Before G. S. Sandhawalia & Vikas Suri, JJ.

NAJAR SINGH AND OTHERS —*Petitioners*

versus

STATE OF PUNJAB AND OTHERS—*Respondents*

CWP No.18921 of 2021

December 10, 2021

Constitution of India, 1950—Arts. 21, 226, 227 and 309 — Right of Children to Free and Compulsory Education Act, 2009— S.11—Punjab State Elementary Education (Pre-Primary School Teachers) Group "C" Service Rules, 2020—Clause 5(iii)— Appointment as Pre-Primary School Teachers—100% Reservation for Schedule Tribe candidates— Permissibility—Held, not permissible for State to have 100% reservation for certain category of persons—State can fill up posts of Pre-Primary School Teachers under Group-C Service Rules, 2020 by only allowing 50% reservation of posts totaling 8393, to give benefit to Education Volunteers etc. under Clause 5(iii)—Balance 50% would have to be left out to other categories, for consideration—Advertisement quashed—Direction to State to issue fresh advertisement in view of essential qualification in Clause 5(iii).

Held that, a Constitution Bench of the Apex Court in **Chebrolu Leela Prasad Rao & others Vs. State of A.P. & others 2020 (6) SLR 558**, while delving on the issue of reservation for Schedule Tribe candidates for the post of teachers, held that 100% reservation is not permissible under the Constitution. The 100% reservation which was provided had been sustained by the Full Bench of the High Court on the ground that it was based on intelligible differentia and the classification had a nexus with the object sought to be achieved. However, the Apex Court held that the concept of equality enshrined in Article 14 could not be used to perpetuate any illegality. The classification should have rationale nexus to the object sought to be achieved and to kill the evil of discrimination and to bring equality. It was accordingly, held that some relaxation may become imperative but extreme relaxation is not to be exercised and special case has to be put for reservation of more than 50%.Resultantly, it was held that the opportunity of public employment cannot be denied unjustifiably and not a prerogative of few as all the citizens have equal right and the total

exclusion of others and to grant opportunity for one class has not been contemplated by the founding fathers of the Constitution. Reliance was placed upon the judgment in **Indra Sawhney Vs. Union of India 1992 Supp. (3) SCC 217** and a specific issue regarding the question of law was framed to this extent whether 100% reservation was permissible under the Constitution. Resultantly, it was answered that reservation cannot exceed 50% and that the Scheduled Caste and Other Backward Classes had also been deprived of their due representation and the action was unreasonable and arbitrary and violative of Articles 14, 15 and 16 of the Constitution of India. It was, accordingly, held that employment to others was illegally deprived and that there was no chance of employment on account of 100% reservation against the post of teachers to the others.

(Para 34)

Vikas Chatrath, Advocate,
for the petitioners (in CWP Nos. 18921, 19959 of 2021).

R.S.Bains, Sr.Advocate with
Loveneet Thakur, Advocate
for petitioners (in CWP-24146-2021).

Parvesh Saini, Advocate,
and Karneev Sandhu, Advocate,

for the petitioners
(in CWP Nos. 18619, 21977, 20413 and 22571 of 2021)

Naveen Batra, Advocate,
for petitioners (in CWP No. 21370 of 2021)

Prince Goyal, Advocate

for the petitioners (in CWP Nos. 20517, 20701, 20717, 20944, 22352, 22353 of 2021).

Deven Munjal, Advocate,
for petitioners (in CWP-23464-2021).

Amit Shukla, Advocate,
for the petitioners (in CWP Nos.17449 and 20349 of 2021)

P.S. Mirpur, Advocate,
for the petitioners (in CWP No.20362 of 2021).

Shreesh Kakkar, Advocater,
for petitioners (in CWP-22708-2021).

Sunny Singla, Advocate,
for the petitioners (inCWP No. 20677 of2021).

Amandeep Singh Jawandha, Advocate,
for the petitioners (in CWP Nos. 20818 and 16143 of 2021).

Manish Bansal, Advocate,
for the petitioners (in CWP-23211 & 23219 of 2021).

Monica Chhibber Sharma, Sr. DAG, Punjab.
Sandeep Jasuja, Advocate, for NCTE.
Buta Singh Bairagi, Advocate
for the respondents No.5 to 9 (in CWP No.18619 of 2021). for the respondents No.4 to 8 (in CWP No.18921 of 2021).

A.S.Chadha, Advocate
for Kannan Malik, Advocate,
for the respondents No.10 to 13 (in CWP No.18619 of 2021).
for the respondents No.9 to 12 (in CWP No.18921 of 2021).

G.S. SANDHAWALIA, J.

(1) The present judgment shall dispose of 26 writ petitions bearing CWP Nos. 18921, 18619, 19959, 20517, 20232, 20349, 20362, 20413, 20677, 20701, 20717, 20818, 20944, 17449, 21370, 21977, 22352, 22353, 22571, 22694, 22708, 23211, 23219, 23464, 24146 & 24242 of 2021, since common questions of law and facts are involved. However, for dictating orders, facts have been taken from CWP-18921- 2021 titled *Najar Singh & others Vs. State of Punjab & others.*

(2) Challenge in the pesent writ petition, filed under Articles 226/227 of the Constitution of India is to the First Amendment made on 07.09.2021 (Annexure P-19) in the Punjab State Elementary Education (Pre-Primary School Teachers) Group "C" Service Rules, 2020. By virtue of the said amendment in Appendix-B against Sr.No.1 under Column No.5, substitution was done of Clause 5 regarding the eligibility criteria prescribed for appointment of Pre-Primary School Teachers wherein experience of 3 years as Education Provider, EducationVolunteer, Education Guarantee Scheme Volunteer (EGSV), Alternative or Innovative Education Volunteer (AIEV), Special Training Resource Volunteer (STRV) or Inclusive Educational Volunteer (IEV) of Government run schools of the State of Punjab, was prescribed as one of the essential qualification in Clause 5(iii).

(3) Resultantly, quashing of the public notice and advertisement dated 14.09.2021 (Annexure P-20) whereby fresh advertisement had been issued for filling up 8393 posts of Primary Teachers, is also subject matter of challenge and the decision of the State dated 26.08.2021 (Annexure P-18) wherein the earlier advertisement dated 23.11.2020 (Annexure P-9) for filling up the said posts had been withdrawn. The candidates who had applied under the earlier recruitment process and deposited the fees, were to be refunded the amount. Resultantly, directions have been sought in the nature of mandamus to finalize the recruitment process in pursuance of the original advertisement dated 23.11.2020, as per the unamended Rules of 2020 which had been notified on 03/05.11.2020 (Annexure P-8) for the said posts in the scale of payplus Pay-Band of Rs.10,300-34,800 + Rs.3,200/-.

(4) The grievance of the petitioners in the present case is thatthey are fully qualified for appointment as Pre-Primary School Teachers in terms of the Rules 2020 (Annexure P-8) and the amendment made is with malice and mala-fide intention to ensure selection of certain set of persons as provided under Clause 5(iii). The pleadings are to the effect that the persons mentioned in Clause 5(iii) are those, whose initial appointment was made by the Village Education Development Committees/Gram Panchayats, without following any due process of law and in an illegal and arbitrary manner, in violation of the Constitutional mandate and even the policy of reservation was not followed. The posts in question were to be filled up 100% by way of direct recruitment as per the unamended Statutory Rules, 2020 and in accordance with the provisions of Articles 14 & 16 of the Constitution of India by providing equal and fair opportunity to all the eligible candidates.

Pleadings :

(5) The pleadings are based on the fact that the respondent-Department firstly cancelled the written examination sought to be taken by way of public notice dated 23.11.2020 (Annexure P-9) and due to the change in criteria, petitioners have been made ineligible for appointment against these posts and an effort has been made to regularize the said categories against the posts. It has been pleaded that the Government of India, Ministry of Human Resource Development had launched a project named Sarva Sikhsha Abhiyan (SSA) and similarly, another project named Rashtriya Madhyamik Shiksha Abhiyan (RMSA) was also introduced in the year 2009 to meet the

object of enhanced access to secondary education and to improve its quality. The appointment of Block Resource Persons (BRP) at Block Level had been done and Education Volunteers were to be appointed by the Village Development Committees (VDC), as per the policy dated 29.11.2004 and supplementedby another policy dated 29.09.2005 (Annexures P-2 & P-3 respectively). The appointments were to be made at local level from the same village and through announcement from Village Gurudwaras and Temples and on temporary basis. The guidelines of NCTE date 11.02.2011 (Annexure P-6) wherein minimum qualifications for appointments were made for teachers from Classes I to VIII was stressed and it was pleaded that for Pre-Primary, Primary, Upper-Primary, Secondary, Senior Secondary or Intermediate Schools or Colleges Regulations, 2014 were also notified on 12.11.2014 (Annexure P-7) which provide the minimum academic and professional qualifications and which provide no experience for appointment of such teachers.

(6) It was, accordingly, pleaded that as per the unamended rules, there was no such provision of experience and the advertisement dated 23.11.2020 (Annexure P-9) had been issued for filling up the said posts in question which provided that State Level Written Examination Test of 100 marks would be held. The merit-list was to be prepared on the basisof the written examination and for the benefit of higher qualifications, marks were to be awarded by giving one mark for one year servicerendered upto the higher limit of 10 marks for the Education Providers/ Education Volunteers, EGS Volunteers, AIE Volunteers and Special Training Resource (STR) Volunteers, serving in Government Schools, belonging to Education Department, Punjab, as per clause 3(i) and as per the notification dated 11.11.2020 (Annexure P-10). Marks for higher education were also to be granted under Clause 3(ii) for Graduation upto 5 marks and in cases of candidates getting equal marks in the written test, the candidate having more age would get enlisted above in the merit-list. For candidates having same marks and age the candidate having higher percentage in professional degrees would be enlisted above in the merit- list. The experience certificate had to be submitted by the said categories of persons duly counter-signed by the concerned District Education Officer (DEO), which were to be admissible. The age bracket was to be between 18-37 years as on 01.01.2020.

(7) The benefit of reserved categories would get relaxation of 5 years in the upper age limit and the candidates serving in

Punjab and other State Government and Union of India would have an upper agelimit of 45 years. The disabled candidates residing in Punjab were to get relaxation of 10 years in the upper age limit. Similarly, reservation was provided for the ex-servicemen by the State wherein they were to be given the benefit of the remaining age after taking the period of service in Army from their age upto 3 years above the upper age limit for the posts.

(8) It was pleaded that vide notification dated 11.11.2020 (Annexure P-10), upper age relaxation was to be given for the said category of persons and also the benefit of one additional mark against each year of service rendered by them in the earlier advertisement. It was submitted that the last date for filling up the Pre-Primary Teachers had been extended from 01.12.2020 upto 21.12.2020 and then upto 21.04.2021, as per the notice dated 03.06.2021 (Annexure P-14). The written test had been fixed for 27.06.2021 which was postponed vide notice dated 17.06.2021 (Annexure P-15), with mala-fide intention on account of the pressure of Union of the Service Providers who were claiming appointments against these posts. The advertisement, thus, had wrongly been withdrawn on account of *dharnas* by the said set of volunteers and reliance was placed upon the agenda dated 29.07.2021 (Annexure P-17) before the Council of Ministers wherein some weightage was to be provided for such set of employees. There was a proposal for change of rules and reliance was placed upon the meeting held of the Council of Ministers on 18.06.2021 regarding the amendment to be made in the rules etc. including the ancillary rules. It was, thus, pleaded that the amendment was made for the specific purpose and excluded every other category of candidates whose claim for regularization had also been denied in **CWP-4060-2016** titled ***Kartar Singh & others*** versus ***State of Punjab & others***, which was dismissed on 11.03.2016 (Annexure P-21). The said judgment had never been challenged and had become final inter se and therefore, it was not permissible to allow them to be given the benefit of appointment by way of back-door entry, to the exclusion of others.

(9) The State, in its response, admitted that for the advertisement dated 14.09.2021, applications had been invited for recruitment of the said teachers the last date of which was 11.10.2021. The State Government had taken a decision to start Pre-Primary classes in the year 2011 and thus, the Rules of 2020 were formulated and notified providing for the cadre strength of 8393 posts. In the Department of Education, number of persons were working as Sikhiya

Providers/Education Volunteers, EGS Volunteers, AIE Volunteers, Special Training Resource (STR) Volunteers, Inclusive Education Volunteer (IEV) under various educational schemes/programs on fixed remuneration since a long period. It was pleaded that the said Service Providers and Volunteers had been taking classes and had acquired necessary experience in teaching the children of tender age and had become familiar in pedagogy which is required to teach pre-primary students. In order to provide some weightage for the experience, proposal was put to the Council of Ministers and a conscious decision was taken for amendment of the rules which was done vide the impugned notification dated 07.09.2021. It was admitted that in the Council of Ministers' meeting held on 18.06.2021, proposal was made for regulating the recruitment rules and the condition of service of the persons appointed to the posts of Elementary Trained Teachers (ETT). A consensus to give weightage of 3 years experience for such volunteers was proposed for appointment of Pre-Primary School Teachers and therefore, it would not be fair to grant further 10 marks in respect of their experience in the recruitment of the Elementary Trained Teachers. The proposal was approved to amend Rule 6 of the Punjab State Elementary Education (Teaching Cadre) Group 'C' Service Rules, 2018 and the corresponding Punjab State Elementary Education (Teaching Cadre) Border Area Group 'C' Service Rules, 2018. The proposal sent by the Department of Education to make amendment in the Rules of 2020 was contained in the draft notification, placed as Annexure A to the memorandum.

(10) Justification was sought to be done that the posts of Pre-Primary Teachers were of utmost importance to be filled up immediately as it would impede the study of the students and hamper the smooth functioning of the schools. The State was competent to legislate on the subject of education as per Article 246(2), Entry 25 of List III of Schedule 7 of the Constitution of India and while framing the Service Rules under Proviso to Article 309. It was thus well within its jurisdiction to lay down any qualification which did not tinker with the minimum qualifications laid down by the NCTE and they were not in conflict with any statutory provision. The earlier advertisement had been withdrawn in view of the amendment and the fees were to be refunded and it was in conformity with the said amendments and therefore, the action of the respondents amending the rules was justified.

Arguments :

(11) Counsel for the petitioners has relied upon the judgment of the Apex Court in ***Secretary of State Government of Karnataka*** versus ***Uma Devi***[1] to submit that the right of employment has got denuded by preferring persons coming from the back-door and Article 21 of the Constitution of India would not give them a right, as held in the said judgment. Similarly, reliance has been placed upon the judgment in ***State of Orissa & another*** versus ***Mamta Mohanty***[2] to submit that quality of education depends on various factors and selection of more suitable persons was essential and it was not permissible for the State to impinge upon the standard of education. The appointments made without inviting names from the Employment Exchange and without putting on the notice board would not meet the requirement of Articles 14 & 16 of the Constitution of India. Similarly, reliance was placed upon ***Ramjit Singh Kardam & others*** versus ***Sanjeev Kumar & others***[3] to the extent that the alteration of criteria was malice in law and equal opportunity was not being given to all to compete in the selection process. It is pointed out from the judgment dated 11.03.2016 (Annexure P-21) passed in Kartar Singh (supra) that regularization had been denied to such set of persons and now, they were being given the said benefits.

(12) Reliance has been placed upon the judgment in ***Jagir Singh*** versus ***Ranbir Singh & others***[4] that it is not permissible to allow things to be done indirectly which is not permissible directly. The judgment of the Full Bench of Allahabad High Court in ***Anand Kumar Yadav & others*** versus ***Union of India & others***[5] was relied upon to contend that the experience gained by a person cannot obviate the need for the essential qualification which was upheld in ***State of U.P.*** versus ***Anand Kumar Yadav***[6]. It is submitted that despite specific averments made regarding the said aspect in the writ petitions, the same had been denied and therefore, the State was also admitting that it was allowing back-door entry to such candidates while placing reliance upon the judgment of the Supreme Court in ***Lohia Properties (P) Ltd. Tinsukia Dibrugarh, Assam*** versus ***Atmaram Kumar***[7] Reliance was

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[1] (2006) 4 SCC 1,
[2] (2011) 2 SCC 704
[3] 2020 (2) SCT 491,
[4] 1979 (2) SCR 282
[5] 2015 (15) SCT 111
[6] (2017) 3 SCT 683
[7] (1993) 4 SCC 6.

placed upon the NCTE regulations dated 12.11.2014 (Annexure P-7) providing the minimum academic and professional qualifications to submit that there is no such criteria prescribed by the NCTE.

(13) On the contrary, counsel for the State has defended the said amendment and referred to the provisions of Section 11 of the Right of Children to Free and Compulsory Education Act, 2009 and Article 246 read with Article 309 of the Constitution of India to submit that children above 3 years have to be prepared for elementary education and Government was making necessary arrangements for providing free pre- school education for such children in pursuance of which the Rules of 2020 have been framed along with provisions of Article 45 of the Constitution of India. It is submitted that the 2020 Rules have been framed and entry 25 of the concurrent list provides for the State to make rules to bring candidates in the mainstream which had been kept in mind and only because it did not suit some individual or a class of individual, the said rules were not liable to be struck down. It is submitted that the onus was on the petitioners to show that these rules were discriminatoryin any manner and reservation could be made for the persons provided as per the amendment in Clause 5 as it was for the purpose to bring the said persons together in the mainstream by giving them the benefit of regular appointment. Reliance was places upon the judgment of the Apex Court in ***Shri Ram Krishna Dalmia*** versus ***Shri Justice S.R.Tendolkar and others***[8], to submit that there was a presumption in favour of a constitutionality of the enactment and the burden was upon the petitioners that there was some discrimination on adequate grounds and whether the same was discriminatory legislation.

(14) Reliance was also placed upon the judgment in ***K.Anjaiah*** versus ***K.Chandraiah***[9] that the striking down of the complete provision under challenge, could be restricted and the rule could be read down to the extent that only the volunteers etc. working with the Government run schools could be modified to the extent that similar volunteers with other aided schools or private schools were also entitled to apply.

(15) Reliance was also placed upon the observations made in ***Chander Mohan Negi & others*** versus ***State of Himachal Pradesh &***

[8] 1959 SCR 279
[9] 1998 (2) SCT 86

others [10] wherein regularization of private Assistant Teachers had been done and upheld by the Apex Court and upholding the Division Bench judgment of the Himachal Pradesh High Court which had upset the judgment of the Learned Single Judge wherein directions had been given not to regularize the Teachers.

Statutory provisions

(16) The statutory rules of 2020 dated 03.11.2020 provide that the method of appointment, qualifications to the service are to be made inthe manner specified in Appendix B. Rule 6 reads as under:

> "6. Method of appointment, qualifications and experience.- (1) All appointments to the Service shall be made in the manner specified in Appendix 'B':
>
> Provided that if no suitable candidate is available for appointment to the Service by direct appointment, the appointment to the Service shall be made by transfer of a person holding an analogous post under any other State Government, Union Territory or Governmentof India.
>
> (2) No person shall be appointed to a post in the Service, unless he possesses the qualifications and experience as specified against that post in Appendix 'B'."

(17) The total cadre strength is provided in Appendix A of 8393 Pre-Primary School Teachers which were to be appointed on need based district-wise allocation of posts, to be made by the Director. As per Appendix B, 100% appointment was to be done by direct appointment and the qualification/experience as provided by the unamended rules andthe amended provisions, read as under:

(18) Articles 14, 16, 39(a) & 45 of the Constitution of India and Section 11 of the RTE Act, 2009 are reproduced as under:

> "14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
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> xxxx xxxx xxxx
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> 16. Equality of opportunity in matters of public employment
>
> (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any

[10] (2020) 5 SCC 732

office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within thatState or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from makingany provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

39. Certain principles of policy to be followed by the State- The State shall in particular, direct its policy towards securing-

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood;

xxxx xxxx xxxx

45. Provision for free and compulsory education for children The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they completethe age of fourteen years."

Material brought on record:

(19) During the course of the proceedings, this Court on 03.11.2021, directed that additional affidavit be filed giving the

number of applications which have been received in pursuance of the advertisement dated 14.09.2021 and the number of persons who have been employed as mentioned in Clause 5(iii) of the Rules, which is under challenge. A perusal of the said affidavit, filed by the Assistant Director, Education Recruitment Directorate, Department of School Education dated 08.11.2021 would show that 13122 number of Education Volunteers applied against the 8393 posts advertised. It is further stated in the affidavit that 13093 numbers of said category of employees were working in the Department prior to the issuance of the advertisement. Another additional affidavit dated 29.11.2021 has been filed by the Secretary to Government of Punjab, Department of School Education, Shri Ajoy Sharma, in pursuance of the orders dated 18.11.2021 whereby clarification was sought regarding the corrigendum issued and whetherthe Secretary to the Government had authorized the Assistant Director, Education Recruitment Directorate to issue such corrigendum. As per the said affidavit, it has specifically been mentioned that on account of repeated representations from the unions of Sikhya Provider/Education Provider, Education Volunteer, Education Guarantee Scheme Volunteers, AIE Volunteers and Special Training Resource Volunteers (STRV) of Government run schools of the State of Punjab, the matter was put up before the Council of Ministers on 16.08.2021. Advertisement dated 23.11.2020 was withdrawn vide public notice dated 26.08.2021 and then the amendment of the Rules were done on 14.09.2021.

The legal questions that thus arise for consideration are:

1.Whether by virtue of the amendment, the State is authorized to limit the opportunity of employment to a certain category of persons as provided under the Rules which would in turn lead to 100% reservation and whether the same would not be violative of Articles 14 & 16 of theConstitution of India.

2.If question No.1 is in the negative, whether the said Rules can be read down to the extent of 50% which is the permissible limit prescribed?

(20) In ***Rohit Singhal & others*** versus ***Principal, Jawahar N. Vidyalaya & others***[11], the Apex Court expressed its great concern regarding education for children observing as under:-

[11] AIR 2003 SC 2088

> "Children are not only the future citizens but also the future of the earth. Elders in general, and parents and teachers in particular, owe a responsibility for taking care of the well-being and welfare of the children. The world shall be a better or worse place to live according to how we treat the children today. Education is an investment made by the nation in its children for harvesting a future crop of responsible adults productive of a well functioning Society. However, children are vulnerable. They need to be valued, nurtured, caressed andprotected." (Emphasis added)

(21) In ***Mamta Mohanty*** (supra), the Apex Court emphasised on the importance of education observing that education connotes the whole course of scholastic instruction which a person has received. Education connotes the process of training and developing the knowledge, skill, mind and character of students by formal schooling. The Court further relied upon the earlier judgment in ***Osmania University Teachers' Association*** versus ***State of A.P. & another***[12] wherein it has been held as under:

> "Democracy depends for its very life on a high standard of general, vocational and professional education. Dissemination of learning with search for new knowledge with discipline all round must be maintained at all costs."The case at hand is to be proceeded with keeping this ethical backdrop in mind.

(22) The background of the litigation has already been noticed that the persons mentioned in Clause 5(iii) whose appointments were made through various projects launched by the Government of India on contractual basis had unsuccessfully claimed regularization by filing CWP-4060-2016, Kartar Singh (supra). The Learned Single Judge came to the conclusion that the Education Volunteers were appointed by the Village Development Committees of the village concerned and without any selection process, the appointments were stop-gap and resultantly, the order of the State whereby regularization had been denied to them on 14.12.2015, was upheld. Nothing could be shown that the said issue has thereafter been further taken in appeal.

(23) The 2020 Rules were notified on 05.11.2020 in which the education qualifications of the Pre-Primary School Teachers which had a cadre strength of 8393 as per Appendix A had been laid down, as

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[12] AIR 1987 SC 2034,

reproduced above. At that point of time, the advertisement had been issued 18 days later on 23.11.2020, for filling up the said posts as per the unamended Rules. A proposal had been made in the earlier advertisement to grant some benefits to the category of persons now have been given 100% reservation. They were to be given the benefit of 1 mark for 1 year of service upto 10 years of service, upto maximum of 10 marks, which was in pursuance of the notification dated 11.11.2020 (Annexure P-10). Also they were to be given the relaxation in the age limit equal to the service rendered by them, as per Clause 5(ii). This had been done on account of the meeting held by the Council of Ministers on 23.09.2020 to mitigate the hardships and the notification had accordingly been issued on 11.11.2020 (Annexure R-3).

(24) In the meantime, however, after 21.04.2021 the last extended date for applying, the weightage given was withdrawn vide order dated 13.09.2021 (Annexure R-5) and before the said date, the advertisement itself had been withdrawn on 26.08.2021 (Annexure P-18). Accordingly, advertisement dated 23.11.2020 was cancelled with the condition that the fee deposited will be deposited in the account from where it had been deposited. The impugned amendment was thus notified on 07.09.2021, limiting the source of appointment to a certain category of persons and thereafter, the advertisement dated 14.09.2021 (Annexure P-20) was issued fixing the cut-off date as 11.10.2021 as provided in thequalifications as per the amended provisions.

(25) Thus, it would be apparent that the State has moved in a specific direction on the pressure from the unions of the said persons who have now been given the benefit of 100% reservation. Counsels for the petitioners are thus well justified to submit that it is with malice that the amendment has been made. In ***State of Punjab*** versus ***Gurdial Singh & others***[13], it was held by the Apex Court that when power is exercised on account of an intent gaining a legitimate goal it can be called colourable exercise of power and the same can be held to have not been exercised bona fide for the end design. The purport and intentcan be determined by the Courts to examine the substance of the legislation and it is always the history in the purpose that the facts and circumstances which led into the legislation by applying the directive of lifting the veil to find out whether what is not permissible to being done is being done in an indirect and circuitous method.

[13] AIR 1980 SC 319

Whether there is arbitrariness in the said action, whether it is by the legislature or executive and if Article 14 is violated, the satisfaction of the Court has to be arrived at that there has to be substantive unreasonableness in the statute.

(26) The issue of 100% reservation has always been frowned upon by the Courts whether it was in the form of public employment or in the form of providing reservation on institutional basis in admissions by excluding all others from applying. Reliance can be placed upon the judgment in ***Kiran Dixit*** versus ***Chandigarh Administration through Secretary to Government***[14] wherein the 50 seats in the MBBS course in U.T. Chandigarh had been reserved for students who have passed their 10th and 12th from the schools and colleges situated in Chandigarh which was struck down on the ground that it amounted to 100% reservation. It was accordingly held that the notification was not justified.

(27) In ***S.Renuka*** versus ***State of Andhra Pradesh***[15] a Three Judges Bench of the Apex Court rejected the plea of the recommended candidates to be appointed as Family Court Judges against the advertisement they had applied for wherein on account of shortage of lady District Judges, it had been decided to recruit women candidates by way of direct recruitment. On a reference being made by the State after the selection process had been completed and the names had been sent to the State Government for appointment, the High Court came to the conclusion that earmarking the posts only to the women candidates would amount to cent-percent reservation which was not constitutionally permissible. Resultantly, it was held that by reserving the 10 posts for women, the High Court had inadvertently created a 100% reservation for women and therefore, did not recommended in favour of appointing any person from the panel prepared. The writ petition thus came to be filed by the 9 women lawyers whose names were forwarded to the State Government and directions were sought for appointing them. In the meantime, an advertisement also was issued reserving only 1 post for a woman and calling for fresh applications which was also challenged. The Apex Court held that there could not be 100% reservation for women and dismissed the writ petitions. The facts thus, would be squarely applicable in the present scenario.

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[14] 1998 (2) RSJ 609
[15] (2002) 5 SCC 195,

(28) In ***Saurabh Chaudri & others*** versus ***Union of India & other***[16] while adjudicating on the constitutional validity of reservation based on domicile or institution in the matter of admission into Post Graduate Course in Government run medical colleges. It was held that reservation by way of institutional preference can only be confined to 50% of seats while noticing that the hardship of few cannot be the basis of determining the validity of any statute, as had been contended by the State.

(29) In ***J.Pandurangarao*** versus ***Andhra Pradesh Public Service Commission*** [17] it was noticed that the classification by which the rules were founded, the same had to be based on intelligible differentia and same had to be in a reasonable relation to the object sought to be achieved. The object which is sought to be achieved cannot be to the extent of total reservation in favour of a certain set of persons at the cost of others. The issue therein was recruitment process which was restricted to Advocates of the High Court of Andhra Pradesh and accordingly, it was held that the same cannot be limited to the confines of Andhra Pradesh and to the detriment of the other practising members of the Bar in other High Courts since all High Courts are equal in thecountry.

(30) The above-said observations directly apply to the facts of the present case where a certain set of persons are now being given preference to the total exclusion of the others by amending the rules to appease them, at the cost of others, for the reasons best known to the State.

(31) In ***Ganga Ram Moolchandani*** versus ***State of Rajasthan*** [18] the Rajasthan High Court had provided that the direct recruitment to the Rajasthan Higher Judicial Service would be limited to the Advocates who had practised in the Rajasthan High Court or the Courts sub-ordinate, for a period of not less than 7 years. Thus, all other Advocates practising outside Rajasthan were debarred. The said Rule had been upheld by the High Court and the appeal filed was allowed, by the Apex Court taking the view that Rule 8(ii) and 15(ii) which provided for such a condition of the Rajasthan Higher Judicial Service Rules, 1969 to be ultra vires of Article 14 of the Constitution of India. It was held that the basis of classification has to be based on

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[16] 2003 (4) SCT 867
[17] 1963 (1) SCR 707
[18] 2001 (3) SCR 992,

intelligible differentia which differentiates persons or things grouped together and there must be a reasonable relation to the object to be achieved by the Rules or the statutory provision(s) in question. It was, accordingly, held that there was no intelligible differentia between all those working in the Rajasthan Bar and those practising outside Rajasthan. Relevant paras read as under:

> "12. While considering the attack on the Rule, the Court observed that when any Rule or a statutory provision is assailed on the ground that it contravenes Article 14, its validity can be sustained if two tests are satisfied. The firsttest is that the classification on which it is founded must be based on an intelligible differentia which distinguishes persons or things grouped together from others left out of the group; and the second is that the differentia in question must have a reasonable relation to the object sought to be achieved by the Rule or a statutory provision in question. It was observed that the object of the Rule was to recruit suitable and proper persons to the judicial service in the State of Andhra Pradesh with a view to secure fair and efficient administration of justice, and so there can be no doubt that it would be perfectly competent to the authority concerned to prescribe qualifications for eligibility for appointment to the said service. Knowledge of local laws as well as knowledge of regional language and adequate experience at the Bar may be prescribed as a qualification which the applicants must satisfy before they apply for the post. In that case, it was contended before this Court that the Rules were framed to require an applicant to possess knowledge of local laws. Though this Court in the case of Pandurangaro (supra) has expressly laid down that validity of such a rule can be sustained on the ground that the object intended to be achieved thereby is that the applicant should have adequate knowledge of local laws and regional language, but while saying so, it has observed that for achieving this object, the proper course could be to prescribe a suitable examination which a candidate should pass whereby knowledge of local laws can be tested.
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> 18. From a perusal of these decisions, it appears that the same do not support the respondents much rather run more

> counter to their submission. It has been observed that there should be no interference with the law laid down in the old decisions merely on the ground that different view is possible but the Court would be justified in interfering if decision is manifestly wrong or unfair. In the present case, we haveclearly held that the Rules are violative of Articles 14 and 16 of the Constitution, as such Division Bench and Full Bench decisions of Rajasthan High Court are manifestly wrong and if the law laid down therein is approved, the same would be unfair to members of the Bar practising in all the courtsthroughout the country, excepting the State of Rajasthan. Thus, we have no option but to hold that Rules 8(ii) and 15(ii)are ultra vires Articles 14 and 16 of the Constitution and liable to be struck down."

(32) In ***Indian Medical Association*** versus ***Union of India & others***[19], the issue was whether 100% of the seats could be reserved for the wards of Army personnel. Accordingly, it was held that the said decision of the Government of Delhi allowing Army College of Medical Science to fill 100% of the seats was violative of the basic principle of democratic governance.

(33) In Uma Devi's case (supra), while rejecting the claim of the persons who were sought to be regularized and who had taken a shelter of Article 21 of the Constitution of India, it was held that the right to employment could not be denuded by preferring those who have got in casually or those who have come through the back door. It was accordingly held that Articles 14, 16 & 309 are there to ensure that public employment is given in a fair and equitable manner and a set of persons cannot be preferred over a vast majority of people. Relevant portions of the judgment reads as under:

> "40. It is contended that the State action in not regularizing the employees was not fair within the framework of the ruleof law. The rule of law compels the State to makeappointments as envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in Tribunals and courts initiated at the instance of the employees. Moreover, accepting an

[19] AIR 2011 SC 2365

argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages. When thecourt is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution.

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42. The argument that the right to life protected by Article 21 of the Constitution of India would include the right to employment cannot also be accepted at this juncture. The law is dynamic and our Constitution is a living document. May beat some future point of time, the right to employment can also be brought in under the concept of right to life or even included as a fundamental right. The new statute is perhaps a beginning. As things now stand, the acceptance of such a pleaat the instance of the employees before us would lead to the consequence of depriving a large number of other aspirants of an opportunity to compete for the post or employment. Their right to employment, if it is a part of right to life, would stand denuded by the preferring of those who have got in casually or those who have come through the back door. The obligation cast on the State under Article 39(a) of the Constitution of India is to ensure that all citizens equally have the right to adequate means of livelihood. It will be more consistent with that policy if the courts recognize that an appointment to a post in government service or in the service of its instrumentalities, can only be by way of a proper selection in the manner recognized by the relevant legislation in the context of the relevant provisions of the Constitution. In the name of individualizing justice, it is also not possible to shut our

> eyes to the constitutional scheme and the right of the numerous as against the few who are before the court. The Directive Principles of State Policy have also to be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the State to one and all and not to a particular group of citizens. We, therefore, overrule the argument based on Article 21 of the Constitution."

(34) Similarly, a Constitution Bench of the Apex Court in ***Chebrolu Leela Prasad Rao & others*** versus ***State of A.P. & others***[20], while delving on the issue of reservation for Schedule Tribe candidates for the post of teachers, held that 100% reservation is not permissible under the Constitution. The 100% reservation which was provided had been sustained by the Full Bench of the High Court on the ground that it was based on intelligible differentia and the classification had a nexus with the object sought to be achieved. However, the Apex Court held that the concept of equality enshrined in Article 14 could not be used to perpetuate any illegality. The classification should have rationale nexus to the object sought to be achieved and to kill the evil of discrimination and to bring equality. It was accordingly, held that some relaxation may become imperative but extreme relaxation is not to be exercised and special case has to be put for reservation of more than 50%.Resultantly, it was held that the opportunity of public employment cannot be denied unjustifiably and not a prerogative of few as all the citizens have equal right and the total exclusion of others and to grant opportunity for one class has not been contemplated by the founding fathers of the Constitution. Reliance was placed upon the judgment in ***Indra Sawhney*** versus ***Union of India*** [21] and a specific issue regarding the question of law was framed to this extent whether 100% reservation was permissible under the Constitution. Resultantly, it was answered that reservation cannot exceed 50% and that the Scheduled Caste and Other Backward Classes had also been deprived of their due representation and the action was unreasonable and arbitrary and violative of Articles 14, 15 and 16 of the Constitution of India. It was, accordingly, held that employment to others was illegally deprived and that there was no chance of employment on account of 100% reservation against the post of teachers to the others. Relevant portions of the judgment read as under:

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[20] 2020 (6) SLR 558

[21] 1992 Supp. (3) SCC 217

"91. The Constitution has provided for justice – social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and opportunity; and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the Nation. The framers of the Constitution have taken great care and deliberation so that it reflects the high purpose and noble objectives. It aims at the formation of an egalitarian order, free from exploitation, the fundamental equality of humans and to provide support to the weaker sections of the society and wherefrom there is a disparity to make them equal by providing protective discrimination. The Constitution in the historic perspective leans in favour of providing equality and those aims sought to be achieved by the Constitution by giving special protection to the socially and economically backward classes by providing a protective umbrella for their social emancipation and providing them equal justice, ensuring the right of equality by providing helping hand to them by way of reservation measures. Article 14 guarantees equality before the law or the equal protection of the laws. Be it a matter of distribution of State largesse; the Government is obligated to follow the constitutionalism. State action cannot be arbitrary and discriminatory and cannot be guided by extraneous considerations, which is opposed to equality. The concept of equality is the antithesis of arbitrariness in action. There cannot be any legislation in violation of equality, which violates the basic concept of equality as enshrined in Part III of the Constitution. An administrative order has to be tested on the anvil of non-arbitrariness. Any action of the legislature, administrative or quasi-judicial, is open to challenge if it is in conflict with the Constitution or the Act and applicable general principles of law. The protective discrimination of persons residing in backward areas is permissible, as held in ***M.P. Oil Extraction & Anr. v. State of M.P. & Ors.***, (1997) 7 SCC 592. The industrial units were set up in backward areas at the instance of the Government. Special treatment was given to them for the supply of sal seeds at a concessional rate of royalty. It was held in the aforesaid decision that the distinction was reasonable.

92. The concept of equality cannot be pressed to commit another wrong. The concept of equality enshrined in Article 14 of the Constitution is a positive concept. It is not a conceptof negative equality. It cannot be used to perpetuate an illegality. Equity cannot be applied when it arises out of illegality. The doctrine of equity would not be attracted when the benefits were conferred on the basis of illegality, as heldin ***Usha Mehta v. Government of Andhra Pradesh***, (2012) 12 SCC 419 John ***Vallamattom v. Union of India,*** (2003) 6 SCC 611 ***General Manager, Uttranchal Jal Sansthan v. Laxmi Devi***, (2009) 7 SCC 205 ***State of West Bengal v. Debashish Mukherjee,*** AIR 2011 SC 3667

93. Article 14 is to be understood in the light of the Directive Principles, as observed in Indra Sawhney (supra). The classification made cannot be unreasonable. It can be basedon a reasonable basis. It cannot be arbitrary but must be rational. It should be based on intelligible differentia and musthave rational nexus to the object sought to be achieved. Thereare various fields in which Article 14 has extended its reach and ambit. The provision is very deep and pervasive. It kills the evil of discrimination to bring equality."

(35) The object of the State which was sought to be defended can be laudatory to the extent of its purpose of giving right of opportunity to the Education Volunteers etc. who had worked against various posts on account of the fact that they had put in several years of service. However, the methodology which has been adopted by excluding the right of consideration of others by virtue of the amendment, is arbitrary and at the cost of other candidates who were duly qualified as per the rules excepton account of the fact that they did not possess the requisite experience as provided under Clause 5(iii). Thus, restricting the source of recruitment to a particular group of persons who had joined service as a stop gap arrangement at local/village level, would deny the other persons an opportunity to apply which would be violative of the equality of opportunity regarding the employment or appointment. It is to be noticed that as per the advertisement itself, the cadre strength is of 8393 postsand it would be highly unjust to deprive the candidates even from applying for the said posts. In such circumstances, the defence of the State that the said persons had the experience and therefore, the interestsof the

children would be looked after, cannot be justified. It has been noticed already that on an earlier occasion that the interests of the said persons had been protected by providing age relaxation and the proposal to even grant weightage for the experience was, however, done away by granting 100% reservation to the said category of employees which cannot stand the test of intelligible differentia.

(36) In ***State of Tamil Nadu & others*** versus ***K.Shyam Sunder & others*** [22] and ***Institution of Mechanical Engineers (India) through its Chairman*** versus ***State of Punjab & others***[23], it was held that it was not permissible to do things indirectly which were not permissible directly.

(37) In ***K.Shyam Sunder*** (supra) the Three Judges Bench of the Apex Court was examining the amendment made by the State Government regarding the uniform system of school education and the fact that on an earlier account the High Court had struck down certain provisions of the Act which had been upheld uptill the Apex Court. However, on account of change of the State Government the amendment was brought in which was again subject matter of challenge. It was resultantly held that once the litigation has been finalized, it was not permissible to annul the effect of the judgment by the said amendment and the same had effect to bring back the section which had been declared ultra vires.

(38) The said employees for whom reservation has been provided to the extent of 100% had failed to get the benefit of regularization as noticed earlier and now the State proposes to absorb most of them by reserving the source of recruitment. The affidavit dated 06.10.2021 speaks volumes that from 13090 Education Volunteers who were working with the State at one point of time they have received 13122 applications against the 8393 posts. It has come at the time of arguments that some of the candidates had applied under a number of categories and therefore, the number of applications is more than the ones employed. It would therefore amount to almost 75% of the said Education Volunteers being absorbed by the recruitment process at the cost of other applicants who are duly qualified and have been totally cut out at the instance of the State, on account of the amendment made on 14.09.2021.

(39) This action of the State is totally arbitrary and in direct

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[22] (2011) 8 SCC 737
[23] (2019) 16 SCC 95

conflict with the Constitutional mandate laid down under Article 14 & 16 of the Constitution of India wherein the right of public employment and equality has been enshrined. Accordingly, it is held that it is not permissible for the State to have 100% reservation for a certain categoryof persons.

(40) The propositions which have been laid down in ***Shri Ram Krishna Dalmia*** (supra) and ***K.Anjaiah*** (supra) are required to be applied in the facts and circumstances of reading down the amendment which has been done and since the said posts have not been filled since 2020 when the Rules were initially notified. It is not disputed that the Education Volunteers have also been working since long and have rendered service and it is for that purpose the State was trying to provide some weightage for experience and marks to them and many of them would be over-age for appointment in Government service. It is not disputed that even otherwise they would have the requisite qualifications as per the Rules amended and they would be competing at an equal platform with other persons who do not have 3 years of experience, filtered down to 50%. In ***Shri Ram Krishna Dalmia*** (supra) the principles were laid down how the Courts have to examine the invalidity of the Act or the notification on the basis of Article 14 when any provision of law is challenged on the ground of being discriminatory and violative of the equal protection of law.

(41) In ***K.Anjaiah*** (supra), the reading down of the provisions of Regulation 9(2) were done of the Andhra Pradesh College Service Commission which had been struck down by the Administrative Tribunal on the ground that the past service of the Government servants had been wiped off while appointing him in the Commission. Resultantly, it was held that reading down should be done to the extent that the inter se seniority of the deputationists in the new cadre under the Commission after they are finally absorbed and their past service rendered in the Government would be taken into account. It was held that the rule or regulation is to be held to be constitutionally valid unless it is established that it violates the provisions of the Constitution and it is the duty of the Court to harmoniously construe the Acts and Rules if possible and sustain them rather than striking them down outrightly. Relevant portion of the judgment read as under:

> "6. In view of the rival submissions at the Bar the only question that arises for consideration is whether the provisions of Regulation 9(2) shall be upheld by reading down the same or the language used in the said provision is

not susceptible to be read down and should be struck down by the Tribunal ? It is a cardinal principle of construction that the Statute and the Rule or the Regulation must be held to be constitutionally valid unless and until it is established they violate any specific prevision of the Constitution. Further it is the duty of the Court to harmoniously construe different provisions of any Act or Rule or Regulation, if possible, and to sustain the same rather than striking down the provisions out right. In other words the Court has to make an attempt to see if the different provisions of the Regulation can survive and in making that attempt it is open for the Court to read down a particular provision to clarify any ambiguity so that the provision can be sustained but not to relegislate a provision, This being the parameters under which a Court is required to scrutinise the provisions of any Act by Regulation when the same is challenged, we would now examine the Validity of Regulation 9(2), Admittedly when the Commission started functioning after being constituted by the Government in exercise of powers under the Act the employees came on deputation from the State Government to man the job in the Commission. When the Commission finally takes a decision to permanently absorb these deputationists after obtaining their option the question of their inter se seniority in the Commission crops up and Regulation 9(2) deals with the said situation. In the case of ***R.S. Makashi & Ors. v. I.M. Menon and Ors***., [1982] 1 Supreme Court Cases 379, this Court had indicated that it is a just and wholesome principle commonly applied to persons coming from different sources and drafted to serve a new service to count their pre- existing length of service for determining their ranking in the new service cadre. The said principle was reiterated by this Court in K. Madhavan's case (supra), A three Judge Bench judgment of this Court in the case of Wing Commander J. Kumar (supra) also reiterated the aforesaid well known principle in the service jurisprudence, and in the case in hand this principle has been engrafted in Regulation 9(1), The question that arises for consideration is whether the benefits conferred upon a deputationist under Regulation 9(1) has been taken away by Regulation 9(2)? the Tribunal has come to the aforesaid conclusion and accordingly has struck down. If a literal

meaning is given to the language used in Regulation 9(2), it may appear that the benefits conferred under Regulation 9(1) is given a go bye and the past services rendered by the deputationists in their parent cadre is not being taken into account while determining their inter se seniority in the new cadre under the Commission. But as has been contended by Mrs. Amareswari, learned senior counsel appearing for the State Government who is the authority for approval of the Regulation that the phraseology used in Regulation 9(2) is no doubt little cumbersome but it conveys the meaning that the total length of service of these deputationists should be taken into account for determining the inter se seniority in the new service under the Commissionand the past service is not being wiped off. We find considerable force in this argument and reading down the provision of Regulation 9(2) we hold that while determining the inter se seniority of the deputationists in the new cadre under the Commission after they are finally absorbed, their past services rendered in the Government have to be taken into account. In other words the total length of service of eachof the employees would be the determinative factor for reckoning their seniority in the new services under the Commission. Mr. Ram Kumar, learned counsel appearing for the appellant vehemently urged that length of service under the Commission should be the criteria For determining the inter se seniority but we are unable to persuade ourselves to agree with the aforesaid submission of the learned counsel. It is not known that when the persons were brought over to the Commission from the Government on deputation whether their option had been asked for or not? Further such a principle if accepted then the inter se seniority would bedependent upon the whim of the Government, and we see no rationale behind the aforesaid principle. The two decisions onwhich Mr. Ram Kumar, learned counsel placed reliance in support of his contention infact do not lay down the aforesaid proposition. We have, therefore, no hesitation to reject the submission of Mr. Ram Kumar.

7. In the aforesaid premises we dispose of these appeals by reading down the provisions of Regulation 9(2) in the manner as indicated earlier rather than striking down the same and hold that while determining the inter se seniority

> of the deputationists in the services of the Commission their entire length of continuous service shall be the basis. These appeals are disposed of accordingly. But in the circumstances there will be no order as to costs."

(42) In ***K.S.Puttaswamy (Retired) and another (AADHAAR)*** versus ***Union of India & another***[24], the said principle of reading down was also dealt. It was held that interference has to beproportionate if the need is of such interference, keeping in mind the law of proportionality and the exercise needs to be taken with the legitimate goal in restricting the right wherever it would impair the freedom as little as possible, while considering the question of privacy qua the issuance of Aadhaar cards.

(43) Resultantly, keeping in view the above, this Court is of the opinion that the State can fill up the posts of Pre-Primary School Teachers under the Group-C Service Rules, 2020 by only allowing 50% reservation of the posts totalling 8393, to give the benefit to the Education Volunteers etc. under Clause 5(iii). The balance 50% would have to be left out to the other categories, for consideration. Resultantly, the advertisement dated 14.09.2021 (Annexure P-20) is quashed and the State is directed to issue fresh advertisement, keeping in view the above reading down of Clause 5(iii). Accordingly question No.2 is answered by reading down the said clause.

(44) Writ petitions stand partly allowed, by answering question No.1 in the negative and by reading down the rule to provide that reservation could only be to the extent of 50% for the said categories of employees.

Ritambhra Rishi

[24] (2019) 1 SCC 1