocate; Jagbir Malik, Mr. Jasbir Mor, Mr. A.K. Bura, Satbir Gill, Ravi Partap Singh, J.P. Sharma, Rajesh Lamba, Harish Nain, H.N. Sahu, Saurabh Dalal, S.S. Ghanghas, Vijay Pal, Mohit Garg, Madan Pal, Suresh Ahlawat, Anand Bhardwaj, J.P. Sharma, Narinder Kumar Sharma, Vivek Goyal, Sandeep Panwar, P.S. Khurana, Gaurav Jindal, DPS Bajwa, Ashok Kaushik, M.S. Randhawa, S.P. Chahar, Parveen Kumar Rohilla, B.S. Mittal, Vivek Khatri, Rajbir Sehrawat, Sanjiv Gupta, B.S. Dhull, Satish Chaudhary, Jitender S. Chahal, R.S. Dhull, S.K. Yadav, R.K. Hooda, Rajesh Duhan, Anurag Goyal, K.S. Dadwal, Surinder Dagar, Jaininder Saini, Dr. Suresh Kumar Redhu, Mr. H.N. Khanduja, Advocates, *for the petitioners.*

G.K. Chatrath, Senior Advocate with Alka Chatrath, Advocate for appellant in LPA-1715-2012

B.S. Rana, Addl. Advocate General, Haryana

**A.K. SIKRI, C.J.**

**Introductory remarks**

(1) The genesis of present dispute, subject matter of these writ petitions, can be traced to November-2005 when due to shortage of teachers, the District Education Officers were prompted by the State of Haryana to fill up the vacancies of Lecturers, Masters and C&V Teachers by engaging the Guest Faculty Teachers (GFTs) against the sanctioned posts. These GFTs were initially engaged on different dates in 2005 and were to continue up to 31.3.2006. However, as would be noted in detail at the appropriate stage, most of these GFTs continued beyond that period and are in service even now. In the interregnum, legal battles ensued in various forms which were taken up to the Supreme Court. The outcome of the various cases was that GFTs are not to be regularized only because of their length of service; no fresh appointments of GFTs would be made from 1.4.2012 and exercise to complete the process of regular selection must be completed within the specified time.

(2) The State of Haryana has now taken steps for filling the posts of Teachers in various disciplines on regular basis. Requisition is sent to the Haryana School Teachers Selection Board (hereinafter to be referred to

as 'the Selection Board') for this purpose. Before doing so, new statutory Rules, namely, 'The Haryana State Education School Cadre (Group-B) Service Rules, 2012 (hereafter to be referred to as 'Rules of 2012') have been promulgated. Before that, the Rules known as 'The Haryana State Education Lecturer School Cadre (Group-C) Service Rules, 1998 (for short, 'Rules of 1998') were in vogue.

(3) From the perusal of Appendix 'B' of Rules of 1998, it is clear that the basic qualification required for the post of Lecturer was MA in the relevant subject with Matric and a certificate of having qualified the School Teachers Eligibility Test (STET) (which was added in 2008) but now by way of the new Rules, an amendment has been made by inserting the qualification of Post Graduation in the relevant subject along with B.Ed. and having passed the STET. Notwithstanding this stipulation of basic essential qualifications in the Rules, at the end of Appendix 'B', Note (i) is given whereby exemption from passing STET/Haryana Teachers Eligibility Test (HTET) is given to the candidates who have worked as Teachers for a minimum period of four years on the date of enforcement of these Rules.

(4) Advertisement has been issued whereby approximately 14,000 posts of PGT Teachers in different subjects are advertised. The qualifications common to all posts specified are: (a) Matric with Hindi/Sanskrit or 10+2/ B.A./M.A. with Hindi as one of the subject and (b) Certificate of having qualified HTET/STET. Further under Note-2, one time exemption of HTET/STET has been granted to the candidates who have worked for minimum four years till 1.4.2012 in privately managed government aided, recognized and government schools. It is further provided that this relaxation is only one time and candidates will have to qualify STET/HTET not later than 1.4.2015, otherwise their services will be terminated automatically.

(5) After some time, another notification was issued whereby the Rules of 2012 were amended by inserting a transitional provision under Rule 19-A whereby it is provided, as one time measure, that the candidates whosoever were qualified under the Rules of 1998 shall also be eligible for recruitment and they will have to qualify HTET and B.Ed. by 1.4.2015. Thereafter, a corrigendum dated 3.7.2012 was issued whereby under transitional provision the candidates who were eligible under the Rules of 1998 were also made eligible, as a one time measure, and further one time

exemption is given to the candidates, who are having four years experience till 11.4.2012 in addition to being in position on the date of applying for the said post, to acquire qualifications of passing HTET/STET and B.Ed.

(6) In most of these petitions, the petitioners herein are those candidates who fulfill the essential qualifications laid down in the Rules of 2012. They have applied for the posts of PGT teachers and are ready to participate in the selection process which is underway. However, they are agitated against Note (i) in the Rules of 2012, which gives exemption from passing School Teachers Eligibility Test (STET)/Haryana Teachers Eligibility Test (HTET) to those candidates who have worked as Teacher for a minimum period of four years on the date of enforcement of these rules, i.e., as on 11.4.2012. They also feel aggrieved by the further amendment on 2.7.2012 relaxing the qualification, even of B.Ed. for such Teachers. Their nurture an apprehension that all this is done to accommodate and select these GTFs which is the manifest intention of the government, adequately demonstrated in the previous litigations wherein over-jealous attempts were made to accord these GTFs status of regular Teachers. It is for this reason, challenging these amendments, these writ petitions are preferred.

(7) To understand the contours of grievances as well as controversy, we reproduce herein below the prayer made in CWP No. 15929 of 2012:

“It is, therefore, respectfully prayed that:-

- (i) records of the case may be called for;
- (ii) filing of the certified copies of the Annexures may kindly be dispensed with and also the petitioner may kindly be exempted from filing fair typed copies of the Annexures and allowed to place on record photo copies of the same;
- (iii) services of advance notices upon the respondents be dispensed with;
- (iv) a writ in the nature of certiorari may kindly be issued quashing the impugned amendment in Note(i), Appendix ‘B’ of the Haryana State Education School Cadre (Group B) Service (Second Amendment) Rules, 2012 and Mewat District School Education (Group B) Service (Second Amendment) Rules, 2012 i.e. Annexures

P-19 & P-19A respectively, exempting the teachers with experience of four years from passing SET/HTET and B.Ed. and in consequence column c (i) of the Corrigendum issued by the Respondent Board dated 03.07.2012 (Annexure P-20);

(v) issue any other Writ, Order or Direction which this Hon'ble Court may deem appropriate and fit in the peculiar facts and circumstances of the case.

(vi) cost of the petition be awarded to the petitioners;"

(Similar prayers are made in other writ petitions as well)

It would be easier to comprehend the contentions of the petitioners, if we have the detailed background facts stating as to how the GFTs were inducted in the first instance and how they have been continuing and also the nature of litigation and orders passed from time to time by this Court as well as the Supreme Court. Therefore, we proceed to record the same in seriatim hereinbelow:

### **History of Previous Litigations:**

(8) In 2005, it was felt that there was a shortage of approximately 13,000 teaching staff in the government teaching institutions in the State of Haryana. As this shortage was adversely affecting the imparting of education in State-run educational institutions, State of Haryana, vide instructions dated 29.11.2005, issued directive to all the District Education Officers to fill up the vacancies of Lecturers. The District Education Officers were to assess the shortfall of teachers in the State of Haryana keeping in view the sanctioned posts of teachers and to fill up those vacancies in the cadre of Lecturer, Master and C&V Teacher by engaging the GFTs against the sanctioned posts. As per these instructions, the power to engage these GFTs was delegated to the Principals/Headmasters/DDOs. It was also provided that if there is requirement of teachers on the basis of vacancies and workload, the Principals/Headmasters/DDOs will display the requirement on a board at the main gate of the institution. Not only this, it was also provided that these GFTs shall be engaged in a particular school of the same village/town and if the teachers from the same village/town are not available,

then candidates belonging to same block or same district would be considered. The exact provisions of the instructions dated 29.11.2005 are reproduced hereinbelow:-

“PROCEDURE:

I. The Head of Institutions would engage teachers on Guest Faculty on the basis of vacancies and the workload.

II. The Principal/Headmaster/DDO after assessing the requirement will display the requirement on a board displayed at the Main Gate of the Institution. In case of schools having post of Principal or Headmaster vacant, the DDO/BEO would assess the requirement and will display the same. BEO would assess the requirement and will display the same. BEO will also assess the requirement of elementary school teacher.

III. The applications should be submitted by the applicants offering their services for engaging as Guest Faculty for a specific period, from the date of engagement till 31.03.2006 only.

IV. The Principal/Headmaster/DDO will process all the application received. If the Principal/Headmaster/DDO receives applications more than the vacancies for that academic session, then he/she shall give preference to the applicants having higher academic merit. First priority for engaging Guest Faculty in a particular school should be to a candidate of same village/town. The merit be made of such candidates. If required candidate of same village/town is not available, then merit be made of candidates belonging to same block. Second priority for engaging Guest Faculty should be from amongst candidates belonging to the block. Third priority should be of candidates belonging to same district.

V. As and when a regular appointee is posted to that school (whether after regular direct recruitment or after promotion or after adjustment or after transfer), the Head of the institution will dispense with the services of engaged teachers on Guest Faculty of that category of post. It is not an appointment but job work offer on period basis on prescribed rates. This is with a view to take care of studies of students where regular teachers are not available in the school.”

Large number of GFTs were engaged on the lines given in the aforesaid instructions dated 29.11.2005, as amended on 16.12.2005. As per these instructions, the GFTs were to continue only up to 31.3.2006. When this date was closing in, fearing their disengagement, large number of such GFTs approached this Court by way of writ petition under Article 226 of the Constitution of India (CWP-2743-2006, titled as *Balraj Singh and others vs. State of Haryana and others*). These GFTs pleaded that they should be allowed to continue till regular employees join the services. They also demanded regular pay scale. The writ petition was contested by the respondent-State and a categorical reply was filed wherein it was submitted that no criteria for selection/interviews of the GFTs was ever framed and the sphere of selection of GFTs was very limited and the applications were invited to teach for certain period on fixed remuneration. It was also submitted by the respondent-State that because of this, a large number of meritorious candidates, who were waiting for the regular process to be initiated, did not apply, as these GFTs were selected only from certain blocks/areas without competing with the best of talent available. It was also submitted by the State that if the petitioners therein are allowed to continue on the posts, then probably they would claim regularization after some time and right of meritorious candidates would be infringed. During the course of hearing, the learned State counsel informed the Court that a requisition has already been sent to the Haryana Staff Selection Commission and approximately 9000 vacancies would be filled up in furtherance to the aforesaid requisition. The Division Bench disposed of the writ petition vide orders dated 20.3.2006 with directions to continue with the GFTs till regular recruitments are made and it was also observed that they are not entitled to regular pay scale.

(9) The State of Haryana, initially, was not satisfied with the aforesaid judgment giving directions to continue these GFTs till regular recruitments are made. It, accordingly, challenged the orders dated 20.3.2006 by filing Special Leave Petitions (SLPs). However, these SLPs were dismissed on 10.2.2012 as not pressed. The GFTs were, thus, allowed to continue and work.

(10) In the year 2007, another attempt was made by these GFTs to allow them to continue till regular appointments are made and they also prayed that directions may be issued not to discontinue GFTs. This was

done in the case of *Baldev Singh and others vs. State of Haryana and others, (CWP 387 of 2007)*. State of Haryana again contested this petition taking a very categorical stand that since these GFTs were recruited to meet out the exigencies in various schools/colleges, they had no right to continue and it was open to the State to terminate their services any time without any notice or assigning any reason. It was stressed that their appointment letters stipulated such terms and conditions and with open eyes they had joined the services, accepting these terms and conditions with their own free will and volition and it was not permissible for them now to raise any objection to the contrary. This writ petition of the GFTs was dismissed by this Court vide orders dated 30.8.2007. Relevant portion of the said judgment is extracted below:

“After hearing counsel for the parties, we are of the considered view that the Policy of appointing Teachers as Guest Faculty Teachers was introduced by the State Government so as to provide uninterrupted education to the students. As the Education Department is a huge Department in which posts of Lecturers remain vacant due to death, retirement, resignation, promotion, etc. of Teachers, therefore, in order to ensure that studies of the students do not suffer hence, the State Government decided to engage Lecturers as Guest Faculty. Accordingly, the Principals were directed to appoint Lecturers on period basis on a fixed remuneration for a fixed period upto 31.3.2007. The petitioners themselves requested that they be engaged for a specified period on a fixed remuneration and hence now they cannot claim that they should be allowed to remain in service till regular appointments are made. A perusal of the Policy shows that appointment of Guest Faculty Teachers was a job work on period basis at prescribed rates and hence, no Guest Faculty Teacher is entitled to remain on the post beyond the period for which he has been engaged. The petitioners were engaged as Guest Faculty Teacher by the Principal of the college concerned, who otherwise, is not the competent authority to make appointment under the Rules.

Apart from the above, the petitioners were engaged from certain pocket areas only i.e., from their village or from the block and they never competed with the best of talent available. The reservation

policy was also not followed. Essentially the petitioners were engaged on contract basis and there was no obligation on either side to continue that contract beyond the period for which the Guest Faculty Teachers/Lecturers were appointed.

It is, thus, clear that the claim of the petitioners for quashing the condition of limiting the period of their appointment does not suffer from any illegality or irregularity which may warrant interference of this Court. In the Constitutional Bench judgement in *Secretary, State of Karnataka & others vs. Umadevi & others, (2006) 4 SCC 1*, the Hon'ble Supreme Court has allowed the State to engage employees on contract basis by taking into account the requirement of work. The petitioners can neither impost themselves upon the respondents nor they can be allowed to continue beyond the period for which they were engaged as Guest Faculty Teachers. **The petitioners also cannot be allowed to continue till regular appointments are made, as Guest Faculty Teachers are appointed only to tide over the situations like death, retirement, resignation, promotion, etc.**

In view of the above, we find no merit in the writ petition and the same is dismissed.”

(11) Notwithstanding the aforesaid judgment wherein the position taken by the State of Haryana was accepted, the Commissioner and Directorate of School Education issued letter dated 2.12.2008 stipulating therein the guidelines for temporary adjustment of displaced Guest Teachers. Even the imposition of complete ban on engagement of fresh Guest Teachers was ordered to be reconsidered after their displacement due to arrival of regular incumbents. It is the contention of the petitioners herein that from now onwards a deliberate effort was made by the Government to accommodate these GFTs within Education Department without giving any further opportunity of employment to any of the unemployed youth like the petitioners.

(12) The respondents, thereafter, issued instructions on 2.3.2009 whereby terms and conditions of these GFTs were ordered to be changed as contractual employees, that too for one year in spite of their earlier engagement on 'per day per person' basis. Not only this, it was also decided

that GFTs will be given exemption from passing the STET and would also be accorded age relaxation for upper age limit. To top it all, they were even to be provided additional weightage for being GFTs by giving up to 24 marks on this count. Issuance of these instructions dated 2.3.2009 started another round of litigation. A batch of writ petitions came to be filed with leading case CWP-13045-2009 titled as Ashok Kumar vs. The State of Haryana and others. This culminated in judgment dated 6.4.2010 whereby making scathing remarks on the softening of attitude of the State of Haryana qua these GFTs, the aforesaid relaxation given by the State in the communication dated 2.3.2009 was held to be bad in law, observing that there was no occasion for the State to relax the condition of STET or giving any weightage up to 24 marks towards experience gained by them as GFTs. In the process, the Court observed:

“31. A reading of orders passed by this Court, as referred to above, makes it very clear that entry of guest faculty teachers was de-hors the regular selection process. It was limited to few candidates. All eligible candidates were not allowed to compete for those posts. The nature of service was contractual. However, despite knowing terms and conditions of their appointment, the guest faculty teachers dragged the State of Haryana into avoidable litigation and on account of their action, even the process of selection of regular teachers was delayed. If at this stage, relaxation in age, exemption from passing STET and weightage upto 24 marks towards experience gained as guest faculty teachers is given to them, it would amount to appointing those very candidates in regular service, who, in the first instance, entered it through a selection process which was not regular and open to all. Obviously, it would mean a grave discrimination to the other more deserving candidates. Most of the guest faculty teachers have service of more than two years to their credit, they are sure to get 24 marks at the time of selection and by that process they are bound to exclude others who are more meritorious from entering in service. The grant of 24 marks in the marks obtained by all the candidates, including the guest faculty teachers, as per criteria, in a fiercely competitive field with thousands of applicants would virtually rule out non guest faculty candidates. This virtually amounts to regularization of guest faculty teachers in service, which was

deprecated and proscribed by the Hon'ble Supreme Court in Uma Devi's case (supra), wherein it was held that persons, who got employment without following a regular procedure and at times enter through backdoor are not entitled to get permanence in service.

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34. In the present case, if apart from relaxation in age, exemption from passing STET and weightage upto 24 marks towards experience gained as guest faculty teachers is given to the guest faculty teachers, then it would virtually amount to their regularization in service, that too, without following the proper procedure for selection and contrary to the pronouncement made by the Hon'ble Supreme Court in Uma Devi's case (supra).

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40. This Court is further of the view that there is no occasion for the State to relax conditions of passing the STET, as has been done in the case of guest faculty teachers. The said qualification was incorporated in the Rules by making an amendment in the year 2008. All other candidates, except the guest faculty teachers, are required to pass that Test, otherwise, they are not eligible to compete for the posts in question. If the guest faculty teachers without passing STET are taken in service, it would amount to giving benefit to the candidates lower in merit. Teachers are the builders of the nation and if the foundation is weak, it is not expected that the nation will progress in the right direction. No reason has been given as to why the guest faculty teachers could not and should not have passed the test, after the date, when it was incorporated as a qualification in the Rules in the year 2008."

The aforesaid judgment amply demonstrates the reasons for quashing the provisions of relaxation given to GFTs vide instructions dated 2.3.2009, as under:-

- (a) These GFTs were given appointment de hors the regular selection process, that is, no regular selection process was undertaken while giving them the appointment;

(b) Neither all eligible candidates were allowed to compete nor all eligible candidates were considered. It was limited to few candidates;

(c) The nature of engagement was contractual and terms and conditions of their appointment clearly specify that it will not bestow any right upon them. It was also made clear that it was a stop-gap arrangement pending selection of regular teachers;

(d) Any such instructions granting relaxation in age, exemption from passing STET and awarding 24 marks towards experience gained as Guest Faculty amounted to providing back-door entry to these GFTs. This would mean a grave discrimination to other more deserving candidates in a fiercely competitive field in which thousand of these GFTs would virtually rule out non-Guest Faculty candidates. Even otherwise, there was no occasion to relax the condition of passing STET, which was the essential qualification incorporated in 2008 and could be relaxed for genuine reasons, but no such reasons were forthcoming;

(13) In the passing, the Division Bench also made following significant observations:-

“43. In view of aforesaid discussion, it is evident that the grant of exemption from passing the STET and weightage of upto 24 marks towards experience to the guest faculty teachers is not justified and runs contrary to the provisions of Articles 14 and 16 of the Constitution of India. The Hon’ble Supreme Court in State of Jharkhand and others v. Bijay Kumar and others, AIR 2008 Supreme Court 1446, while dealing with a similar controversy, observed that “constitutional guarantee of equality as envisaged under Articles 14 and 16 of the Constitution of India must be protected. While passing one order or the other, we should not forget the interest of those who are not before us, citizens have human right of development and offer of appointment on such posts should be directed to be made only on merit.”

44. There are always more aspirants in the field of public employment with each passing year. Thousands of candidates may have acquired similar or higher qualifications after the date, when guest faculty

teachers were taken in service in the year 2005-2006. Those who may have become eligible now, are not likely to be successful, if exemption from passing STET and award of upto 24 marks towards experience upheld in favour of guest faculty teachers. Constitutional guarantee of equal opportunity in public service, as envisaged under Articles 14 and 16 of the Constitution has to be protected. All the applicants have equal right of being considered for selection and the posts are supposed to be filled up only by selecting the meritorious candidates.”

(14) The State of Haryana accepted the aforesaid verdict of this Court. However, GFTs, who were affected thereby filed Special Leave Petitions in the apex Court with leading case SLP No.24882 of 2010 titled as Mohinder Kumar and others vs. State of Haryana, which was dismissed by the Supreme Court with following reasons in support:

“It is not in dispute that the essential qualifications enumerated in the advertisement issued by the Commission were in consonance with the requirement of the Rules as amended vide Notification dated 24.7.2008. In other words, the certificate of having qualified School Teacher’s Eligibility Test was an integral part of the essential qualifications. Rule 17 of the Rules does empower the State Government to relax any of the provisions of the Rules with respect to any class or category of persons but the exercise of power under that rule is hedged with the condition that while granting relaxation, the State Government must record reasons for doing so. Before the High Court, the State Government did not produce any document to show that it had exercised power under Rule 17 and passed a reasoned order for granting exemption to the Teachers engaged as the Guest Faculty from the requirement of having qualified STET. Even before this Court, no such document has been produced. Therefore, the High Court was right in taking the view that the essential qualification prescribed under the rules could not have been relaxed by issuing a corrigendum in the advertisement issued by the Commission.

Shri P.P. Rao, learned senior counsel relied upon the judgment in K.V. Rajalakshmiiah Setty and another vs. State of Mysore and another (1967) 2 SCR 70 to show that one time ad hoc concession

given to teachers could be treated as legitimate and the exercise of power by the Government does not result in violation of Article 14 and 16 of the Constitution.

We have carefully gone through the judgment but do not find any proposition of legality that a qualification prescribed under the rules framed under Article 309 of the Constitution can be relaxed simply by issuing a corrigendum in the advertisement issued by the Commission. Insofar as the grant of weightage of additional marks is concerned, we are in complete agreement with the High Court that this was an indirect methodology adopted by the State to ensure regularisation of the Guest Faculty Teachers who had earlier failed to convince the High Court to issue a mandamus to the State Government to frame a policy for regularisation of their services.

In the result, the special leave petitions are dismissed.”

(15) While the aforesaid events were taking place, side by side, a PIL was also filed for quashing of the action of the State of Haryana by which tenure of the GFTs was extended for a further period of one year. Prayer was also made in the said PIL seeking directions to the Government of Haryana to fill up the vacant posts of Teachers/Lecturers on regular basis through a process provided in the Constitution Scheme which was the subject matter of CWP-6090-2010 entitled: Tilak Raj vs. State of Haryana. This writ petition was disposed of vide judgment dated 30.3.2011 whereby important observations were made about the balance between the need for education and the need for upholding the fundamental rights of a large section of the citizens under Articles 14 and 16 of the Constitution of India and further it was also observed that the Court cannot overlook the manner in which GFTs have entered into service and how they have continued and how a large number of eligible candidates are still waiting for regular appointments and finally directions were given to extend the tenure of the GFTs up to 31.3.2012 with specific observation that on the expiry of the said date, the services of the GFTs shall be understood to have lapsed and it will not be open for the State to continue any such GFTs in service. However, after nine months, i.e., on 16.12.2011, an application was filed by the State seeking extension of time granted by this Court for compliance of the order dated 30.3.2011. In this application, orders dated 15.3.2012

were passed dismissing the same, inter alia, observing that the State had failed to make out any justifiable case for extension and, in any case, finality had to be achieved in the selection process of regular teachers by making an extra effort, as the game of extension serves nobody's cause in long run.

(16) Against this order, refusing to extend time, Special Leave Petition was filed, which was decided on 30.3.2012 whereby it was directed that no fresh appointments of G.T's will be made from 01.04.2012 and exercise to complete the process of selection must be completed within the time specified in the Scheme and it was also observed that no further extension or deviation therefrom will be permitted. Finally, it was also observed that the recruitment of teachers on regular basis shall not be supplemented or replaced by this procedure of appointing the G.T's. For the sake of convenience, the pertinent observations given by the Supreme Court are as under:-

“7. Having heard the learned Attorney General for India, Mr. Subramaniam and Mr. Vishwanathan, senior advocates, for the parties and also keeping in mind the submissions made by Mr. Vishwanathan, that the intention of the Division Bench of the High Court was that no further appointments of ‘Guest Teachers’ should be made after 1st April, 2012, and that the vacancies should be filled up by posting and reposting SLP(C)...CC5956-5957/12 etc. in the different institutions, we feel the two things should really be kept separate, notwithstanding the apprehension voiced by Mr. Vishwanathan, that this court lead to continuance of appointment of ‘Guest Teachers’.

8. We make it very clear that as directed by the Division Bench of the High Court, no fresh appointments of ‘Guest Teachers’ will be made from 1st April, 2012. However, since students also cannot be made to suffer on account of the delay in the appointment of regular teachers, we direct that the exercise indicated in the scheme, must be completed within the time specified in the scheme and no further extension or deviation therefrom will be permitted.

9. Till then, the ‘Guest Teachers’ may be allowed to continue to function, as they have been doing so far.

10. We once again reiterate that the recruitment of teachers on the regular basis shall not be supplemented or replaced by this procedure of appointing ‘Guest Teachers’ for the sake of convenience.”

**Impugned Provisions:**

(17) As pointed out above, thereafter the State promulgated Rules of 2012 and also came out with the first amendment as well as second amendment in the said rules. As per Rules of 2012, essential qualification for PGT Teacher is Post-Graduation in the relevant subject along with B.Ed. and also having passed the STET/HTET. However, in these very rules, after stating the aforesaid basic essential qualifications, at the end of Appendix-B, a note is given whereby those Teachers who have worked for a minimum period of four years on the date of enforcement of these rules, i.e., 11.4.2012, they have been exempted to clear qualification of passing STET as a one-time measure with the condition that they will have to qualify HTET by not later than April 01, 2015. This eligibility condition for PGT with aforesaid note is as under:

“Appendix-B

**PGT English:**

- (i) M.A. English with at least 50% marks and B.Ed. from recognized University, AND
- (ii) Matric with Hindi/Sanskrit or 10+2/B.A./M.A. with Hindi as one of the subject, AND
- (iii) Certificate of having qualified Haryana Teacher Eligibility Test (HTET)/School Teachers Eligibility Test (STET).
- (iv) Consistent good academic record.

Note: (i) That in case of different recruitment, the teachers working in privately managed Government aided, recognized and Government schools, are exempted to acquire qualifications of passing HTET as described in column No. 1, if they have worked as a teacher for a minimum period of four years on the date of enforcement of these rules. However, said exemption is as a one time measure and the said category of teachers on the their appointment shall have to qualify HTET by not later than 1st April, 2015; otherwise their appointment shall stand terminated automatically without giving any further notice.

(ii) A person who has passed STET/HTET without the qualification of B.Ed. before the notification of these rules, shall be considered eligible for the post of PGT in case of direct recruitment.

(iii) In case of direct recruitment, consistent good academic record means that out of the lower qualification i.e. Matric/10+2/Graduation than the requisite minimum qualification, one need secure at least 50% in two lower exams and 45% in third lower exam. If there is only two lower exams, then one must secure at least 50% in one exam and 45% in another.

(iv) Professional Training Diploma or Certificate awarded by any State Board or University other than Haryana Education Department will be recognized only if this Degree or Diploma or Certificate has been recognized by the Haryana Government.

(v) Relaxation up to 5% in the qualifying marks shall be allowed to the candidates belonging to Scheduled Castes (SC) and differently aided candidates.”

On this basis, advertisement was issued on 6.6.2012 whereby approximately 14,000 posts of PGT Teachers in different subjects have been advertised. After issuance of the aforesaid advertisement, a notification was again issued dated 2.7.2012 whereby the Rules of 2012 were amended by inserting a transitional provision under Rule 19-A whereby it is provided that the candidates whosoever were qualified under the Rules of 1998 shall also be eligible for recruitment as one time measure and they will have to qualify HTET and B.Ed. by 1.4.2015 and if they fail to do so, the appointments shall stand terminated automatically. Further, Note (i) of Appendix ‘B’ of Rules of 2012 is also substituted by saying that in case of direct recruitment, the teachers working in the privately managed Government aided, recognized and Government schools are exempted from having qualifications of HTET/STET and B.Ed. if they have worked as a teacher for a minimum period of 4 years on the date of enforcement of these Rules. The exact amendment in Note (i) is as under:-

“3. In the said rules, in Appendix B, for note (i) the following note shall be substituted, namely: -

(i) That in case of direct recruitment, the teachers working in privately managed Government aided, recognized and Government schools, are exempted from having qualifications

of Haryana teachers Eligibility Test or School Teachers Eligibility Test and B.Ed. as described in column 3, if they have worked as a teacher for a minimum period of four years on the date of enforcement of these rules.”

For such teachers, who have four years’ teaching experience and these certainly include these GFTs, one time relaxation from passing STET/ITET as well as qualification of B.Ed. is relaxed as one-time measure. The effect is that these GFTs or other Teachers, who are not possessing ITET Certificate or B.Ed. Certificate, are made eligible to compete along with others like the petitioners in these writ petitions.

**The Challenge:**

(18) According to petitioners, these amendments are deliberately made with sole motive to accommodate GFTs by giving them the regular appointment. In nutshell, the case of the petitioners is that though in the beginning the Government was opposed to the claim of these GFTs, but after 2008 there was change of mind and there have been repeated attempts on the part of the State to see that these GFTs somehow continue and are given appointment on regular basis. However, even when such demands failed on the anvil of judicial scrutiny, to wriggle out of the mandate given by this Court and the Supreme Court, the government has come out with the exemption clauses waiving the essential conditions for appointment of these Teachers. With the result, these GFTs, who are otherwise not eligible for consideration to the posts of PGTs, will now be considered and will be allowed to compete with the petitioners and others, who are having the requisite qualifications and waiting for their appointment on merits. It is the apprehension of the petitioners that all this is done just to favour these GFTs by giving them the appointment. The benefit is extended even to those Teachers working in privately managed government aided schools and recognized schools. According to petitioners, this is only a make belief just to show that this exemption is a uniform exemption and not for the Guest Faculty only, but for the benefit of teaching faculty in all. Otherwise argued the petitioners, the whole intention is to circumvent the basic mandate of this Court in Ashok Kumar’s case (supra) and that of the Supreme Court in Mohinder Kumar’s case (supra) whereby these types of exemptions are held to be arbitrary and violative of Articles 14 and 16 of the Constitution of India.

(19) Mr. Anupam Gupta, learned senior counsel, appearing for the petitioners, spearheaded the attack by exemplifying the aforesaid submissions in the following manner:

(i) Track record in which the Government has conducted itself in past few years clearly exemplifies the intention of the Government, namely, somehow help these GFTs;

(ii) This intention of the Government is very clear even from the online application form wherein a specific column is provided asking as to whether the candidate is working as Guest Teacher in the State of Haryana or not. The column, in verbatim, is as under:

“Are you working as Guest Teacher in Haryana”

(iii) That by providing this exemption, respondent department/Government has treated equals and unequals equally which is not permissible from any corner of law as any sort of classification should have some nexus with the ultimate object sought to be achieved whereas in the present case, the only object of the respondent department/Government is just to accommodate/select these GFTs by any means by providing them any sort of relaxation/exemptions;

(iv) Mr. Gupta also found oblique motive in specifying period of four years' experience for grant of exemption and not any other period. In this behalf, the argument is that for the first time, the GFTs were appointed in the year 2005 and this process of engaging GFTs was continued up to the year 2008. Thereafter, no GFT was appointed. The last appointment of GFTs was made in the year 2008. This is why, magic number of four years is given by the respondent-State. He argued that in *Secretary, State of Karnataka & others* versus *Uma Devi & others (1)*, the Supreme Court has categorically held that the persons who have been appointed by irregular process of selection (not illegal) and who are working for the last more than 10 years should be regularized by one time policy framed by the Government. But unfortunately, the Government of Haryana cannot apply the mandate given in *Uma Devi's* case (supra) on the GFTs because they have their own categoric stand in this Court that these

appointments are stop gap arrangement and without following the exact intent of Articles 14 and 16 of the Constitution of India and that is why the respondent department/Government is trying to benefit these GFTs by providing these types of exemptions. that too by making a specific mention in the application form and seeking specific information from the GFTs about their status. If at all, the intention of the Government would have been to make transparent selection. by providing exemption, the question in the application form should have been about the status of all the teachers working in the privately managed government aided, recognized and Government schools. Here, it is important to mention that the GFTs are only in the Government schools. Therefore, keeping in view the intention of the Government, they have provided these exemptions in note (i) of the Rules of 2012 dated 11.4.2012;

(v) It was also submitted by Mr. Gupta that as per the information provided under the RTI, thousands of candidates have passed the STATE/UNIT test in different subjects and are waiting for their selection. Thus, when sufficient number of eligible candidates are available in the market, who have applied for the post of PGT, there is no reason or justification to give relaxation to such Teachers including GFTs and accommodate these ineligible candidates which is also irrational, illogical, arbitrary and thus, amounts to infraction of Article 14 of the Constitution. This Note (i) in Appendix-B and further amendment giving relaxation of B.Ed. as well, was also challenged as colourable exercise of power;

Mr. K. S. Dadwal, learned counsel for the writ petitioner (in CWP-25476-2012), in addition, raised the following arguments:

(vi) Giving relaxations to GFTs and other such Teachers and making them eligible, had resulted in short-listing because of swelling number of the total candidates. This short-listing was done in 4 disciplines, whereas, the advertisement pertained to 14 subjects. Though the requirement as per the rules is 50% marks in M.A., because of the short-listing, this bar was raised higher. The effect of that was that many eligible candidates from amongst the petitioners stood excluded

from consideration. It was argued that had there been no exemption, most of these candidates would have been eligible as in such eventuality there might not have been any occasion for short-listing. It was also submitted that short-listing in four subjects was because of the reason that almost all the GFIs belong to these four subjects and thus, it was done with intention to help them. The effect of this was that many eligible candidates were out of consideration, whereas, ineligible candidates like the GFIs were being considered;

(vii) Learned counsel drew attention to Rule 5 of NCTE Rules, which read as under :

“In accordance with the provisions of subsection (1) Of Section 23 of the RTE Act, the National Council for Teacher Education (NCTE) had vide Notification dated 23rd August, 2010 and 29th July, 2011 laid down the minimum qualifications for a person to be eligible for appointment as a teacher in classes I to VIII. It had been inter alia provided that one of the essential qualifications for a person to be eligible for appointment as a teacher in any of the schools referred to in clause (n) of section 2 of the RTE Act is that he/she should pass the Teacher Eligibility Test (TET) which will be conducted by the appropriate Government in accordance with the Guidelines framed by the NCTE.

The rationale for including the TET as a minimum qualification for a person to be eligible for appointment as a teacher is 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.”

As per this rule, relaxation, if any, could be given by NCTE. On that basis, it was sought to contend that there was no jurisdiction with the State to frame such rules and provide relaxation by themselves by-passing NCTE and, therefore, such an action was ultra vires the powers of the State Government as well.

(20) Mr. Jagbir Malik, Advocate, appearing for some of the petitioners, made additional arguments:

(viii) By exempting the passing of STET exam, no weightage thereto is given which is contrary to the entire scheme of inclusion of STET as mandatory requirement. He stressed the rationale behind the passing of STET as essential qualification issued by CBSE in the following words:

Mr. Malik, thus, argued that having regard to the importance attached to the STET examination, there could not have been relaxation to this provision.

(21) The aforesaid contentions are stoutly refuted by Mr. Rana, learned Additional Advocate General, Haryana and Mr. Chatrath, learned senior counsel, who appeared for the appellant in I.P.A No. 1715 of 2012, made his own additions with all vehemence at his command, highlighting the circumstances under which GFTs came to be appointed. He made a fervent appeal with the aid of plethora of case law to the effect that such a provision made in the rules in the form of Note as well as in advertisement does not suffer from any illegality or impropriety. We are not taking note of these submissions in detail here. Instead we would be referring to same while giving our reasons in support of our conclusion.

### **The Decision:**

(22) Our conclusion, after giving due consideration to the arguments of the learned counsel for the parties, is that attack on the validity of the rule is devoid of any merit and stands blunted when examined on the touchstone of legal principles. The rules do not have any blemish and the Note (i) in Appendix 'B' of the Rules, 2012, exempting Teachers with experience of four years from passing STET/ITET and B.Ed., as a one time measure, is not violative of Article 14 of the Constitution or suffers from any other illegality.

### Reasons in Support:

(23) At the outset, we would like to comment that this exemption provides as a one time measure only entitles Teachers with experience of four years, from passing STET/HTET and B.Ed. while considering their cases for appointment. Further it is not that the requirement of passing STET/HTET and B.Ed. is waived for all times to come. In the relaxation which is given, it is specifically provided that those Teachers who are selected for appointment on regular basis will have to pass STET/HTET and B.Ed. by 1.4.2015, failing which their appointment shall stand terminated automatically without giving any further notice.

(24) Based on the aforesaid provision contained in the rules, advertisement was issued on 6.6.2012 whereby approximately 14,000 posts of PGT Teachers in different subjects have been advertised. After issuance of the aforesaid advertisement, a notification was again issued dated 2.7.2012 whereby the Rules of 2012 were amended by inserting a transitional provision under Rule 19-A whereby it is provided that the candidates whosoever were qualified under the Rules of 1998 shall also be eligible for recruitment as one time measure and they will have to qualify HTET and B.Ed. by 1.4.2015 and if they fail to do so, the appointments shall stand terminated automatically. Further, Note (i) of Appendix 'B' of Rules of 2012 is also substituted by saying that in case of direct recruitment, the teachers working in the privately managed Government aided, recognized and Government schools are exempted from having qualifications of HTET/STET and B.Ed. if they have worked as a teacher for a minimum period of 4 years on the date of enforcement of these Rules.

(25) There was some misgiving that the exemption from acquiring the qualification of STET/HTET and B.Ed. is granted for all times to come. However, when the counsel for the petitioners were informed that this Court has already taken view in its decision dated 30.11.2012 in **Civil Writ Petition No.21611 of 2012**, entitled *Vijayjanti Jakhar vs. Haryana School Teachers Selection Board* that the requirement of acquiring these qualifications by 1.4.2015 stands. Mr.Anupam Gupta, learned senior

counsel for the petitioners and other counsel accepted this position. We quote the following extract which makes the stand of the Government very explicit:-

“Learned counsel for the State, on the other hand, submits that this benefit can be extended to only those candidates who fulfill the requirement contained in para C(i) as well i.e. only those candidates who have worked as teachers for a minimum four years till 11.4.2012 and are in service as on that date. The question that arises for consideration, in these circumstances, is “whether the eligibility conditions mentioned in paras C(i) and C(ii) on the one hand and transitional provision on the one hand are mutually exclusive or a candidate is required to fulfill all the eligibility conditions?” After the aforesaid corrigendum issued on 3.12.2012, within two days thereof, interpretation to this provision was issued by the Board by public notice given on 5.7.2012, which reads as under:

“Interpretation Transitional Provision Corrigendum, dated 3.7.2012 Reference corrigendum dated 3.7.2012, the transitional provision at para 4 of HSTSB corrigendum 3.7.2012 appears to be interpreted in isolation by some applicants. The Haryana State Lecturer School Cadre (Group-C) Services Rules, 1998 eligibility is applicable provided applicants meet the eligibility conditions given under heading “common to all posts” at point (a), (b), (c) (i) and (c) (ii). The point (d) is still applicable and is now modified for applicants under above referred Service Rules, 1998 and gives relief in Essential Qualifications (E.Q.), subject combination, B.Ed. and Post Graduate Degree which have been specified under relevant category of PGT Mathematics, Biology, Political Science and History under para 4 of the corrigendum.”

It is clear from the above that the transitional provision contained in para No.4 is not to be read in isolation. The clear intention is to give the relaxation only to those candidates who fulfill eligibility conditions given under heading “COMMON TO ALL POSTS” at points (a), (b), (c) (i) and (c) (ii) and (d). Thus, the petitioner could claim the benefit only if she was teaching and had completed four years of

teaching as on 11.4.2012. Since, this is not the condition fulfilled by the petitioner and she is not having the qualification of HTET/STET, we are of the view that she does not fulfill the eligibility conditions as per the advertisement and therefore, her candidature was rightly rejected.”

The only question which needs determination is as to whether there could be relaxation of this condition of not.

(26) It is this aspect which we proceed to answer in the following paragraphs:

(27) Let us first discuss the circumstances under which GFTs came to be appointed. It was a common case of the parties that in the year 2005, the respondent-State was faced with a situation where there was acute shortage of Teachers in the schools. In order to ensure that the education of the students does not suffer because of the shortage, a short time measure/strategy was formulated by deciding to make appointment of Guest Teachers. As per the Government, it was a sincere effort to ensure quality and uninterrupted study of the students in the Government schools. For this purpose, all the Heads of the institutions (Principals/Head Masters) were directed to assess the shortfall of Teachers in their respective schools keeping in view the sanctioned posts and strength of students and, wherever required, to engage the teachers on guest faculty basis as per their need on ‘period’ basis, on a fixed remuneration. Instructions dated 29.11.2005, in this behalf, provided that if there is requirement of Teachers on the basis of vacancies and workload, the Principal/Head Master/DDO will display requirement on a board at the main gate of the institution. It was also provided that these GFTs shall be engaged in a particular school of the same village/town and if teachers from the same village/town are not available, then the candidates belonging to same block/district would be considered. These instructions also provided that as and when a regular appointee is posted to that school, the head of the institution will dispense with the services of the GFT of that category of post. It was not opposed. No doubt, the appointment of GFTs was for a specific period, i.e., up to 31.3.2006. However, as already noted, the GFTs continued even after 31.3.2006. First direction to this effect was passed by the Division Bench in Balraj Singh’s case (supra) on 20.3.2006, permitting them to continue till regular recruitments

are made, though, at the same time, it was very categorically held that they were not entitled for regularisation nor even the regular pay scale. For whatever reasons, the regular appointments could not be made and these GFTs continued. No doubt, in the meantime, their attempt for regularisation failed again, as writ petition titled as Baldev Singh and others vs. State of Haryana and others, CWP-387- 2007, was dismissed vide order dated 30.8.2007.

(28) The Government thereafter issued instructions dated 2.12.2008 stipulating guidelines for temporary adjustment of displaced Guest Teachers and also issued instructions on 2.3.2009 whereby terms and conditions of these GFTs were ordered to be changed as contractual employees. It was also decided that these GFTs would be given exemption from passing STET and would be accorded age relaxation of upper age limit at the time of selection and they would be provided additional weightage for being GFTs by giving up to 24 marks for teaching. These instructions dated 2.3.2009 were struck down in Ashok Kumar's case (supra) by the Division Bench of this Court vide judgment dated 6.4.2010 which was upheld by the Supreme Court in Mohinder Kumar (supra). We have already extracted the relevant portion of the judgment in Ashok Kumar (supra) from which it is clear that the Court decided against the weightage of giving marks up to 24 marks towards experience gained as Guest Faculty Teacher which was sought to be given to these GFTs, as giving of weightage of so many marks would have the effect of appointment of GFTs only in regular service which would have amounted to grave discrimination to the other more deserving candidates. Insofar as exemption from passing STET is concerned, the Court held it to be impermissible because exemption as per rules could be given only for valid reasons and no such reasons were recorded while giving exemption.

(29) It is in this backdrop we have to examine the validity of Rules, 2012. There is no provision for giving any weightage/marks for teaching as GFTs or teaching experience. It is also not a case of exercising power of relaxation. Instead insofar as age relaxation is concerned, no such provision is made. Insofar as relaxation of condition of passing STET and B.Ed. is concerned, now the Rules of 2012, which are statutory in nature, itself provide for the same. Therefore, first question that arises for consideration is validity of Note(i) of Appendix 'B' in the rules itself which provides for such relaxation.

(30) These rules are framed under the proviso to Article 309 of the Constitution. The character of such rules is explained by the Supreme Court in the case of *B.S. Vadera versus Union of India (2)*, to be that of equivalent to a legislation/statute. Following discussion, in this behalf, is worthy of a quote:

“24. It is also significant to note that the proviso to Article 309, clearly lays down that ‘any rules so made shall have effect, subject to the provisions of any such Act’. The clear and unambiguous expressions, used in the Constitution, must be given their full and unrestricted meaning unless hedged-in, by any limitations. The rules, which have to be ‘subject to the provisions of the Constitution shall have effect, ‘subject to the provisions of any such Act’. That is, if the appropriate Legislature has passed an Act, under Article 309, the rules, framed under the Proviso, will have effect, subject to that Act; but, in the absence of any Act, of the appropriate Legislature, on the matter, in our opinion, the rules, made by the President or by such person as he may direct, are to have effect, both prospectively and retrospectively. Apart from the limitations, pointed out above, there is none other imposed by the proviso to Article 309, regarding the ambit of the, operations of such rules. In other words the rules, unless they can be impeached on grounds such as breach of Part III, or any other Constitutional provision, must be enforced, if made by the appropriate authority.”

The same view was reiterated in the Constitutional Bench judgment of the Supreme Court in *B.S. Yadav and others versus State of Haryana and others (3)*, in the following manner:-

“44. It is in this context that the proviso to Art. 309 assumes relevance and importance. The State legislature has the power to pass laws regulating the recruitment and conditions of service of judicial officers of the State. But it was necessary to make a suitable provision enabling the exercise of that power until the passing of the law by the legislature on that subject. The Constitution furnishes by its provisions ample evidence that it abhors a vacuum. It has therefore made provisions

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(2) AIR 1969:SC 118

(3) AIR 1981 SC 561

to deal with situations which arise on account of the ultimate repository of a power not exercising that power. The proviso to Art. 309 provides, in so far as material, that until the State legislature passes a law on the particular subject, it shall be competent to the Governor of the State to make rules regulating the recruitment and the conditions of service of the judicial officers of the State. The Governor thus steps in when the legislature does not act. **The power exercised by the Governor under the proviso is thus a power which the legislature is competent to exercise but has in fact not yet exercised. It partakes of the characteristics of the legislative, not executive, power. It is legislative power.**

**45. That the Governor possesses legislative power under our Constitution is incontrovertible and, therefore, there is nothing unique about the Governor's power under the proviso to Article 309 being in the nature of a legislative power. ....”**

It is clear from the above that the rules framed under proviso to Article 309 are not only having statutory character, such rules are given the character of legislation itself. Once this position is accepted, the plea that the introduction of the aforesaid Note is mala fide, cannot be entertained, as a statute cannot be questioned on the ground of mala fides. Law, in this behalf, is well grounded by series of judgments of the Supreme Court. It would suffice to refer to recent judgment of the Supreme Court in *State of Tamil Nadu and others versus K. Shyam Sunder and others (4)*, wherein the apex court observed as under:-

“22. It has consistently been held by this Court that the doctrine of malafide does not involve any question of bonafide or malafide on the part of legislature as in such a case the Court is concerned to a limited issue of competence of the particular legislature to enact a particular law. If the legislature is competent to pass a particular enactment, the motives which impelled it to an act are really irrelevant.

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22.1 Motive of the legislature while enacting a Statute is inconsequential: “Malice or motive is beside the point, and it is not permissible to suggest parliamentary incompetence on the score of mala fides.”

(31) The State has also sought to provide justification for giving one time relaxation. In the first place, as already noted above, this relaxation is not permanent. It is not only given to GFTs but other teachers as well who have been teaching in the Government schools and recognized private schools as well, if they have teaching experience of four years as on 11.4.2012. Furthermore, if any of these teachers is appointed, he/she is required to acquire these qualifications by 1st April, 2015.

(32) Thus, by this provision, they are only made eligible to be considered for the post. Justification for having this provision, as pointed out by Mr. Rana, learned Additional Advocate General, was that GFTs or the other Teachers, at the time of their initial appointment, were fulfilling all the requisite eligibility conditions. At that time, there was no requirement of having passed the STET/HTET which was introduced only in the year 2008. Same was the position as far as qualification of B.Ed. is concerned. To sum up, the following aspects need to be noted:

(a) At the time of their initial appointment as GFTs, they were fulfilling eligibility conditions for appointment as PGT Teachers;

(b) The provision for relaxation is made permitting them to acquire these qualifications by 1st April, 2015 in order to give them time to acquire these qualifications, as these eligibility conditions are introduced in the year 2008 and 2012, respectively;

(c) No age relaxation is given. Further, no weightage for teaching experience, at the time of selection, is given as was sought to be done earlier.

(d) They are only made eligible to be considered on their own merits along with other candidates. Further, it is not only GFTs but all other teachers of the Govt. schools and private recognised schools which are accorded same treatment.

(e) It was argued by Mr. Rana as well as Mr. Chatrath that having regard to their teaching experience such an exemption is permissible and recognized by the Courts. (see, *State of Kerala versus N.M. Thomas* (5).

(33) The Courts have held that when there is a power to relax a particular provision, the Government can exercise such a power to mitigate undue hardship in any particular case and to deal with a case in a just and equitable manner. [See, *J.C. Yadav versus State of Haryana (6)* and *K.K. Khosla and another versus State of Haryana and others (7)*. In the present case, the question of even exercising such a power does not arise as the provision is made in the rules itself which are legislative in nature. Thus, it is a policy decision which is given statutory shape.

(34) Once we consider the matter in the aforesaid hue, the argument that the Government has treated equals and unequals at par also fails. It hardly needs reiteration that these GFTs or other teachers from Government schools/recognized schools, who have four years experience, are only made eligible for consideration. In the selection process, these GFTs, etc. are to be considered on their own merits along with others and in the selection process, it is only merit which is to prevail with no weightage for their teaching experience. The selection committee cannot give them any preference or favourable treatment. If that is done, selection can always be questioned and challenged.

(35) Once we hold that the aforesaid provision in Note(i) in Appendix 'B' in the rules is valid in law and does not suffer from any legal infirmity, then the effect thereof is that these GFTs and other teachers with four years experience also become eligible. Merely because it would result in short-listing of candidates, as number of applicants is expected to rise very high, that by itself would not mean that these GFTs are to be treated as ineligible. It is trite that if the number of applications are huge, eligibility bar can be raised to short-list the candidates.

(36) We also accept that the passing of HFTET/STET has some rationale as emphasised by NCTE as well. The fact remains, however, that this was not the qualification earlier when these GFTs started teaching. Further, they have been teaching all this while and even at present. Therefore, merely because they are allowed some time to pass this STET, that is, by

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(6) AIR 1990 SC 857

(7) AIR 1990 SC 1069

1st April, 2015, having regard to their teaching experience, that by itself would not result in denying them consideration at this stage.

(37) In view of the aforesaid discussion, we reject the argument of the petitioners that Note(i) in Appendix 'B' to Rules, 2012, is illegal or unconstitutional.

(38) One aspect raised in some of the writ petitions remains to be discussed, viz., some of such GI'Ts and other Teachers, who have four years experience but were not in service as on 11.4.2012 have been excluded from consideration. Insofar as Note(i) in the Rules of 2012 is concerned, it does not contain any stipulation that such Teachers are to be in service as on the date of enforcement of the rules, i.e., 11.4.2012. The exemption is given "if they have worked as Teachers for the minimum period of four years on the date of enforcement of these rules". That means, they should have worked for a period of four years and this four years period is to be reckoned by taking cut off date as 11.4.2012. However, in the advertisement, such a condition, namely, Teacher should be working also as on 11.4.2012, is provided. We do not see any rationale or justification in prescribing this condition. Once we accept the argument of the Government itself that because of experience of four years provision is made in the rules giving them exemption, such benefit needs to be extended to all those who have requisite four years experience whether they were working on 11.4.2012 or not. It is more so when Rules of 2012 do not prescribe any such condition and laying down same in the advertisement is contrary to the rules.

(39) We, thus, hold that all those who have working experience as Teacher for a minimum period of four years on the date of enforcement of rules i.e. 11.4.2012, would be entitled to be considered for the posts in question whether they were in fact in service as on 11.4.2012 or not. Writ petitions of such Teachers are, accordingly, allowed. As a result, LPA No.1715 of 2012 is also allowed. Other writ petitions stand dismissed. There shall be no order as to costs.