

(2009) 09 BOM CK 0077

In the Bombay High Court

Case No : Public Interest Litigation No. 157 of 2009 and Civil Application No. 72 of 2009

Akhil Bharatiya Vidyarthi Parishad, Prof. Narendra Pathak and
Prof. Shekhar Chandrate, President, Mumbai University and
College Teachers Associates **APPELLANT**

Vs

State of Maharashtra, Department of School Education and
Maharashtra State Secondary and Higher Secondary
Education Board **RESPONDENT**

Date of Decision : 24-09-2009

Acts Referred:

Constitution of India, 1950 — Article 14

Maharashtra Secondary and Higher Secondary Education Boards Act, 1965 — Section 34, 36, 37, 37(2)

Maharashtra Secondary and Higher Secondary Education Boards Regulations, 1977 — Regulation 104, 79, 79(1A)

Citation : (2009) 111 BOMLR 3933

Hon'ble Judges : Swatanter Kumar, C.J; A.M. Khanwilkar, J

Bench : Division Bench

Advocate : R.S. Apte and N.G. Helekar, instructed by A.N. Helekar, for the Appellant; R.M. Kadam, General, S.R. Nargolkar, Assistant Government Pleader for the State, Deepa Chavan and K.J. Gandhi, instructed by Little and Co. for the Respondent No. 2, for the Respondent

Judgement

A.M. Khanwilkar, J.—Rule. Rule made returnable forthwith by consent. Advocate for the Respondents waive notice. Having regard to the nature of challenge involved we decided to finally dispose of the matter at the admission stage itself, by consent.

2. The Petitioner No. 1 is a Students organization registered under the Societies Registration Act in the year 1949. The Petitioners 2 and 3 are the office bearers of the Petitioner No. 1 organisation. By the present petition, the Petitioners are challenging the decision of the Respondents to introduce and implement the facility of ATKT (Allowed to Keep Terms) for the students who have failed in one

or two subjects in Secondary School Certificate (SSC) examination and allowing such students to take admission in 11th Standard or first year Junior College, Higher Secondary Certificate (HSC) course for academic year 2009-2010. According to the Petitioners in exercise of powers u/s 36 of the Maharashtra Secondary and Higher Secondary Boards Act, 1965 (hereinafter referred to as the said Act), the Respondent No. 2 Board has framed Regulation. The said Regulation is known as the Maharashtra Secondary and Higher Secondary Boards Regulation, 1977. Regulation 79 thereof provides for eligibility criteria for admission to junior college. It postulates that the eligibility criteria for the students in 10 + 2 + 3 system for securing admission to junior college is passing of SSC examination. As per the said provision, the students who have successfully passed SSC examination alone would secure admission to first year junior college or HSC course and while doing so could opt for one of the branches out of Arts, commerce or Science. Besides, the students who have passed SCC examination can also opt for different diploma courses which provide for minimum qualification of having passed SSC examination (10th Standard). On the other hand, if the student fails in SSC examination (10th Standard), he is required to appear for the same examination to be held in November of the same academic year or in the next academic year so as to successfully complete his basic education till 10th Standard. It is stated that till recently the Board was conducting supplementary examination for the failed students so as to facilitate them to pass out in the failed subject(s) and could thereafter take admission in the first year junior college/HSC course which is also known as 11th Standard in the desired faculty/diploma of their choice.

3. It is stated that the result of the SSC examination held for academic year 2008-2009 was declared on 25th June, 2009 and the result for HSC for academic year 2008-2009 was declared on 4th June, 2009. In the SSC examination held in the month of March 2009 nearly 16 lakhs students had appeared. Out of them, about 3 lakhs students failed. The number of students failed in one subject is stated to be 1,37,000/-and the number of students failed in two subjects is approximately 64,000. After the results of SSC examination were declared, on-line admission process for junior college was commenced. According to the Petitioners while on-line admission process for 11th Standard was still in progress, news item appeared on 10th July, 2009 in newspaper Lokmat followed by another news item on 11th July, 2009 in newspaper Sakal and Lokmat respectively and on 14th July, 2009 in newspaper Prahar and Mumbai Mitra. The substance of the news item was that the Minister of School Education of the State of Maharashtra made announcement regarding supplementary examination and ATKT facility for the failed students in one or two subjects by allowing them to take admission on provisional basis to 11th Standard. The news item reported that such decision was in contemplation as it was noticed that the failed students loose one academic year and there were reported incidents of suicide and as also to address other social problems. It was also reported that the Unit Test were likely to be cancelled as the same occupies lot of time of teachers. The news item

further reported that about 1,50,000 additional seats will be required and the students taking admission will have to spend about Rs. 15,000/-, as the fees structure will be decided by each individual college. It was also reported that the decision to offer ATKT facility to the failed students would be only for the academic year 2009-2010 and the Respondent No. 2 will hold supplementary examination for the academic year 2010-2011. Further, the admission process for the students who want to opt for ATKT would commence from 4th August, 2009 and that process was not by on-line method but would be off-line admission process.

4. The Petitioners assert that after the said announcement, the issue was discussed and some reactions were reported. Many people opined that policy of giving ATKT to failed students should be eschewed as it would create more social problems. It is stated that as per the Secondary School Course, the School is expected to work for not less than 230 days and it must do instructional work for not less than 195 days. Since the admission process for failed students offering them ATKT was yet to be started, they would not be in a position to fulfill the said mandatory requirement and thus not eligible to appear for the final examination. Moreover, the decision to offer ATKT facility to failed students was abruptly declared on 10th July, 2009 without a notification or resolution passed till 20th July, 2009. The Respondent No. 2 issued a circular only on 23rd July, 2009 and forwarded the same to Schools and Junior Colleges throughout the State informing about the decision of Respondent No. 1 dated 20th July, 2009 sanctioning the policy of ATKT for students who have failed in 10th Standard for admission to 11th Standard. It is stated that the primary consideration for issuance of circular dated 23rd July, 2009 by the Respondents No. 2 was that the Board was not in a position to conduct supplementary examination for the failed students and the option of ATKT was preferred so as to avoid loss of academic year of such students. According to the Petitioners, the decision though appears to have been taken in the interest of students is infact against the welfare of the students as well as the Society for various reasons. Firstly, it is against the provisions of Act of 1965 and Regulation of 1977 framed there under. Such change could not be brought about in absence of the relevant provisions of Act and/or Regulation being amended, which could be done only by issuing notification by the Government in the Official Gazette. No such steps were taken by the State Government or the Board. According to the Petitioners, the decision to offer ATKT facility was intended only for academic year 2009-2010 and to revert back to supplementary examination from academic years 2010-2011 onwards. That indicates that there was no consistent policy and the arrangement was only a short term arrangement for one academic year essentially on account of the inability of the Board to conduct supplementary examination. According to the Petitioners, the ATKT is a concept relevant to University courses and cannot be applied to a final year of the course study. In that, examination of Standard 10th is final examination of Secondary School Education Course. Similarly, HSC examination is final examination of Higher Secondary Education course; whereas

ATKT facility would be relevant for student continuing in the same course upto the final examination of that course. According to the Petitioners, the decision taken by the Respondents was in haste, though a major policy decision. Moreover, the said decision was not the result of a conscious decision keeping in mind the long term education policy, but a decision passed on short term consideration to get popularity. According to the Petitioners, the said decision is totally perverse, arbitrary and unreasonable. Moreover, the same was not fair, rational and based on reasonable grounds. In as much as, the criteria of merit will be given a complete go by and the students may develop tendency of not taking studies seriously. It is further stated that the decision suffers from total non- application of mind and absence of inconsistent policy in the field of education. Significantly, when the students appeared for the examination of 10th Standard nor at the time of declaration of their results, the students were made aware about such decision but it has come as a surprise to them. There was absolutely no logic as to why the facility of ATKT was introduced only for the current academic year. It is stated that there is a possibility that the students will be lured to take admission in private colleges by paying high fees without understanding the implications of their decision having regard to the conditions on which facility is extended. The Petitioners have also criticized the ground put forth by the Respondents that by resorting to ATKT procedure, the work load and pressure on the students would be reduced. On the other hand, according to the Petitioners, the failed students would be put to more strain and would result in creating additional work load and pressure on them. It is stated that large number of students who fail in SSC examination come from weaker section of the Society and many of them pursue their education in vernacular medium. Moreover, the decision if allowed to be implemented would result in discrimination and arbitrariness as the facility will be extended only to students who have appeared in March 2009 SSC examination with all subjects and to none else. There was no intelligible differentia for carving out only students who have appeared for SCC examination in March 2009 with all subjects at the same time. That would not serve the purpose of introducing the said system which is expected to address the growing demand of finding out ways and means to save one academic year of the failed students and to dissuade them from dropping out of the education system and to take extreme step of suicide and to address other social problems. Besides, the decision has been taken at a belated stage after completion of first phase of admission to 11th Standard and particularly when necessary infrastructure to provide admission to the additional students was not provided for. To aggravate the problem, the Respondents were inclined to grant permission to start additional divisions if the colleges were to apply for the same, which could not be done unless mandatory compliance for allowing such additional divisions were to be observed. Whereas, if the Respondents were to allow that to happen, it would raise serious issues about the quality of education due to absence of necessary infrastructure like class rooms, adequate teaching and non-teaching staff, adequate laboratory facilities etc. For the aforesaid reasons, the Petitioners rushed to this Court by way of present Petition in the

public interest praying for declaration that the decision of the Respondent No. 1 dated 20th July, 2009 was arbitrary and illegal and to issue writ of mandamus directing Respondent No. 1 to withdraw/cancel or to set aside the said decision as well as the circular issued in furtherance thereof on 23rd July, 2009 Exhibit C. This Petition was filed on 4th August, 2009. The Petition was taken up for admission on 6th August, 2009 when this Court felt that there was substance in the grievance of the Petitioners amongst others that the proposed change of introducing ATKT facility could not be given effect to in absence of amendment of the Regulation by issuance of notification. As a result, the Court passed the following order:

Notice. The learned Counsel appearing for the respective respondents put in appearance and pray for time to file reply. Reply affidavit be filed within two weeks from today. Rejoinder within one week thereafter. Stand over to 27th August, 2009.

2. On the question of interim direction, we have heard the learned Counsel appearing for the parties. The contention raised before us is that the letter dated 20th July, 2009 issued by the Department of School Education & Sports, Mantralaya, Mumbai has been issued without , compliance to the statutory provisions of the Maharashtra Secondary and Higher Secondary Board Act, 1965 with particular reference to the provisions of Sections 34 and 37 of the Act. It is further contended that the decision is an abrupt decision taken arbitrarily and that too at the nick of the time without any preparations and proper thinking. It is averred that nearly two lakh students who have failed in one or two subjects of examination of 10th Standard would have to be admitted as a result of issuance of this circular. It is also stated that there is no infrastructure provided to admit these students in the education institutions as the decision which has been made applicable for the current year only.

3. However, the learned Advocate General states that the proposal was mooted and was accepted by the State Government and of course, the arguments are not correct.

4. We have examined the matter and it appears to us that this decision has been taken abruptly without any proper preparation. It may be noted that approximately two lakh students are permitted to be admitted to the next Standard without any proper infrastructure. Besides that, we are unable to understand as to why this circular dated 20th July, 2009 has been implemented only for the current year and as to how it is sought to be justified on the ground that such concession will do away with immediate supplementary examination which may be conducted later o. There is no dispute that the amendment/change in the letter dated 20th July, 2009 has not been gazetted and therefore, has not come into force in accordance with law as of now. In these circumstances, we stay the operation of the impugned circular.

5. State is at liberty to proceed in accordance with law in completing the process

of notification if it so desires. Original records shall be produced in court on the next date.

5. The Respondents thereafter filed reply affidavit. In the reply affidavit of Respondent No. 1 filed by Anil Madhaorao Bhattalwar, Joint Secretary to Government, School Education and Sports Department, it is stated that communication dated 20th July, 2009 has been withdrawn and cancelled by the State Government. Further, the State Government has now issued notification on 17th August, 2009. Copy of the said notification is appended to the said affidavit. The affidavit also gives the background in which the decision was taken by the State Government to introduce ATKT facility for academic year 2009-2010. According to Respondent No. 1, the decision was not an abrupt decision as suggested by the Petitioners but a well considered and a conscious decision taken after due deliberations at different levels. Firstly, the issue was examined by the Academic Council of the Board who made the said recommendation which received approval of the Executive Council and later on of the State Board. It is only thereafter, the Government accorded approval to the proposal so as to introduce ATKT facility from academic year 2009-2010. All matters relevant for taking the said decision were deliberated upon by the authorities at different levels. The affidavit also highlights the purpose for introducing such change which would be beneficial to the students as well as the Board and the Society as a whole. The affidavit discloses the figures of total number of students who had appeared for the SSC examination in March 2009 to be 15,94,673. 12,78,562 students passed in all the subjects and 3,16,111 students failed in one or several subjects. The details of students failed subject-wise are also mentioned. Students failed in one subject are about 90,881, 2 subjects about 56,809, 3 subjects about 39,230 and 4 or more subjects about 64,818. The affidavit also discloses the statistics of sanctioned strength of divisions for 11th and 12th Standards and the total intake capacity to admit students in different faculties. As per the said statistics the sanctioned strength of divisions for 11th Standard is 14,596 and total intake capacity to admit students is about 10,03,345. As against this, the total number of failed students upto two subjects at the SSC examination was 1,47,690 and the vacancies available in 11th Standard after regular admission was over is 1,85,091. This disclosure is made on the basis of report received from the Director of Education. The affidavit asserts that the Court should not interfere with the wisdom of the policy decision taken by the Respondents as it cannot be said to be unreasonable or arbitrary in any manner as the same has been arrived at after due consideration and deliberation on the basis of relevant material and following the due process. There was no malafide intention for taking the said policy decision. It is reiterated in the affidavit that the scheme was for avoiding the loss of valuable academic year of thousands of students who would be provisionally promoted and allowed to keep terms in the 11th Standard or first year junior college. Another affidavit sworn on 21st August, 2009, by Shahaji Haribau Dekhane, the Joint Secretary of Respondent No. 2, has been filed to oppose the present Petition. This affidavit refers to the

background in which the decision culminated with the notification dated 17th August, 2009 for introducing the policy decision of extending ATKT facility to failed students upto two subjects from academic year 2009-2010. It is stated that the avowed object kept in mind was that the students do not lose one year of their life in successfully passing their first public examination. It is asserted that there would be no violation of academic Standards by introduction of this exemption/concession because the students will be required to pass the examination in the subjects in which they have failed. It would only provide an additional opportunity to the failed students to pass the subjects without losing an academic year. It is also stated that the ATKT facility is not compulsory but would be optional opportunity available to the failed students to continue and remain in the education stream while ensuring successful completion of SSC course by them, with provisional entry to the College.

6. The Petitioners, in view of the changed situation, filed Civil Application to allow them to amend the Petition so as to incorporate additional averments by way of Paragraph 17A and 24A respectively and further reliefs (c-1) (d-1) and (e-1). The Petitioners by the proposed Paragraph 17A would assert that all the grounds mentioned in the present Public Interest Litigation for challenging the order dated 20th July, 2009 survive and are being raised for challenging the notification dated 17th August, 2009 except the ground of Regulation was not amended. By way of Paragraph 24A, the Petitioners assert that the impugned notification appears to be self contradictory and discriminatory. In that, the students who have appeared for 10th Standard examination in March 2009 only will be eligible for ATKT in this academic year as well as in future whenever they seek admission to Standard 11th /first year Junior College. The Government has thus carved out a special category of students who have appeared in Standard 10th examination in March 2009. This classification is not based on intelligible criteria and is, therefore, violative of Article 14 of the Constitution of India. By way of further reliefs, the Petitioners pray for notification dated 17th August, 2009 annexed to the affidavit of Respondent No. 1 be quashed and set aside. This application was handed in to the Court when the matter was listed for arguments. Counsel appearing for the Respondents fairly agreed that the Court may proceed on the assumption that the amendment as prayed for has already been granted and may dispose of the application alongwith the Writ Petition on that basis. Thus, arguments on merits continued. However, with reference to the doubts expressed by the Court about the figures referred to in the reply affidavit, the Respondent No. 1 sought liberty to file additional affidavit. Accordingly, additional affidavit dated 25th August, 2009 was filed. This affidavit also gives the statistics about the level of drop out students for the past few years. The arguments were then concluded on 25th August, 2009 and the matter was reserved for orders. The Respondent No. 1, however, filed additional affidavit of Anil Madhaorao. Bhattalwar, Joint Secretary to Government, School Education & Sports Department dated 1st September, 2009 to clarify the position that although the amended Regulation 79(1A) envisages that the change introduced

regarding ATKT facility is applicable only for one academic year, however, the policy is not a one time experiment but will be consistently followed in the years to come. In view of this affidavit, the matter was ordered to be listed on 2nd September, 2009 for directions. Later on, the matter was listed on 7/9/2009 when further arguments were advanced by Counsel appearing for the parties. On 9th September, 2009 liberty was sought by the Respondents to file additional affidavit to furnish information amongst others regarding district-wise vacancies available as of now. Pursuant to the said liberty, the Respondent No. 1 has filed additional affidavit of Anil Madhaorao Bhattalwar sworn on 11th September, 2009. The same was made available to the Counsel for the Petitioner on 15th September, 2009, when he asked for time to examine the same. Accordingly, the matter was listed for further arguments on 16th September, 2009 on which date the arguments were finally concluded.

7. At the outset, the Counsel appearing for the Petitioners fairly conceded that the relief as claimed in the original Petition would not survive for consideration in view of the cancellation/withdrawal of the decision dated 20th July, 2009 Exhibit B as also the circular dated 23rd July, 2009 Exhibit C to the Petition. However, the Counsel during the course of arguments reiterated the points made out in the present Petition which are already adverted to above to assail the impugned notification dated 17th August, 2009. The challenge is principally three fold. Firstly, that the policy decision has been taken in undue haste without reckoning the relevant matters. Secondly, the amendment made to Regulation-79 would result in ex facie discrimination and arbitrariness. In that, only students who have failed in one or two subjects who had appeared in the SSC examination conducted in March 2009 with all subjects alone would be entitled to this facility. Thirdly, even if the policy of introducing ATKT facility was valid, the same overlooks the lack of infrastructure for accommodating all the failed candidates and more so of ensuring quality education and avoiding over burdening of the students. The Petitioners have also found fault with the figures disclosed by the Respondents about the vacancy of seats. The Petitioners also contended that the number of failed students in one or two subjects(eligible for ATKT) is far more than the vacant seats with reference to the affidavit of the Board and the affidavit of the Government. According to the Petitioners, keeping in mind the total intake capacity of the students and the students passed in all subjects, it was obvious that the number of seats available were less than the students who have passed in all subjects. This would indicate that infrastructure to accommodate the failed students (eligible for ATKT) was not available. It necessarily follows that the Respondents would then create additional seats by procuring additional divisions in schools/colleges which would compromise quality education. The Counsel for the Petitioners also contended that the impugned decision if allowed to be implemented will have retrospective operation which cannot be countenanced in the case of delegated legislation.

8. Per contra, the Respondents would contend that there was no substance in the first grievance of the Petitioners that the decision was taken in undue haste in as

much as the same was arrived at after due deliberations and following due process as the matter was considered first by the Academic Council and the recommendation of the Academic Council was then approved by the Executive Council as well as the State Board. It is only thereafter the matter was brought before the State Government for sanction. Even before grant of sanction, the matter was examined at the highest level and after considering all relevant matters order were issued by the State Government on 20th July, 2009. In furtherance of the said order, the State Board issued circular on 23rd July, 2009. Later on the State Government accorded sanction for modification of Regulation on 31st July, 2009. The amendment to Regulation 79 was culmination of due process followed by the Respondents. It was a conscious decision taken at the highest level as to why ATKT was preferred instead of supplementary examination due to peculiar situation and more so to avoid loss of one academic year of the failed students(eligible for ATKT). It was argued that such procedure is followed even in other States. The new policy was introduced so that the students will not miss out one academic year and if the same was found to be successful could be continued even for the future. According to the Respondents, the Petitioners were not able to specifically point out any short comings so as to question the wisdom of the policy makers. According to the Respondents, the policy does not affect those who have passed as also it does not discriminate between failed students. It was not an ex facie arbitrary policy or provision. Even the apprehension of the Petitioners that the time span available may not be sufficient to comply with the mandatory academic Standards was misplaced. In that, the Respondents have already prepared an action plan as to how it can be made good. The Respondents also argued that the apprehension of the Petitioners that sufficient number of teachers may not be available and more so in view of the impending Legislative Assembly Elections in the State was also misplaced. In as much as, election duty is assigned to the teachers as per the guidelines of the Election Commission. There would be no compromise on teaching Standards or loss in teaching. On the other hand, there was sufficient margin to make good the deficient instruction hours by prescribing one extra hour everyday and also additionally during the vacations so as to make good the loss of instruction hours. A chart explaining that position has been handed in to the Court. Besides, by way of additional affidavit the Respondents have made it clear that the policy is not a one time experiment but will be consistently followed in the years to come. That would take away the grievance of the Petitioners that the policy results in discrimination. Counsel for the Respondents have placed reliance on the decisions of the Apex Court which according to them should be borne in mind while considering the question of validity of the policy introduced by the Respondents. Reliance is placed on the case of Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others, ; State of U.P. Vs. Dr. G.K. Ghosh, ; Bombay Dyeing and Mfg. Co. Ltd. Vs. Bombay Environmental Action Group and Others, page 434 and Bhavesh D. Parish and Others Vs. Union of India and Another, page 471.

9. Before analyzing the rival submissions it may be apposite to advert to the relevant provisions. As per Section 36 of the Act of 1965, the State Board has power to make Regulations. In exercise of the said power, the State Board has framed Regulation of 1977. Regulation 79 thereof which is of some significance to our case, deals with the eligibility for admission to junior college. Sub-clause (1) of Regulation 79 postulates that students who have passed 10 year Secondary School Certificate (SSC) examination under (10+2) education pattern of any statutory Board in India shall be admitted to the first year of junior college if they have offered and passed in minimum five subjects with English as one of the subjects. On plain reading of this Provision, only a student who has passed 10 year Secondary School Certificate Examination of any statutory Board in India in minimum five subjects with English as one of the subject alone can be admitted to the first year of junior college. In the face of this provision, the Respondents could not have introduced the scheme of ATKT facility-so long as Regulation 79 remained unamended. Nevertheless, the Respondents proceeded to do so by issuing order under the signature of Under Secretary-State of Maharashtra dated 20th July, 2009 and the circular under the signature of Secretary State Board of Maharashtra State Secondary and Higher Secondary Education Board dated 23rd July, 2009. Obviously, therefore, this Court at the instance of the Petitioners intervened in the matter on 6th August, 2009 and directed the Respondents to forbear from giving effect to the said decision. However, the Respondents have now issued notification to amend Regulation 79 by introducing Clause (1A). The said notification is published in the Official Gazette dated 17th August, 2009, which reads thus:

SCHOOL EDUCATION AND SPORTS DEPARTMENT Mantralaya(Annex), Mumbai 400 032, dated the 17th August 2009

NOTIFICATION

MAHARASHTRA SECONDARY AND HIGHER SECONDARY EDUCATION BOARDS ACT, 1956.

No.HSC-2009/(167/09)/hsc-2, date 17th August 2009.-In exercise of the powers conferred by Sub-section (2) of Section 37 read with Section 36 of the Maharashtra Secondary and Higher Secondary Education Boards Act, 1965 (Mah. XLI of 1965), the Government of Maharashtra, after consultation with the Maharashtra State Board of Secondary and Higher Secondary Education, is hereby pleased to amend the Maharashtra Secondary and Higher Secondary Education Regulations, 1977, as follows:

In Regulation 79 of the Maharashtra Secondary and Higher Secondary Education Regulations, 1977, after Sub-rule (1), the following Sub-rule shall be inserted, namely:

(1A) Notwithstanding anything contained in Sub-rule (1), a student who has appeared to the Secondary School Certificate examination (Std.X) conducted by the Maharashtra State Board of Secondary and Higher Secondary Education in

March 2009, with all subjects but failed in not more than two subjects, shall be allowed to keep terms (ATKT) and shall be eligible to take provisional admission to the first year of junior college or Higher Secondary Schools, as the case may be, affiliated to the Maharashtra State Board of Secondary and Higher Secondary Education, Pune, from the current Academic Year. It shall be compulsory for such student to appear for the October examination to be held by the State Board in the respective Academic Year with the subjects in which he has been given the facility to keep terms (ATKT). If he fails in this final examination, he will get last opportunity to clear the subjects in the final examination of that Academic Year. The student who is availing of the facility to keep terms (ATKT), shall not be eligible for admission to Std. XI in Science stream of the junior college or Higher Secondary Schools, as the case may be, unless he has secured more than 40% marks in Science subjects. At the time of taking October Examination or the Annual Examination of such student for the subjects in which he has failed, the State Board shall arrange only written examination of such student and marks of the earlier examination in practical and oral and internal valuation in the said subjects shall be taken into consideration for passing of respective subjects. Such student shall not be entitled to his result of Std.XI examination and shall not be eligible for admission to Std. XII till he successfully passes the said subjects in which he had failed at Secondary School Certificate examination (Std.X).

By Order and in the name of the Governor of Maharashtra,

A.M.BHATTALWAR, Joint Secretary to Government.

10. The Respondents have justified its policy decision which has culminated with the above notification on the basis of the opinion of the Academic Council which has been approved by the Executive Council and the State Board. On the basis of the opinion of the Academic Council, the Secretary of the State Board sent communication dated 9th July, 2009 to the Secretary, Government of Maharashtra, School Education and Sports Department. The office translation of the said communication reads thus:

Ex. A Number S. B/Examination -6/4396 Pune 411004. Date : 9th July, 2009.

To, The Secretary, Government of Maharashtra, School Education & Sports Department, Mantralaya Extension Building, Mumbai 400032.

Subject: Regarding conducting supplementary Examination within one month after declaring the results of February/ March Examinations.

Sir,

As per the representations received from Punekar Vidyarthi Kriti Samiti, Pune (Puneites Students Action Committee, Pune)/ Shivsena Shahar Pramukh, Kolhapur and Samatavadi Chhatra Bharati (Maharashtra), through the Divisional Boards, as regards Secondary School Certificate Examination (Standard 10th) and Higher Secondary Certificate Examination (Standard 12th), following demands have been received by the State Boards.

(1) Supplementary Examination may be conducted immediately after declaring the results.

(2) Facility of re-valuation of answer sheets may be made available.

(3) If the students make requisition then a xerox copy of the answersheets may be provided.

As per the news published in the various news-papers in the month of June and July, similar kinds of demands are being made. The Hon"ble Minister in this regard has declared positive role through the newspapers. Hence, in order to make discussion consideration on the aforesaid things and for deciding procedure in that regard, in-depth discussion has been made in the meeting of Academic Council, Executive Council and State Board on the dates 29th and 30th June 2009. On account of Supplementary Examination of October, academic year of the students is lost and which cause them loss and hence if this examination is conducted within 10 days immediately after declaring the results, instead of losing academic year of the students who failed in one or two subjects, such students can take admission for further education (studies) in the same academic year. For this purpose, the said scheme is most welcomed the Board should adopt this. However, the Board does not have merely a responsibility of examination it has other important responsibilities viz. Curriculum, textual development, text books, evaluation and Teachers Training etc. Hence, it has been decided with the consent of all that if such examination is conducted in the month of June, immediately after the results of February/ March, then it is presently does not seem possible for the Board to take Supplementary examination again in the October. In this regard, State Board Members, should immediately make a study as to how the Supplementary Examination, being conducted in this manner, is implemented in other States (especially Karnatak, Gujarat, Andhra Pradesh States) and for that purpose, it has been decided that one Sub-committee should be appointed and such Sub-committee should submit a report. A copy of the resolution passed in the aforesaid meetings and copies of the order having formed the Sub-committee and of issuing the orders to the concerned in that regard, are submitted separately. Moreover, if such Supplementary examination is required to be conducted within ensuing one month period in this academic year then how would be it's time table, on this issue also the discussion was made. This Examination can be conducted as early as in the first week of August month. The said Time Table can be prepared as early as mentioned hereinbelow:

(9) The result of the examination conducted in the first week of August can be declared upto 15th September. However, the admission period for the academic year is generally upto 31st July and the first term is generally gets over on 20th October. Therefore, according to all the members the benefit of the examination conducted in the month of August, 95 aforesaid, will not be availed by the students for taking admission to the next class in the same academic year. Moreover, if the Supplementary examination of the students, failed in two

subjects, is required to be conducted, then all the papers can not be kept on the same day or even on two days. If the examination of all the subject are to be kept (conducted) within 1 day, then students can appear for examination of only one subject. Therefore, if the examination is to be conducted for two or more subjects, then the programme of examination for the entire period, as before, shall have to be prepared, because, these subjects can, studentwise, be different. Therefore, for supplementary examination, minimum 9 days actual period is necessary.

In the current year, as Diwali is during the period from 17th to 19th October, 2009, it is proposed to conduct regular October examination, during the period from 22nd September, 2009 to 10th October, 2009. Result of this examination can be declared upto 20th November as per last year.

The aforesaid Supplementary examination is proposed with a view to save academic year of the students of 10th Standard. However, as the process of printing examination papers is not yet started in the current year, it would not be possible to conduct the examination this year before the August. The application form for 10th and 12th Standard for October examination have received and the October Supplementary examination of the 12th Standard is required to be conducted again, immediately. For both these examinations, appointments of Custodian, Examiner, Moderator, Centre Director (Head), Supervisor etc. shall have to be made twice. As a result even the expenditure of their honorarium shall become double. Moreover, for the work of paper checking of the October examination, generally time is available owing to Diwali vacation, as a result days of teaching (tuition) are wasted. However, if it is required to conduct Supplementary examination now, then days of their teaching will be wasted. And that would even become the subject of criticism. As the month of August is monsoon season, the students, at District level, may find it difficult to reach at Examination Centre, due to traffic and other problems. Taking this fact into account at least one Examination Centre shall have to be given to each Taluka. The aforesaid problems may arise even to reach at the Taluka place.

Regarding reaching Question papers on the concerned custodian Centre, by internet

In the action of sending question papers to the concerned custodian centre by internet, preparing copies thereof and sending the same to the concerned centre, following things shall have to be taken into consideration.

The examination for Std. 10th is conducted in 8 mediums whereas examination for 12th Science is conducted in 4 mediums and for other branches it is conducted in 6 mediums. On each centre, the students of at least 3-4 mediums are admitted. If volume on question paper is considered to be 4 pages, the work of assembling question papers and packing the same in centrewise packets shall have to be done on the custodian centre itself and considering the transportation period required therefor, the question papers shall have to be sent to the

custodian centre at least three hours in advance. If minimum 350 students are expected at each Taluka Centre, the work to prepare that much medium wise copies and sealed packets thereof etc. shall have to be done within the period of three hours. While carrying out these works, various types of irregularities like the question papers being leaked from custodian centre, the same being read, additional unauthorised copies thereof being made, answers thereof being prepared and supplied may occur on large scale.

In the existing distribution system, each custodian is provided with centrewise sealed packets, therefore if any irregularity occurs it is possible to find out the same. However, if this work is to be done by internet, the Board will not have any control over the same and unnecessarily, the Board will be held responsible in these irregularities and the Board is likely to be defamed as a result thereof. Besides this, every custodian centre shall have to keep the internet facility in permanent upto date working condition. Moreover, the schedule of load shedding shall have to be kept similar all over the State. As the Mahavidyut vitaran has rejected the request of school education department not to do load shedding during the exam period of March 2009, even this time it will have to be presumed that Schedule of load shedding will be irregular. As a result thereof, on some occasion, even the question papers will have to be sent to the custodian centres, one day in advance which is likely to cause breach of confidentiality as regards question papers on large scale. Moreover, if the concerned custodian/officer can not obtain the question papers on account of some technical reasons then, the possibility can not be ruled out that exams of the students at such centres will have to be postponed and the Board will have to make different question paper available for such students. In such situation, the Board will have to conduct the exams at such centres again as per the revised time table. Therefore, since the vidyut Mahavitaran has informed that load shedding will be continued upto 2012, at least till then, it does not seem to be possible that distribution of question papers can be done by internet.

For October exams, on an average 2 thousand students are expected at one custodian centre whereas, at the time of examination held in March, 6 to 25 thousand students are expected at one custodian centre. For the examination held in March 2009, there were in all 485 custodian centres. Considering the centre/ medium/ subjectwise types and number of question papers on such a large scale (For Std 10th 59 subjects and number of question papers for different medium is 139 and for Std 12th total No. of subjects 143 and number of question papers is 390), it is opined that in order to maintain the confidentiality of examination, to conduct examinations as per the scheduled time table and to see that students shall get sufficient number of question papers of proper medium, the prevailing packing system of Board shall be continued.

The State Board has appreciated the proposal of conducting Supplementary examination in June. However, if this examination is to be conducted in place of October examination, this decision being comprehensive, it is necessary to

provide information in respect thereof to each section of society, in time. For this purpose, the State Board, by taking the information as regards examination system followed in other States, shall submit thorough proposal to the Government. The State Board has taken a decision to declare this examination at the beginning of academic year itself. Moreover, considering the fact that the students will not get benefit of avoiding loss of one academic year by conducting this supplementary examination in this year itself and that even the Board is not well prepared for this, a resolution has been passed that implementation of this decision shall be considered from next academic year and for this purpose it has also been decided in the State Board meeting that result of Std. 12th shall have to be declared before 30th May and result of Std. 10th shall have to be declared before 10th June and considering the period required for printing of marksheets, the result shall be declared in advance on website so that the students would get clear idea whether they have to appear for supplementary exam or not.

In view of the aforesaid facts and difficulties likely to occur in Supplementary examination. State Board has considered over the option of A. T. K. T.

Regarding giving an opportunity of admission to 11th Standard to the students who have failed in one subject:

In all 1594673 students appeared for Secondary School Certificate Examination held in March, 2009. Of them, 1278562 students passed and 316111 students failed. The numerical details of the failed students are as follows:

The percentage of the results of Secondary School Certificate Examinations held in October during last three years is as follows:

From the aforesaid statistical data, it is seen that the total result of October examination is less than the result of the students failed in one subject. In other words, it appears that generally, the very students will be more benefited in October. In order to see that academic year of the students is not wasted. Supplementary examination is demanded from the society. Therefore, as an alternative to Supplementary examination, a facility of admission to 11th Standard can be given to the students who have failed in one subject on the line of University's A. T. K. T. (Allowed To Keep Terms) facility. However, 10th Standard is a final step at secondary level and as the phase of Higher Secondary education starts from 11th Standard, a policy decision thereon may be taken at the Government level. If A. T. K. T. Scheme is to be implemented, then it would be proper to take into account below mentioned things:

1) A student, who has failed in any one subject from out of the subject in respect of which examinations are conducted by the Board, may be treated as eligible for admission to 11th Standard by giving A. T. K. T. facility. However, for science faculty, the condition of minimum marks (minimum 40%) in science subject may be kept intact.

2) Those students to whom A. T. K. T. facility is admissible, a clear entry to that

effect may be made in their mark-sheets. However, as mark-sheets of the examination held in March, 2009 have been issued to the students by the Board, as regards admissions of such students, separate orders may be given to the Director (Secondary and Higher Secondary) from the Government level. However, from the examination of the year 2010, entry of A. T. K. T. facility can be shown in the mark-sheets of the Board.

3) A. T. K. T. facility shall be applicable only to a student who will appear for Secondary School Certificate examination by taking all subjects (excluding Grade subjects) at a time (excluding Grade Improvement Scheme).

4) After such students takes admission to 11th Standard alongwith A. T. K. T. facility, it may be made mandatory for them to pass the subject, for which A. T. K. T. facility has been given, in October and March examinations in the academic year of 11th Standard. By obtaining an Undertaking to that effect from the students, they may be given temporary admission to 11th Standard. During the said period, if the said students do not pass the said subject, then their temporary admission to 11th Standard shall be cancelled.

5) The student shall have the option to accept or reject the A. T. K. T. facility. The said A. T. K. T. facility shall be limited to taking temporary admission to 11th Standard in the next immediate academic year for the students who have failed in one subject of the Maharashtra State Secondary and Higher Secondary Education Board Examination.

6) The facility of taking admission in 11th Standard along with A. T. K. T. facility can be given in the Junior Colleges affiliated to the Maharashtra State Secondary and Higher Secondary Board, Pune.

7) While conducting examination of the subject for which A. T. K. T. facility is given within the aforesaid prescribed period, the Board should conduct only written examination. However, as regards practical/ oral/ internal assessment etc. the marks received in the original examination should be held valid.

8) Due to aforesaid A. T. K. T. facility, the number of students taking admission for 11th Standard will be increased and therefore, as regards number of Divisions and enhanced number of teachers, a separate planning will have to be made at the level of the Director, (Secondary and Higher Secondary).

9) If a Decision on A. T. K. T. is taken as aforesaid and if the same is to be implemented from the students appeared for March 2009 examination, then a separate planning for filing in Applications of such students for admission to 11th Standard will have to be immediately made through the Director of Education, (Secondary and Higher Secondary).

10) After Government Resolution in this regard is received, incidental amendments will have to be made in connection with 11th Standard admissions in S.S. Code and M. E. P. S. Rules (1981) and the action of making amendments in necessary provisions of the Board in connection with 11th Standard

Admissions will be taken with the approval of the Competent Committee of the Board.

Further, on the line of Standard 10th as aforesaid, if A. T. K. T. facility is to be given to 12th Standard Students for further College admission, then it is necessary to carry out correspondence with the Higher Education Department at the Government level. However, if such decision is taken at Government level, then it will be possible to make an entry viz. Received A. T. K. T. facility in the mark-sheets given to 12th Standard students by the Board.

If A. T. K. T. facility is given, then there will be no need to conduct Supplementary examination in July and as a result, the failed students can study properly and appear for the examination.

After Government order in this regard is received, a proposal therefore will be separately submitted to the Government with the approval of all the Competent Committees (Examination Committee, Executive Council (Ad hoc); State Board Meeting) of the Board.

Yours faithfully, (Signature Illegible) (T. N. Supe) Secretary, State Board, Pune.
Office Copy (Signature Illegible) 9/7/9

True Copy (Signature Illegible) Advocate

11. We have reproduced the said communication in its entirety as the justification to introduce policy of ATKT facility emanates from the opinion of the Academic Council which has been deliberated upon at the highest level before culminating in the impugned Notification dated 17th August, 2009. It is on the basis of the above said proposal submitted by the Respondent No. 2, the Respondent No. 1 issued order on 20th July, 2009 and communicated the same to the Secretary of the Board. The Office translation of the said communication as furnished by the Petitioners read thus:

Government of Maharashtra

No.HSC-2009/(167/09)/. -2 Department of School Education & Sports
Mantralaya, Extension Building, Mumbai-400032. Date: 20th July 2009.

To,

Secretary, Maharashtra State Board of Secondary & Higher Secondary Education
Pune.

Sub:-With respect to giving facility of ATKT (Allowed to keep term) to students failing in 10th Standard for admission to 11th Standard

Ref:-Your letter No. jk-ea-/ ijh{kk/ 4396, dtd.9th July 2009

Please refer to the letter under reference.

2. Pursuant to the proposal submitted by you vide your aforesaid letter, the

Government Order is being issued under the provisions of Section 34 of the Maharashtra State Secondary and Higher Secondary Board Act, 1965 as follows:

In order that there should not be a loss of academic year of students who have failed in 10th Standard examination held in February/March 2009 in maximum 2 subject, the government hereby sanctions to give admission to such students to 11th Standard in this academic year on the following conditions

(1) The facility of A.T.K.T. Shall be available for admission to 11th Standard in the academic year 2009-2010 only to those students who have appeared for S.S.C Examination (10th Standard) in March 2009, held by Maharashtra State Secondary and Higher Secondary Education Board and have failed in maximum two subjects. For the admission in science stream the students opting for the facility of A.T.K.T must secure more than 40% marks in the subject of science.

(2) The admission with facility of A.T.K.T. Will be provisional/temporary. It will be compulsory for such students to appear for the examination to be held by Board in October 2009 with the subjects in which he has been given the A.T.K.T.. If he fails in this, he will get last opportunity to clear the examination in March 2010. If the students does not pass in the subject in which he has got A.T.K.T. even at the last opportunity, admission given to him to 11th Standard shall be cancelled. The result of 11th Standard shall not be declared till he passes the subjects in which he has got A.T.K.T. in the SSC examination, and the marksheet will not be given. Similarly, he shall not be eligible for admission in 12th Standard.

(3) The facility of A.T.K.T. will be applicable only to those students who have appeared for the SSC Examination in March 2009(10th Standard) with all the subjects (except subject of grade) at the same time (Except for improving the grade).

(4) The student will have option to accept or reject the facility of A.T.K.T.

(5) Henceforth there will be mention in the marklists of such students who have failed in 10th Standard examination in maximum 2 subject, and wanting to take benefit of facility of ATK T in said respect. The necessary instructions will be issued to all Divisional Boards from State Board in this respect. However, as the marklists are already distributed this year, the students shown failed in 2 subjects in the marklist shall be entitled to get benefit of facility of ATK T on the above conditions.

(6) As there will be increase in number of students taking admission to 11th Standard, separate arrangements will have to be made for No. of divisions and additional teaching staff at the level of Director(Secondary and Higher Secondary)

(7) Necessary instructions with respect to admissions to 11th Standard for students getting facility of ATK T will be given by Director(Secondary and Higher Secondary) to concerned office of Divisional Deputy Director of Education and to all concerned.

(8) At the time of taking examination in October 2009 or March 2010 of the students who have been given A.T.K.T. facility, for the subjects in which he was failed, the Board should arrange only written examination and marks of the earlier examination practical/oral/internal valuation in the said subject should be taken into consideration.

3. Necessary changes in respect of facility of ATKT should be made by the concerned in S.S. Code and M.E.P.S. Rules (1981) and in Board Regulations in respect of admissions to 11th Standard and such proposal should be sent to Government.

(S.P.Khorgade) Under Secretary, State of Maharashtra

Copy to

1. Director(Secondary and Higher Secondary), State of Maharashtra.;

12. On the basis of the above said order, the State Board issued circular on 23rd July, 2009. Office translation of the said document as furnished by the Petitioners would read thus:

STATE BOARD, PUNE

MAHARASHTRA STATE SECONDARY & HIGHER SECONDARY EDUCATION BOARD,
PUNE CIRCULAR

Sub: In respect of giving facility of A.T.K.T. (Allowed to keep Term) to the students who have failed in examination of 10th Standard for admission in 11th Standard.

There was demand for holding supplementary examination in Order that there should not be a loss of academic year of students who have failed in Second School Examination held by Maharashtra Rajya Secondary and High Secondary Education Board through 8 divisions boards namely Pune/Nagpur/Aurangabad/Mumbai/Solapur/Amravati/ Nashik.Latur. However, as there are many defects in arranging supplementary examination this year and as the academic year of the students who have failed the SSC examination (10th Standard) held in February-march 2009 should not be wasted, the Government by its Order dated 20.7.2009 has sanctioned to give facilities of A.T.K.T. on the basis of Universities for taking admission in 11th Standard to the students who have failed in maximum two subjects in the current academic year subject to the following conditions:

(1) The facility of A.T.K.T. shall be available for admission to 11th Standard in the academic year 2009-2010 only to those students who have appeared for S.S.C. Examination (10th Standard) in March 2009, held by Maharashtra State Secondary and High Secondary Education Board and have failed to maximum two subjects.

(2) For the admission in science stream the students opting for the facility of A.T.K.T. must secure more than 40% marks in the subject of science.

(3) The admission with facility of A.T.K.T. will be provisional/temporary. It will be compulsory for such students to appear for the examination to be held by Board in October 2009 with the subjects in which he has been given the A.T.K.T.. If he fails in this, he will get last opportunity to clear the examination in March 2010. If the students does not pass in the subject in which he has got A.T.K.T. even at the last opportunity, admission given to him to 11th Standard shall be cancelled. The result of 11th Standard shall not be declared till he passes the subjects in which he has got A.T.K.T. in the SSC examination, and the marksheet will not be given. Similarly, he shall not be eligible for admission in 12th Standard.

(4) The facility of A.T.K.T. will be applicable only to those students who have appeared for the SSC Examination in March 2009(10th Standard) with all the subjects (except subject of grade) at the same time (Except for improve the grade).

(5) The student will have option to accept or reject the facility of A.T.K.T.

(6) The students who have been given A.T.K.T. facility will have to give only written examination in which he has failed (one or two) in October 2009 or March 2010 and marks of the earlier examination practical/oral/internal valuation in the said subject will be considered.

Sd/- Secretary State Board, Pune

Pune 411004

23.7.2009

13. Indubitably, after the issuance of Notification dated 17th August, 2009 in the official gazette, challenge to the above said order issued by the Respondent No. 1 dated 20th July, 2009 and the circular issued by the Respondent No. 2 dated 23rd July, 2009 would not survive for consideration to the extent that due process was not followed by the Respondents before introducing the policy of extending ATKT facility to the failed students. To that limited extent nothing survives for consideration in the present Petition.

14. However, since the Petitioners by way of amendment have asserted that the grounds for challenge to the aforesaid order and circular would still continue and would be available to challenge the notification dated 17th August, 2009, as a result the said aspects will have to be addressed by us. Before doing so, it may be apposite to advert to the legal position enunciated by the Apex Court which have been consistently adopted and applied in subsequent cases to examine the argument regarding the invalidity of the amended provision, Regulation-79. The Apex Court in the case of Ramkrishna Dalmia (supra) after adverting to its earlier decisions and other reported cases have culled out the principles to be borne in mind by the Court to examine such controversy. The same can be discerned from Paragraph 11 of the said decision. The relevant extract thereof is reproduced thus:

(11) The principal ground urged in support of the contention as to the invalidity of the Act and/or the notification is founded on Article 14 of the Constitution. In *Budhan Choudhry and Others Vs. The State of Bihar*, a Constitution Bench of seven Judges of this Court at pages 1048-49 (of SCR) : (at p.193 of AIR) explained the true meaning and scope of Article 14 as follows:

The provisions of Article 14 of the Constitution have come up for discussion before this Court in a number of cases, namely *Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others*, ; *The State of Bombay v. F. N. Balsara* 1951 SCR 652 : AIR 1951 SC 318 (C); *The State of West Bengal Vs. Anwar Ali Sarkar*, ; *Kathi Raning Rawat Vs. The State of Saurashtra*, ; *Lachmandas Kewalram Ahuja and Another Vs. The State of Bombay*, ; *Syed Qasim Razvi Vs. The State of Hyderabad and Others*, and *Habeeb Mohamed Vs. The State of Hyderabad*, , it is, therefore, not necessary to enter upon any lengthy discussion as to the meaning, scope and effect of the article in question. It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, filled namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and, (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different basis, namely, geographical, or according to objects or occupations or the like. What is necessary is that there "Must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure.

The principle enunciated above has been consistently adopted and applied in subsequent cases. The decisions of this Court further establish

(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest ;

(e) that in order to sustain the presumption of constitutionality the court may

take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

The above principles will have to be constantly borne in mind by the court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and -violative of the equal protection of the laws.

15. It will be useful to reproduce Paragraphs 12 of the same Judgment which reads thus:

(12) A close perusal of the decisions of this Court in which the above principles have been enunciated and applied by this Court will also show that a statute which may come up for consideration on a question of its validity under Article 14 of the Constitution, may be placed in one or other of the following five classes:

(i) A statute may itself indicate the persons or things to whom its provisions are intended to apply and the basis of the classification of such persons or things may appear on the face of the statute or may be gathered from the surrounding circumstances known to or brought to the notice of the court. In determining the validity or otherwise of such a statute the court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute, no matter whether the provisions of the statute are intended to apply only to a particular person or thing or only to a certain class of persons or things. Where the court finds that the classification satisfies the tests, the court will uphold the validity of the law, as it did in *Chiranjitlal v. The Union of India* (B) (supra); *The State of Bombay v. F. N. Balsara* (C) (supra); *Kedar Nath Bajoria Vs. The State of West Bengal*, ; *V.M. Syed Mohammad and Company Vs. The State of Andhra*, and *Budhan Choudhry v. The State of Bihar* (A) (supra).

(ii) A statute may direct its provisions against one individual person or thing or to several individual persons or things but, no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge. In such a case the court will strike down the law as an instance of naked discrimination, as it did in *Ameerunnissa Begum and Others Vs. Mahboob Begum and Others*, and *Ram Prasad Narayan Sahi and Another Vs. The State of Bihar and Others*, .

(iii) A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the court will not strike down the law out of hand only because no Classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny the court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situated and that, therefore, the discrimination is inherent in the statute itself. In such a case the court will strike down both the law as well as the executive action taken under such law, as it did in *State of West Bengal v. Anwar, Ali Sarkar (D)* (supra); *Dwarka Prasad Laxmi Narain Vs. The State of Uttar Pradesh and Others*, and *Dhirendra Kumar Mandal Vs. The Superintendent and Remembrancer of Legal Affairs to The Government of West Bengal and Another*, .

(iv) A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the Government to select and classify the persons or things to whom its provisions are to apply but may at the same time lay down a policy or principle for the guidance of the exercise of discretion by the Government in the matter of such selection or classification, the court will uphold the law as constitutional, as it did in *Kathi Raning Rawat v. The State of Saurashtra (E)* (supra).

(v) A statute may not make a classification of the persons or things to whom their provisions are intended to apply and leave it to the discretion of the Government to select or classify the persons or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance of the exercise of discretion by the Government in the matter of such selection or classification. If the Government in making the selection or classification does not proceed on or follow such policy or principle, it has been held by this Court, e. g., in *Kathi Raning Rawat v. The State of Saurashtra (E)* (supra) that in such a case the executive action but not the statute should be condemned as unconstitutional.

In the light of the foregoing discussions the what category does the Act or the appeals fall ? question at once notification impugned arises: In these

16. In the case of *Maharashtra State Board of Secondary and Higher Secondary Board* (supra), while examining the validity of Regulation 104, the Court more or less re-stated the legal principle in the following words. The relevant extract of Paragraph 14 reads thus:

...In our opinion, this approach made by the High Court was not correct or proper because the question whether a particular piece of delegated legislation-whether a rule or regulation or other type of statutory instrument-is in excess of the power of subordinate legislation conferred on the delegate as to be determined with reference only to the specific provisions contained in the relevant statute conferring the power to make the rule, regulation, etc. and also the object and purpose of the Act as can be gathered from the various provisions of the enactment. It would be wholly wrong for the court to substitute its own opinion for that of the legislature or its delegate as to what principle or policy would best serve the objects and purposes of the Act and to sit in judgment over the wisdom and effectiveness or otherwise of the policy laid down by the regulation-making body and declare a regulation to be ultra vires merely on the ground that, in the view of the Court, the impugned provisions will not help to serve the object and purpose of the Act. So long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it, in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the Statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations. It is exclusively within the province of the legislature and its delegate to determine, as a matter of policy, how the provisions of the Statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act. It is not for the Court to examine the merits or demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation-making power conferred on the delegate by the Statute....

17. We may also usefully refer to the dictum of the Apex Court in the case of *Bombay Dyeing & Manufacturing Co. Ltd.* (3) *supra*. In Paragraph 204 to 208 of the said decision, the Apex Court observed thus:

204. For the purpose of striking down a legislation on the ground of infraction of the Constitutional provisions, the court would not exercise its jurisdiction only because the recommendations of the committees had not been accepted in toto but would do so inter alia on the ground as to whether they otherwise violate the constitutional principles.

205. Arbitrariness on the part of the legislature so as to make the legislation violative of Article 14 of the Constitution should ordinarily be manifest arbitrariness. What would be arbitrary exercise of legislative power would depend upon the provisions of the statute vis-a-vis the purpose and object thereof. See *Sharma Transport Rep. by D.P. Sharma Vs. Government of Andhra Pradesh and Others*, ; *M/s. Khoday Distilleries Ltd. etc. Vs. State of Karnataka and others*, and *Otis Elevator Employees" Union S. Reg and Others Vs. Union of India (UOI) and Others*, .

206. In *Om Prakash and Others Vs. State of U.P. and Others*, this Court has held

that the test of reasonableness is nothing substantially different from social engineering, balancing of interests or any other formulae which modern sociological theories suggest as an answer to the problem of judicial interference.

207. In *Cipla Ltd.* (supra), this Court in relation to a legislation while interpreting the statutory provisions on the touchstone of Article 14 of the Constitution of India, was of the opinion: (SCC p.9, para 4.1)

The Government exercising its delegated legislative power should make a real and earnest attempt to apply the criteria laid down by itself. The delegated legislation that follows the policy formulation should be broadly and substantially in conformity with that policy, otherwise it would be vulnerable to attack on the ground of arbitrariness resulting in violation of Article 14.

It was further opined: (SCC p.10, para 4.3.)

Broadly, the subordinate law-making authority is guided by the policy and objectives of the primary legislation disclosed by the preamble and other provisions. The delegated legislation need not be modelled on a set pattern or prefixed guidelines. However, where the delegate goes a step further, draws up and announces a rational policy in keeping with the purposes of the enabling legislation and even lays down specific criteria to promote the policy, the criteria so evolved become the guideposts for its legislative action. In that sense, its freedom of classification will be regulated by the self-evolved criteria and there should be demonstrable justification for deviating therefrom.

208. The amendment to DCR 58 was carried out 10 years after the original DCR 58 was introduced. Before doing so, due consultative process as laid down in Section 37 of the MRTP which involves suggestions and objections from public and the concerned statutory authorities was taken recourse to. Consideration of the same by Dy. Director of Town Planning and thereafter promulgation of the same in the form of direct regulation establishes that the same is not ex facie arbitrary in nature, particularly when most of the suggestions of the said Committees were accepted.

18. In the case of *Bhavesh D. Parish and Ors.* (supra) in Paragraph 23, the Apex Court has adverted to the exposition of its earlier decision in *R.K. Garg and Others Vs. Union of India (UOI) and Others*, which in turn refers to the opinion of Holmes, J. that the legislature should be allowed some play in the joints because it has to deal with the complex problems which do not admit of solution through any doctrinaire or straight jacket formula. In the case of legislation, where, having regard to the nature of problems required to be dealt with, greater play in the joints has to be allowed to the legislature. Reference is then made to the opinion of Frankfurter, J. wherein he has observed about the judicial self restraint if not judicial deference to legislative Judgment. It is observed that the legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. The Apex Court then went on to observe that the Court must always remember that legislation is directed to solve

problems, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by extract symmetry; that extract wisdom and nice adoption of remedy are not always possible and that Judgment is largely a prophency based on meagre and uninterpreted experience. It is then observed that every legislation is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. Further, there may be crudities and inequities in complicated experimentally economic legislation but on that count alone it cannot be struck down as invalid.

19. Applying the exposition of the Apex Court which has been adverted to hitherto, the question that immediately arises for consideration is whether the amendment to Regulation-79 lacks legislative competence. No such grievance has been made by the Petitioners. The grievance however, is of decision taken in undue haste and without being alive to the issues of adequate infrastructure and possibility of compromising academic Standards or quality of education and more importantly inadequate number of vacancies to accommodate all the failed students (eligible for ATKT). Moreover, the amended provision results in discrimination as it excludes all other students except the students who have appeared for the SSC examination in March 2009 with all subjects but failed in not more than two subjects. In so far as the former grievance is concerned, the same is inviting the Court to question the wisdom of the delegated legislation. By now it is well established position that the Court should not concern itself with the wisdom or efficaciousness of such rules or regulations. For, it is exclusively within the province of the legislature and its delegate to determine, as a matter of policy, how the provisions of statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the legislation. It is not for the Courts to examine the merits or demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned Regulation falls within the scope of the regulation making power conferred on the delegate by the Statute. It is well established that there is always a presumption in favour of the constitutionality of the enactment and the burden is upon the Petitioners to show that there has been a clear transgression of the constitutional principles. There is always presumption that the legislature understands and correctly appreciates the need of its own people that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.

20. In the present case, it is noticed that the proposal originated from the opinion of the Academic Council of the Board which was formalized in the meeting held on 29th June, 2009. The said proposal was then scrutinized by the Executive Council and later on by the State Board. Even the said two statutory bodies after due deliberation recommended to seek approval of the State Government. It is only thereafter the matter was considered at the highest level by the State Government and approval was accorded on the basis of which order

was issued by the State Government. It is not in dispute that the authorities have now complied with the due process of issuance of notification dated 17th August, 2009 in the Official Gazette. With the issuance of such notification the provision in Regulation 79 would stand amended. Assuming that it is open to the Court to examine as to how the provision can best be implemented and what measures substantive as well as procedural would have to be incorporated for the efficacious achievement of the objects and purpose of the amendment. The same can be considered on the basis of the modalities envisaged by the Respondents to ensure that quality of education is not compromised. The Respondents have demonstrated as to how the loss of instructional hours would be made good within the available days during the academic year. A chart indicating that position which was placed on record before us deals with that aspect. The same reads thus:

Days available in the year

Total

Actual Teaching

Extra curricular activities and examinations

June 14

July 26

August 22

September 22

October 9

93

77

16

November 24

December 25

January 22

February 21

March 23

April 24

May 4

143

114

29

Total

236

191

45

? instructional hours every week = 40 periods of 40 mins.

? 195 days of instructions = 33 weeks for 5th to 10th Standard -period = 30 mins.

? Only 27 weeks necessary for 11th and 12th Standard because period = 40 mins.

? If ATKT students start attending college/school from 10th September "loss of instructional hours (26.6 hours per week x 30 days of actual teaching) = 133 hours

? Instructional days available "Ist Semester = 21 days

? Extra 1 hour every day = 135 hours in the year

? Examination in 6 subjects can be held over a period of 6 days.

Instructions end on 31st March of Academic year

? Usually examinations begin on 1st April.

? Term ends on 6th May of Academic year.

? This year examinations can be held from 10th April = 10 days instructions extra

? Diwali vacation of 21 days can be curtailed by 12 days = 12 days instructions extra

21. The question is whether the projection made by the Respondents of extra hours of work and additional working hours during the vacations to make good the loss of instructional hours would not be an achievable target. We find that it is only an apprehension of the Petitioners without any concrete basis that the Respondents would not be able to achieve this target. Indeed, the Petitioners argued that it would create additional burden on the students on account of extra instructional hours. But, that is a matter of choice of the students who want to opt for the ATKT facility. The said facility is not compulsory at all. A student who opts for the said facility is expected to be aware and conscious of the position that he would be required to comply with the academic norms. The counter argument of the Petitioners is that the teachers may not volunteer for such additional work and more so during the time when they would be expected to also attend to election work during the same period on account of impending elections to Maharashtra Legislative Assembly. This is obviously hypothetical

argument. Further, the Respondents have relied on the guidelines issued in relation to drafting of services of teachers for the election work. The said norms will have to be adhered to before requiring the concerned teacher to attend to the election duty. The norms clearly provide that the services of teacher would be availed only after the regular school work is discharged. The validity of provision, however, cannot be decided on the basis of such hypothesis. Even the apprehension of the Petitioners that the vacancies were not adequate to accommodate all the failed students (eligible for ATKT). This apprehension is misplaced. For, the Respondents have demonstrated that out of the failed students (eligible for ATKT) is only about 1,47,960, as against the total number of vacancies available throughout Maharashtra to the extent of 1,72,320. The district-wise, stream wise and intake capacity and vacancies chart for 11th Standard admission for the year 2009-2010 has been produced alongwith affidavit which reads thus:

DISTRICT WISE, STREAMWISE INTAKE CAPACITY AND VACANCIES
FOR XITH Standard ADMISSION -2009-2010

Sr.

District/

Intake capacity

Stream wise vacancies

Arts

Science

Commerce

Composite

Total

Arts

Science

Commerce

Composite

Total

1

Mumbai Division

50135

75031

147424

4590

277480

9805

6935

11076

0

27816

2

Latur

17880

12680

3080

2520

36160

7227

1977

770

657

10631

3

Usmanabad

12240

6360

1920

720

21240

4829

350

90

50
5319
4
Nanded
22400
16040
1920
1920
42280
12532
1366
617
284
14799
5
Nashik
31400
14940
10920
1760
59120
2176
254
212
67
2709
6
Dhule
13520
7200

1200
1120
23040
2474
432
149
165
3220
7
Jalgaon
28760
12160
4280
1960
46960
1812
111
204
65
2192
8
Nandurbar
9200
5120
720
400
15440
1627
488
209

70
2394
9
Aurangabad
41920
9620
3200
880
55620
3618
1652
455
87
5812
10
Jalna
13440
3120
1760
80
18400
2886
1404
916
0
5206
11
Parbhani
14960
6880

1680
400
23920
200
250
210
130
790
12
Hingoli
6560
2720
400
160
9740
1598
622
55
0
2275
13
Beed
18960
10080
720
2320
32080
7874
2826
480

419
11599
14
Nagpur
37280
20720
14500
8320
80820
576
161
97
85
919
15
Chandrapur
20900
7180
2040
880
30760
3045
1230
770
150
5195
16
Gondia
13040
6040

560

840

20480

1523

1710

100

74

3407

17

Bhandara

12680

4920

480

480

17560

1505

403

101

43

2052

18

Gadchiroli

11400

3520

680

0

15600

406

219

10

32
667
19
Wardha
9175
3440
650
1740
15005
951
636
317
11
1915
20
Pune
24165
28820
25460
3480
83610
1960
450
1500
0
3910
21
Solapur
26480
11400

4820
1640
44440
3310
0
0
0
3310
22
Ahmednagar
27400
21400
8000
1240
59280
4351
944
1992
24
7311
23
Amravati
15800
7300
900
3880
27880
2775
420
188

335

3718

24

Akola

10490

5760

1340

1220

18810

2243

746

110

156

3255

25

Yewatmal

14160

5340

960

1360

21820

5268

1238

280

228

7014

26

Buldhana

12860

6140

940
1440
21380
254
18
6
9
287
27
Vashim
7740
3100
240
1020
12100
291
10
10
9
320
28
Kolhapur
23600
13560
9280
3600
50040
7489
2494
1777

569

12329

29

Sangli

15160

10960

4880

2200

33200

5705

1538

786

352

8381

30

Satara

17440

11640

6680

3280

39040

5384

846

1167

474

7871

31

Sindhudurg

3080

2040

1800
2520
9440
583
382
173
140
1278
32
Ratnagiri
6400
4640
4920
2120
18080
1919
1166
939
395
4419
Total
590625
359871
268654
60090
1279240
108196
33278
25766
5080

The figures so furnished on affidavit have not been challenged. The argument of the Petitioners, however, is that the total number of seats are far less than the total number of passed students. That anomaly has been answered by the Respondents on the argument that all the passed students do not take admission only in XI Standard or Junior Colleges, but some of them opt for other courses. As a result the seats in XI Standard or Junior Colleges are still available to the extent of 1,72,320. There is no material to doubt the correctness of this stand. In other words, although the admission process of the passed students is completed, there are still 1,72,320 vacant seats available in the Junior Colleges or XI Standard against which all the failed students (eligible for ATKT) about 1,47,960 can be easily accommodated.

22. A priori, the grievance of the Petitioners that there is possibility of breach of academic Standards or quality of education or that of inadequate vacancies and infrastructure cannot be countenanced. Even if this Court were to examine the steps taken by the Respondents for the efficacious achievement of objects and purposes of the amendment, as observed by the Apex Court, it is not for the Courts to examine the merits or demerits of a policy because a scrutiny has to be limited to the question as to whether the impugned Regulation falls within the scope of regulation making power conferred on the delegate by the Statute. As aforesaid, no such contention has been advanced by the Petitioners in the present case. The argument of inadequate infrastructure and decision taken in haste is on the hypothesis that of impossibility of efficacious achievement of the objects and purposes of the amendment.

23. That takes us to the question as to whether the amended provisions would result in discrimination. That question will have to be answered on the basis of amended provision introduced by way of notification dated 17th August, 2009. We have already reproduced the said provision hereinbefore. On the plain language of this provision, it is noticed that the same overrides the eligibility criteria prescribed in Sub-rule (1) of Regulation 79. In that, in so far as the students who have appeared for the Secondary School Certificate Examination (Standard X) conducted by the Board in March 2009 with all subjects but failed in not more than two subjects have been made eligible to take provisional admission by allowing them to keep terms (ATKT) to the first year of junior college or Higher Secondary Schools, as the case may be, affiliated to the Board from the current academic year. It then provides that such students would be obliged to appear for the October examination to be held by the Board in the respective academic year with the subjects in which he has been given the facility to keep terms (ATKT). That compliance has been made compulsory. It then provides that if the said student fails in that examination, he will get last opportunity to clear the subject(s) in the final examination of that Academic Year. It also provides that a student, who is availing of the facility to keep terms (ATKT), shall not be eligible for admission to Standard XI in Science stream of

Junior college or Higher Secondary Schools, as the case may, unless he has secured more than 40% marks in Science subjects. It further postulates that at the time of taking October examination or annual examination of such students for the subjects in which he has failed, the State Board shall arrange only written examination of such students and marks of the earlier examination practical and oral and internal valuation of the said subject shall be taken into consideration for passing of respective subjects. Lastly, such student shall not be entitled to his result of Standard XI examination and shall not be eligible for admission to Standard XII till he successfully passes the said subjects in which he has failed in Secondary Certificate Examination (Standard X).

24. We shall revert back to the argument about this provision being discriminatory a little later. Before that we would first deal with the argument canvassed on behalf of the Petitioners that the student who avails of ATKT facility will not be eligible for admission to Standard XI in Science stream of the junior college or Higher Secondary School unless he has secured more than 40% marks in Science subject. Moreover, after securing admission to some other stream, if such student was to later on pass the failed subjects would be denied opportunity of shifting to Science stream. This argument does not commend to us. This argument clearly overlooks the fact that the student would take admission on his own volition and it is not a compulsory admission. If he has taken admission to any other stream of his choice, he cannot later on be heard to make grievance that he has been denied opportunity to shift to Science stream after having passed all the subjects of SCC course. This provision by no Standards can be said to be unreasonable-as it provides further minimum qualification of specified class of students having secured more than 40% marks in Science subjects as pre-condition for being eligible for admission to Standard XI in Science stream of junior college or Higher Secondary Schools. In other words, all similarly placed students who have secured less than 40% marks in Science subjects have been considered as ineligible to get admission in Science stream in Standard XI. The student has a choice to skip over the facility of ATKT and appear in all subjects in the following SSC examination if he wants to improve upon his marks in Science subjects or to improve his prospects for admissions to Science stream. However, the fact that he is denied opportunity to change the stream to Science stream of the junior college cannot be the basis to hold that the provision is discriminatory as such. The right to be admitted to any course ought to be governed by the Regulation in place. It is not open to the students to claim that irrespective of the eligibility criteria, they should be admitted to course of their choice. Suffice it to observe that there is no force in this argument of the Petitioners.

25. The principal grievance regarding amendment being discriminatory and unreasonable is in the context of the criteria applied in the first part of the amended Regulation. It extends only to such students who have appeared in the Secondary School Certificate Examination in March 2009 with all subjects but failed in not more than two subjects. In so far as this grievance is concerned, the same will have to be considered in the context of whether the classification

carved out by this amendment is reasonable classification in the context of the purpose of the legislation. To pass the test of permissible classification, two conditions will have to be fulfilled. Firstly, the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out from the group. Secondly, that differentia must have a rational relation to the object sought to be achieved by the statute in question. The question is whether there is nexus between the basis of classification and the object of amendment under consideration. The object of the amendment under consideration is highlighted in the documents relied by the Respondents. It is founded on the underlying purpose of ensuring that the students remain in the education stream and more so do not lose out their one academic year. This is the laudable purpose for which the change has been brought about. That purpose applies *proprio vigore* to the students who are similarly placed (having appeared in the SSC examination with all subjects but failed in not more than two subjects), but have not appeared in the Secondary School Certificate Examination (Standard X) in exams conducted other than in March 2009. Thus understood, there is no nexus between the basis of classification and the object of the provision so as to exclude the others. From the plain language of the amended provision it does appear that it is intended to give one time benefit only to students who have appeared in the SSC examination in March 2009 with all subjects but failed in not more than two subjects. There is no nexus for such classification and carving out class of students, having regard to the object sought to be achieved by the amendment. In our opinion, the classification is not founded on any intelligible differentia which distinguishes persons or things that are placed together from others left out of the group except to identify them in the context of having appeared in the examination conducted by the Board in March 2009 with all subjects. That differentia has no rational relation to the object sought to be achieved by the legislation in question. Viewed thus, the first part of the amended provision results in discrimination and is arbitrary and hit by Article 14 of the Constitution of India.

26. A priori, the provision appearing in the first part of this amended provision will have to be struck down as unconstitutional. The remaining provision is however, only consequential and of application of the scheme to the eligible students. For that reason, even the same would become redundant. The question is instead of striking down the entire first part of this amended provision as a whole, is it possible to preserve the provision by severing the unreasonable part thereof. The unreasonable part is on account of the scheme is made applicable only to students who have appeared in the examination in March 2009 with all subjects but failed in not more than two subjects. If the expression in March 2009 is to be struck down from the first part of the amended provision, in that case the amendment would become applicable to all students similarly placed—whether having appeared for the examination in March 2009 or otherwise. That would efface the discrimination and all students similarly placed would be treated

as equals. In that, irrespective of when the student has had appeared for the SSC examination with all subjects but failed in not more than two subjects, he would become eligible for being considered for ATKT facility and to take provisional admission to the First Year Junior College or Higher Secondary School as the case may be. In that case, the object of the amended Regulation to facilitate the students to save their one academic year and to dissuade them from dropping out of the education stream will be accomplished even in respect of such students. Indeed, in this process the students who have appeared in the examination with all subjects in anterior point of time but failed in not more than two subjects and who were otherwise ineligible till now to take provisional admission in the first year of junior college or Higher Secondary Schools, as the case may be, would become eligible to do so. However, their eligibility would be prospective from the introduction of the amended provision from the current Academic Year 2009-2010. That is permissible. Moreover, that would not affect the students who have passed and already secured admission. It would also not discriminate between the failed students who are similarly situated. One of the grievance made by the Petitioners is that the students eligible for ATKT may have to secure admission in private colleges which are run on unaided basis and will have to therefore pay high fees. As is noticed earlier, availing of ATKT facility is not compulsory. It is plainly optional. If the student is interested in getting admission, he does so by choice. More so, the claim of the specified students shall have to be considered alongwith other students similarly placed on inter se merit. Besides, in so far as the apprehension of the Petitioners that the facility is available only as one time measure also stands answered on the basis of the stand taken by the Respondents, in particular in the affidavit of the Joint Secretary of the 1st Government dated September, 2009, which states that the State Government has taken a policy decision in order to maintain students in the education stream and to obviate the high drop out rate. For which reason, the State has decided to adopt the policy of having supplementary examination and/or ATKT which is not a one time experiment but will be consistently followed in the years to come. The affidavit, however, records that from the next year the policy decision will be implemented on the basis of the report of the Expert Committee which is set up to consider the supplementary examination pattern. Suffice it to observe that till any other change is brought about by following due process, the eligible students would be free to avail of ATKT facility. On this analysis, the amended provision would not be a one time arrangement but a policy to be consistently followed for the present (from Academic Year 2009-2010) as well as for the future academic years till suitably altered by following due process. Indeed, the authorities are free to consider the efficaciousness of the policy of ATKT on the basis of their experience.

27. The grievance of the Petitioners that ATKT facility can be no substitute for the supplementary examination though seem to be attractive, does not take the matter any further. It is essentially a policy matter. Indeed, the admission to junior college is of students converging from different Boards, such as ICSE,

CBSE, SSC etc. The change has presently been introduced by way of amendment to Regulation of 1977 only, in respect of students who have appeared for SSC examination. It is also true that Standard X in SSC examination, which is the final examination of that course; and the XI and XII Standard would be a different course of Higher Secondary School Certificate Examination. In other words, the two courses are different. The stand of the State Government however, is that, it is one course in two steps. Nevertheless, it is noticed that both the courses are regulated under the umbrella of one State Board constituted under the provisions of Act of 1965. As aforesaid, it is matter of policy providing for eligibility for admission to Standard XI or junior colleges.

28. We are inclined to uphold the validity of amended provision subject to striking down the offending part therein. It will be open to the Respondents to commence the admission process of students eligible for ATKT facility subject to ensuring that the same is purely on inter se merit and upon fulfilling the essential academic norms. Indeed, the Regulation by itself does not provide for the mechanism that will be adopted by the Respondents to admit such students against the vacant seats. The break up of vacant seats has been furnished to us, which is referred to earlier. It is noticed that the vacant seats are spread out in different Schools and Junior colleges within the districts. Since the admission process of passed candidates is already completed, it is quite possible that in a given school all the seats for XI Standard have already been exhausted by now. In case of such school, the eligible students for ATKT though from the same school may not be in a position to get in-house admission. But he may have to be content with taking admission to some other school or junior college where vacant seats are available. The students cannot have any right to get admission in the same School from where they have appeared for X Standard examination if the seats of Standard XI of that school are already filled up on the basis of merit by the passed students. Besides, the students eligible for admission on account of ATKT facility cannot be heard to insist for admission in the same school even though they have secured less marks than the merit (passed) candidates. The Respondents shall ensure that the seats available in all the schools or junior colleges should be first filled up by the passed students in order of merit and only the left over seats if any should be offered to the students seeking admission on ATKT facility. In other words, the passed students shall get precedence of admission in the schools or Junior colleges of their choice in order of merit. Notably, the provision is only an enabling provision providing an opportunity or concession to the specified students to avail of ATKT facility. The fact that this change has been introduced after declaration of results, therefore, would make no difference. The specified students would form a class by themselves and their admission will have to be governed on the basis of inter se merit while ensuring that the academic norms are not compromised in any manner.

29. We hope and trust that the Respondents before commencing the admission process would first formulate proper guidelines in this behalf so as to ensure that

the students availing of ATKT facility are admitted on inter se merit. The Respondents may consider of evolving a transparent mechanism for admission of students seeking admission on the basis of ATKT facility, treating them as a separate class than the passed students whose admission is governed by principle of merit. At the same time, the Respondents will have to keep in mind that the norms regarding maintenance of quality education are in no way compromised or relaxed either with regard to the instructional hour or for that matter of opening of new or additional division in a given school or junior college.

30. We direct the Respondents to ensure that admission to eligible students availing ATKT facility is continued in future on the same lines as for the current year 2009-2010-as that alone would efface the plea of discrimination, until any other change is introduced by following due process. We also direct the Respondents to ensure creation of proper infrastructure in the respective Schools/ Junior Colleges in conformity with the mandatory norms in place before admissions are given, since around 1,50,000 students will become eligible to seek admissions as per the new regime.

31. Taking over all view of the matter, therefore, we are of the considered opinion that the amended Regulation 79(1A) is valid except the offending part thereof. In other words, expression in March, 2009 appearing in the first part of the said provision is struck down being discriminatory and unreasonable. Rest of the provision is valid and intra vires the Constitution and the relevant Act and Regulation. We hope and trust that the Respondents would commence the admission process of students eligible for ATKT facility only after being satisfied that the norms to maintain quality of education in respect of instruction hours or adequate staff pattern etc., in the concerned school/junior college, where such students will be admitted, is in place and in conformity with the prescribed Act, Rules and Regulation. Further, the admission of eligible students for ATKT shall be strictly on the basis of inter se merit against the left over vacant seats by following a transparent mechanism such as by periodical publication of updated information with regard to the names of schools and junior colleges, district-wise and stream-wise, of vacant seats available for admission therein-so as to facilitate the eligible students to take an informed decision. The information shall be displayed not only in the respective schools and junior colleges but also in the offices of Department of School Education, State of Maharashtra as well as of the Maharashtra State Secondary and Higher Secondary Education Board, Pune respectively and at suitable locations to give wide publicity thereof so as to disseminate the required information, in addition to displaying the said information on their respective web-sites on internet. We direct the Respondents to give wide publicity of the guidelines to be formulated by them to govern the admission process of students eligible for ATKT facility; and also notify the names and designation of officers, who would be responsible to oversee not only transparency in the admission process, but also oversee that the admissions are given by the respective schools and Junior colleges strictly on the basis of inter se merit of the eligible students.

32. Accordingly, we pass the following order.

(1) This Public Interest Litigation partly succeeds. We strike down only the offending words in March 2009 appearing in the first part of the amended Regulation 79(1A) being arbitrary, unreasonable and unconstitutional. The rest of the amended Regulation 79(1A) is declared valid and intra vires.

(2) The Respondents are directed to adhere to the admission process governed by the amended provision as has been upheld, keeping in mind the observations made by us in this Judgment in Paragraphs 28 to 31 respectively.

(3) The Civil Application is allowed. Amendment be carried out within one week from today.

(4) No order as to costs.