
(2016) 03 GAU CK 0021
In the Gauhati High Court
Case No : W.P.(C) No. 6715 of 2015

Arup Talukdar and others

APPELLANT

Vs

State of Assam and others

RESPONDENT

Date of Decision : 10-03-2016

Acts Referred:

Assam Elementary Education (Provincialisation) Rules, 1977 — Rule 3(iv)

Citation : (2016) 4 GauLJ 204 : (2016) 2 GauLT 788

Hon'ble Judges : Hrishikesh Roy;Ujjal Bhuyan, JJ.

Bench : Division Bench

Advocate : R. Mazumdar, SC Education (Elementary) Department, S. Sharma, SC, SSA and K.N. Choudhury, Sr. Advocate, for the Respondent

Final Decision : Disposed off

Judgement

Ujjal Bhuyan, J. - We have been called upon to hear this case as a Special Bench by order of the Hon''ble the Chief Justice (Acting), dated 03.02.2016, following a reference made by the learned Single Judge in the order dated 29.01.2016 while hearing this case after expressing difference of opinion from the previous orders passed by a Co-ordinate Bench in identical matters.

2. Matter relates to selection and appointment of Assistant Teacher in Lower Primary (LP) schools in 10 districts of the State of Assam following advertisement dated 30.10.2014 of the Director of Elementary Education, Assam.

3. For a better understanding of the lis involved, it would be apposite to briefly state the facts at the outset.

4. An advertisement was published by the Director of Elementary Education, Assam, on 30.10.2014 inviting online applications in prescribed format from all Teachers Eligibility Test (TET) qualified candidates for filling up a total of 8193 vacancies in the post of Assistant Teacher in selected Government/Provincialised L.P. Schools under the Directorate of Elementary Education, Assam in 10 districts of the State. The 10 districts were Barpeta, Bongaigaon, Cachar, Darrang,

Dhubri, Goalpara, Karimganj, Morigaon, Nagaon and Tinsukia. The district-wise breakup of vacancy was mentioned in the said advertisement. The advertisement was published as per provisions of the Right of Children to Free and Compulsory Education Act, 2009 and Assam Elementary Education (Provincialisation) Rules, 1977, as amended. The essential qualifications and experience prescribed for the post of Assistant Teacher in LP School was as follows:

50% in Higher Secondary (or its equivalent) and TET passed, or Graduate degree from UGC recognised university and TET passed [5% relaxation for SC/ST/OBC/MOBC and physically handicapped candidates Preference will be given to those who have two years diploma in Elementary Education and two years diploma in Elementary Education (Special Education) from recognised institutes].

5. It was mentioned that a candidate could apply for only one of the districts and that applications would be received online from 04.11.2014 to midnight of 13.11.2014.

6. At this stage, it may be noted that by a subsequent corrigendum dated 14.08.2015, it was mentioned that though 8193 vacancies were notified, Director of Elementary Education, Assam, could obtain SIU approval from Finance (SIU) Department for 7236 numbers of vacancies.

7. WP(C) No. 6827/2014 came to be filed by a group of candidates belonging to South Salmara Mancachar Sub-Division of Dhubri district with the grievance that two years diploma course in Elementary Education was started for contractual appointees of the State in the year 2012 to enable them to attain eligibility for the post of Assistant Teacher. But in the case of the petitioners, who are contractual teachers, the diploma course started only in the year 2013 and would be over only by the end of the year 2015. Therefore, no candidate from the said Sub-Division would have the benefit of "preference" in terms of the advertisement, dated 30.10.2014. With similar grievance, another group of candidates, hailing from Karimganj district, filed WP(C) No. 6315/2014. They are also Assistant Teachers working on contractual basis. At this stage, it may be stated that petitioners of both the cases were appointed as Assistant Teachers on contract basis under the Sarba Siksha Abhiyan (SSA). Both the cases were heard together and were disposed of by a common order, dated 12.03.2015.

8. Learned Single Judge took the view that it was the inability of the State to provide the petitioners approved institutes to undergo the diploma course. Thus, petitioners were prejudiced and denied a level playing field to compete with those who were fortunate to complete the diploma course. After holding that denial of such level playing field violated Articles 14 and 16 of the Constitution, learned Single Judge disposed of the writ petitions by issuing the following directions:

"9. In the premises set forth above, this writ petition is disposed of with the following directions:

(a) The ongoing recruitment process for 745 vacant posts of Assistant Teachers meant for South Salmara Mankachar Sub-Division and 753 posts of Assistant Teachers for Karimganj District in terms of the impugned advertisement shall not be initiated or completed till the result of the two years course of Diploma in Elementary Education undergone by the petitioners are declared.

(b) If the petitioners, or any of the petitioners, are declared to have passed the said Diploma course within 2015, they shall be allowed to participate in such recruitment together with the already qualified candidates, if necessary by re-advertising the posts.

(c) Any or all of the petitioners, who does/do not successfully complete the Diploma course, shall stand disqualified for this recruitment process.

(d) It is, however, made clear that if any of the petitioners in both the writ petitions were offered the approved study centre by the State-respondents for undergoing the Diploma course, but had refused or declined or omitted to do so, this judgment shall not ensure to their benefit. "

9. It appears that a petition was filed for deletion of the expression "if necessary by re-advertising the posts" as appearing in direction (b) in the order dated 12.03.2015. The said petition was registered as Review Petition No. 85/2015. By order dated 22.06.2015, learned Single Judge allowed the review petition by deleting the aforesaid expression. Consequently, direction (b) reads as follows:

"(b). if the petitioners or any of the petitioners are declared to have passed the said diploma course within 2015, they shall be allowed to participate in such recruitment together with the already qualified candidates."

10. An addendum was issued by the Director of Elementary Education, Assam, on 20.06.2015. By the said addendum, candidates who had applied pursuant to the advertisement dated 30.10.2014 and had appeared before the District Level Selection Committee (DLSC) for screening of documents but subsequently came out successful in two years diploma in Elementary Education and two years diploma in Elementary Education (Special Education) from recognised institute were asked to produce their certificates and mark-sheets of the diploma before the respective District Elementary Education Officers within 25.06.2015.

11. WP(C) No. 5450/2015 was filed by a group of candidates who contended that after they qualified in TET in the year 2010, they were appointed as Assistant Teachers in L.P. Schools under the SSA on contractual basis on 12.08.2012. They were nominated for the two years diploma course in the year 2013. The results of their diploma course were declared only on 23.08.2015. Petitioners contended that as per the applicable rules, marks secured in the diploma course were required to be taken into consideration for determining over-all marks secured by the candidate, but in their case respondents refused to consider their marks obtained in the diploma course. Learned Single Judge vide order dated 09.09.2015, disposed of the said writ petition with the following directions:

"4. For the reasons stated in the foregoing, this writ petition is disposed of with the following directions:

(1) The respondent No. 2 shall allow the petitioners to submit their mark sheets of the 2 Years course of Diploma in Elementary Education within seven days from today.

(2) It is made clear that the mark sheets of their 2 year course in Diploma in Elementary Education to be submitted by the petitioners shall be taken into account by the respondent authorities only when equal marks are obtained by them vis-à-vis the other candidates.

(3) These directions are issued on the specific statement by the learned counsel for the petitioners that there are no other results to be declared in respect of 2 years course of Diploma in Elementary Education during 2015."

12. In other words, learned Single Judge directed the State to allow the petitioners to submit their mark-sheets of the diploma course with the rider that the same may be taken into account only when equal marks are obtained by the petitioners vis-à-vis the other candidates.

13. With similar grievance, WP(C) No. 5538/2015 was filed by another group of candidates who also contended that since results of their diploma course were declared only on 23.08.2015, they were refused addition of marks obtained in the diploma course. It was stated that petitioners could not submit their mark-sheets on or before 25.06.2015 in terms of the addendum dated 20.06.2015 as they did not pass the diploma course by then for circumstances beyond their control. Learned Single Judge took the view that there was no rationality in denying the petitioners right to submit their mark-sheets of the diploma course. Accordingly, WP(C) No. 5538/2015 was disposed of vide order dated 11.09.2015 by issuing identical directions as in WP(C) No. 5450/2015.

14. It may be mentioned that another writ petition being WP(C) No. 5878/2015 came to be filed before this Court by a group of candidates raising identical grievance i.e., results of their diploma course were declared only on 23.08.2015 and consequently respondents refused addition of marks obtained in the diploma course in the selection process. Following previous orders passed, learned Single Judge disposed of the writ petition vide order dated 22.09.2015 issuing identical directions, only difference being that instead of 7 days, 10 days time was granted to the said petitioners to submit their mark-sheets of the diploma course.

15. Director of Elementary Education, Assam, issued an addendum dated 10.10.2015 in continuation of the previous addendum dated 20.06.2015. It was stated that candidates who had applied pursuant to advertisement dated 30.10.2014 and had appeared before the respective DLSC and who had successfully come out in the two years diploma course from recognised institute as per the result declared during the year 2015 were asked to submit pass

certificates and mark-sheets of the diploma course as per schedule given therein, last date being 15.10.2015. Reference was made to various orders passed by this Court as extracted above.

16. At this stage, WP(C) No. 6715/2015 i.e., the present writ petition came to be filed by a group of candidates who claimed to have applied pursuant to advertisement dated 30.10.2014 in respect of Barpeta district. Though various issues have been raised in the present writ petition, the issue with which we are concerned and for which reference has been made, is the one relating to addition of marks obtained by the petitioners in the diploma course while computing their total marks in the selection. Petitioners have contended that they are TET qualified following which they were appointed as Assistant Teachers in L.P. schools on contractual basis under the SSA. Though they were appointed in the year 2012, they were sent to undergo the diploma course only in the year 2013. Here also, results of the diploma course were declared only on 23.08.2015. A district-wise provisional select list was published on 29.10.2015 but from a perusal of the said provisional select list, it is evident that in the provisional select list, names of the petitioners are not included in respect of Barpeta district. While cut-off mark for Barpeta district has been shown as 184, petitioners contend that if the marks secured by them in the diploma course are added, they would secure marks above the cut-off mark. In the light of the above, prayer made is for addition of marks obtained by the petitioners in the diploma course while computing the total marks and thereafter to publish the final select list.

17. Respondent No. 2, i.e., Director of Elementary Education, Assam, has filed affidavit. Stand taken in the affidavit is that petitioners have acquired diploma only in the year 2015. On the date of advertisement as well as on the last date of submission of application, they did not possess the diploma. Petitioners were appointed as Assistant Teachers in L.P. schools under the SSA in the year 2012.

18. Ministry of Human Resource Development, Govt. of India, had granted relaxation on the mandatory criteria of possessing diploma in elementary education for being appointed as Assistant Teacher in L.P. school up-to 31.03.2015. Appointments of petitioners were made by the SSA and not by the Directorate of Elementary Education. The Directorate had no obligation to facilitate undergoing of diploma course by the contractual appointees serving under the SSA. Advertisement under consideration was issued on 30.10.2014 and was within the relaxation period granted by the Ministry of Human Resource Development, Govt. of India. As per advertisement, preference would be given to candidates possessing two years diploma from recognised institute(s). On the date of advertisement as well as on the last date of receipt of application, petitioners did not possess the said qualification. It is also stated that diploma course was conducted by Krishna Kanta Handique State Open University and that respondent No. 2 was not connected with the deputation of the petitioners to undergo the said course or declaration of result. Further stand taken is that

marks obtained by the petitioners in their diploma course would be taken into account only when equal marks are obtained by them vis-à-vis other candidates. In view of orders passed by this Court, all candidates who had obtained two years diploma were requested to deposit their mark-sheets and pass certificates of diploma. Petitioners had submitted their pass certificates and mark-sheets. Respondent No. 2 has asserted that all candidates who were allowed to deposit their mark-sheets pursuant to orders of this Court or pursuant to addendum dated 10.10.2015 have been similarly and equally treated; no discrimination has been made. In other words, marks secured by them in the diploma course would be taken into consideration only in the event of equality of marks between the petitioners and other candidates. It is also stated that since the selection process commenced at a time when relaxation of requirement of diploma was available, diploma has been considered as a preferential qualification and not a mandatory qualification. In paragraph-25 of the affidavit, respondent No. 2 has stated that results of the diploma course of some candidates were declared on 10.11.2014 which was within the time limit prescribed for receipt of applications as per advertisement. However, some of those candidates had already submitted applications prior to 10.11.2014; they could not submit their mark-sheets at that point of time as those were not available with them. Therefore, such candidates were actually diploma qualified as on the last date of submission of application but could not produce pass certificates and mark-sheets because they had already filled up online applications. It was in that context that addendum was issued on 20.06.2015 allowing such candidates to submit their mark-sheets and pass certificates so that those candidates who qualified in the diploma course on 10.11.2014 would get the benefit of "preference" in terms of the advertisement. In so far rest of the candidates are concerned, marks secured by them in the diploma course would be taken into consideration when there is equality of marks with other candidates. It is specifically stated that marks secured by the petitioners in the diploma course would be added only if they secure equal marks with other candidates. Finally, it is stated that since only a provisional select list has been published which is yet to be finalised, writ petition is premature.

19. It appears that present writ petition was heard along with a number of other connected cases. After due consideration, learned Single Judge passed the order dated 29.01.2016 taking the view that since after 31.03.2015, there is no relaxation of the minimum qualification prescribed for appointment of teachers in L.P. schools, respondents have no other alternative but to appoint only those candidates having the prescribed qualification. The provisional select list dated 29.10.2015 was set aside and quashed. Respondents were directed to prepare final select list including for Karimganj district and South Salmara Mancachar Sub-Division of Dhubri district by following the statutory provisions relating to eligibility and computation of marks in the selection. It was specifically directed that while preparing such select list, respondents should include the marks obtained by the petitioners in their diploma course results of which were declared

on 23.08.2015.

20. Referring to the decisions rendered by a Co-ordinate Bench on 09.09.2015 in WP(C) No. 5450/2015 and on 22.09.2015 passed in WP(C) No. 5878/2015, learned Single Judge observed that the Central Government notification relaxing the eligibility requirement up-to 31.03.2015 as well as the common judgment dated 12.03.2015 passed in WP(C) Nos. 6315/2014 and 6827/2014 were not brought to the notice of the Court while passing the orders dated 09.09.2015 and 22.09.2015. Therefore, learned Single Judge held that his decision and conclusion somewhat differed from the decision rendered by the Co-ordinate Bench dated 09.09.2015 and 22.09.2015. Accordingly, reference was made to the Hon'ble the Chief Justice to consider placement before a larger Bench.

21. This is how the matter is before us.

22. We have heard Mr. A.M. Buzarbaruah, learned Senior counsel, for the petitioners, Mr. R. Mazumdar, learned Standing Counsel, Education (Elementary) Department and Mr. K.N. Choudhury, learned Senior counsel, appearing for the candidates supporting the orders dated 09.09.2015 and 22.09.2015. Heard also Mr. S. Sharma, learned counsel, appearing for the SSA.

23. Before we deal with the submissions made by the learned counsel for the parties, it will be useful to briefly refer to the relevant legal provisions applicable to the facts of the case.

24. Assam Elementary Education (Provincialisation) Act, 1974 (1974 Act), was enacted for provincialisation of elementary schools in the State of Assam. By the said 1974 Act, services of the teachers and employees of elementary schools were provincialised and the management and control of elementary education was taken over by the State Government.

25. Thereafter, State of Assam framed the Assam Elementary Education (Provincialisation) Rules, 1977 (the 1977 Rules) regulating recruitment and conditions of service of teachers of elementary schools provincialised under the 1974 Act. The 1977 Rules have undergone major amendments in so far recruitment of teachers is concerned. More about this, at a later stage of the judgement.

26. As noticed above, the 1977 Rules, more particularly the Rule relating to method of recruitment, was amended with effect from 25.10.2012 following laying down of minimum qualifications by the National Council for Teacher Education (NCTE) on 23.08.2010. Rule 3 of the 1977 Rules provides for method of recruitment. As per Rule 3(iii), minimum qualification of a person to be eligible for appointment as a teacher in elementary school shall be as per the notification issued by the State Government from time to time in conformity with the NCTE norms. It is mentioned that in case, any relaxation is required in respect of any qualification as prescribed by the NCTE, the State Government shall take up the matter with the Government of India for such relaxation. Details of selection

procedure are mentioned in Rule 3(vi) read with Schedule-1 to the 1977 Rules. It is provided that for the post of L.P. school teacher, selection shall be made on the basis of marks obtained out of the total marks of 330, break-up of which is as follows:

- (1) Credit for marks secured in Higher Secondary or equivalent - 100, which shall be directly proportional to the percentage of marks secured in the Higher Secondary or equivalent examination,
- (2) Credit for marks secured in degree/diploma in elementary education by whatever name called from any recognised university - 100 marks, which shall be directly proportional to the percentage of marks secured in such degree/diploma examination,
- (3) Credit for marks secured in TET examination - 100 marks which shall be directly proportional to the percentage of marks secured in the TET examination,
- (4) For NCC ("C" certificate) - 10 marks, 5 marks for "B" certificate holder,
- (5) For participation in recognised sports at national level representing Assam - 10 marks,
- (6) For achievement in Fine Arts and cultural activities representing the State officially at national level - 10 marks.

There shall be no marks for viva voce.

27. Following the Constitution (86th) Amendment Act, 2002, Article 21A was inserted in the Constitution of India with effect from 01.04.2010. Article 21A which makes the right to education a fundamental right, mandates the State to provide free and compulsory education to all children of the age of 6 to 14 years in the manner as the State may by law determine.

28. Following the mandate of Article 21A, Parliament enacted the Right of Children to Free and Compulsory Education Act, 2009 (Right to Education Act) to provide free and compulsory education to all children in the age group of 6 to 14 years. The Right to Education Act came into force with effect from 01.04.2010. Section 23 of the Right to Education Act provides for qualifications for appointment and terms and conditions of service of teachers. Sub-Section (1) provides that any person possessing such minimum qualifications as may be laid down by an academic authority authorised by the Central Government by notification in this regard shall be eligible for appointment as teacher. Sub-Section(2) however provides that where a State does not have adequate institutions offering courses or training for teacher education or where a State does not have sufficient number of teachers possessing the minimum qualification as may be prescribed, the Central Government may by notification relax the minimum qualifications prescribed for appointment as teacher for such period not exceeding five years as may be specified in that notification. It also provides that those teachers who do not possess the minimum qualifications as

may be prescribed at the commencement of the Act, shall acquire such minimum qualification within a period of five years. Section 38 of the Right to Education Act is the rule making provision.

29. In exercise of powers conferred by Section 38 of the Right to Education Act, the Central Government has made the Right of Children to Free and Compulsory Education Rules, 2010 (Right to Education Rules). Rule 17 provides for minimum qualifications of teacher. It says that the Central Government shall within one month of the appointed date, notify an academic authority for laying down the minimum qualifications for a person to be eligible for appointment as a teacher. Academic authority so notified shall within three months of such notification lay down the minimum qualifications for persons to be eligible for appointment as teacher in an elementary school, applicable for every school imparting elementary education within the meaning of Section 2(n) of the Right to Education Act. Rule 18 provides for relaxation of minimum qualifications. As per Rule 18(2), where a State Government or a Union Territory does not have adequate institutions offering courses or training in teacher education or persons possessing minimum qualifications are not available in sufficient numbers, the State Government or the Union Territory shall request the Central Government within one year of the commencement of the Right to Education Act for relaxation of the prescribed minimum qualifications. On such request being made and received, the Central Government shall examine the request and may by notification relax the minimum qualifications. The nature of relaxation and the period of relaxation shall be specified. It specifically provides that subject to relaxation as above, no appointment of teacher shall be made without possessing the minimum qualifications prescribed after six months from the commencement of the Act. As per Rule 19, State Governments and the Union Territories are required to provide adequate educational facilities to ensure that all teachers imparting elementary education acquire minimum qualifications prescribed within five years from the commencement of the Right to Education Act.

30. National Council for Teacher Education (NCTE) was thereafter authorised by the Central Government to be the academic authority to lay down the minimum qualifications to be eligible for appointment as teacher in so far elementary education is concerned.

31. NCTE issued notification dated 23.08.2010 laying down the minimum qualifications for a person to be eligible for appointment as a teacher in class-I to class-VIII in a school referred to in Section 2(n) of the Right to Education Act with effect from the date of notification. The minimum qualifications for appointment as teacher in class-I to class-V, i.e., L.P. school, are as under:

Senior Secondary or its equivalent with at least 50% marks and two years diploma in elementary education, or

Senior Secondary or its equivalent with at least 45% marks and two years diploma in elementary education in accordance with the NCTE (Recommendation,

Norms and Procedure) Regulations, 2002, or

Senior Secondary or its equivalent with at least 50% marks and four years Bachelor of Elementary Education, or

Senior Secondary or its equivalent with at least 50% of marks and two years diploma in education (special education)

and

TET passed.

32. State of Assam has also framed the Right of Children to Free and Compulsory Education Rules, 2011, to give effect to the provisions of the Right to Education Act. While Rule 15 deals with minimum qualifications for the purpose of Section 23(1), Rule 16 on the other hand deals with relaxation of minimum qualifications for the purpose of Section 23(2). Rule 17 provides for acquiring of minimum qualifications which are almost identical to the provisions contained in Rules 17, 18 and 19 of the Right to Education Rules.

33. Govt. of Assam vide letter dated 16.06.2011 submitted a proposal to the Central Government for relaxation of the requirement of minimum qualifications for appointment of teacher. The Central Government on due examination of the proposal exercised the power of relaxation conferred by Sub-Section (2) of Section 23 of the Right to Education Act and relaxed the minimum qualification notified on 23.08.2010. In this connection, notification dated 26.08.2011 was issued by the Ministry of Human Resource Development (Department of School Education and Literacy), Govt. of India. Thus, requirement of having diploma stood relaxed for a period up-to 31.03.2015 subject to the conditions mentioned in the said notification. The conditions included holding of TET, amendment of Recruitment Rules providing for minimum qualifications as laid down by the NCTE and the State Government giving priority to the eligible candidates possessing minimum qualifications in the matter of appointment and thereafter consider other candidates eligible with the relaxed qualifications and the State Government ensuring that teachers appointed with relaxed qualifications acquire the minimum qualifications specified within a period of two years from the date of appointment.

34. Having noticed the relevant legal provisions as above, we may now record the submissions made by the learned counsel for the parties.

35. Mr. A.M. Buzarbaruah, learned Senior counsel, appearing for the petitioners, submits that there were two batches of contractual appointees under the SSA, who were deputed to undergo the diploma course from Krishna Kanta Handique State Open University; the first batch was deputed in the year 2012 whereas the second batch was deputed in the year 2013. In so far the first batch is concerned, their results were declared on 10.11.2014 but results of the second batch were declared only on 23.08.2015. Those who were part of the second batch had no control over their nomination for undergoing the diploma course.

While diploma holders of the first batch would be entitled to benefit of marks while computing their overall merit in the selection, those who obtained diploma on 23.08.2015 would stand deprived of such benefit. Those candidates belonging to the second batch of the year 2013 would thus be denied a level playing field thereby violating Article 14 of the Constitution of India. Both the two batches are similarly placed. Therefore, both the batches are required to be treated similarly, otherwise it would amount to discrimination. In this connection, learned Senior counsel has placed reliance on the decision of the Apex Court in *Re The Special Courts Bill, 1978* (Special Reference No. 1 of 1978), reported in (1979) 1 SCC 380. Referring to the advertisement dated 30.10.2014, learned Senior counsel submits that this advertisement was issued as per provisions contained in the Right to Education Act as well as under the 1997 Rules. The objective of Right to Education Act is to provide for free and compulsory education to all children in the age group of 6 to 14 years. The education is to be provided by qualified teachers as per eligibility prescribed by the NCTE, the authority authorised by the Central Government. Therefore, it is essential to have duly qualified persons to be appointed as teachers. Having regard to the object of the Right to Education Act, the word "preference" mentioned in the advertisement while referring to the candidates having two years diploma course would mean "priority". In this connection, learned Senior counsel has placed reliance on the following decisions of the Apex Court:

(2002) 4 SCC 219 = *Municipal Corporation of Greater Bombay v. Bharat Petroleum Corporation Ltd.*

(2007) 11 SCC 599 = *Surinder Singh v. Union of India and others*

36. Therefore, to achieve the objective, addendum and corrigendum issued by the Director of Elementary Education after issuance of the advertisement would have to be read as part of the advertisement. It would mean that cut-off date for submission of application in terms of the advertisement would stand extended till such dates mentioned in the addendum and the corrigendum. He submits that in the above context, refusal of the respondents to add the marks secured by the petitioners in the diploma course results of which were declared on 23.08.2015 while computing their total marks in the selection would be absolutely arbitrary, unreasonable and discriminatory. There is no justifiable reason to discriminate the petitioners while extending such benefit to those candidates belonging to the first batch of 2012. Procedure prescribed in Schedule-I to the 1977 Rules for selection of Assistant Teacher in L.P. school has to be followed which means that marks obtained in the diploma course has to be counted while determining the total marks of the candidates out of the maximum 330 marks. Learned Senior counsel would therefore submit that the view taken by the learned Single Judge in WP(C) No. 6715/2015 is the correct view, which should be upheld by this Bench.

37. Mr. R. Mazumdar, learned Standing Counsel, Education (Elementary) Department, submits that the advertisement dated 30.10.2014 was issued when

relaxation of eligibility was in force. Therefore, the selection undertaken pursuant to the said advertisement would be governed by the relaxed criteria. He submits that it is a well recognised legal proposition that the rules which were in force at the commencement of the recruitment process would continue to govern the recruitment process. In view of relaxation granted by the NCTE regarding obtaining of diploma, Director of Elementary Education had rightly issued the advertisement dated 30.10.2014 providing for only "preference" to those having two years diploma. Results of two years diploma were declared on 10.11.2014. Those candidates who had already submitted their online applications prior to 10.11.2014 were allowed to submit their certificates and mark-sheets of two years diploma course vide addendum dated 10.06.2015. Since they had obtained diploma before the last date of submission of application, their marks will be added while computing the total marks in the selection. In this connection, learned Standing counsel has referred to Schedule-1 of the 1977 Rules. He, therefore, submits that those candidates who had obtained two years diploma after the date of advertisement or after the last date of submission of application as per the advertisement would be entitled to "preference" only in the event the marks obtained by them are equal to other candidates. This stand has been made clear in the affidavit of respondent No. 2 wherein it has been stated that marks secured by the petitioners in the two years diploma course would be added only if they secure equal marks with the other candidates. He, therefore, submits that the view taken by the learned Single Judge in the orders dated 09.09.2015 passed in WP(C) No. 5450/2015 and 22.09.2015 passed in WP(C) No. 5878/2015 is the correct view which should be confirmed by this Bench after setting aside the order dated 29.01.2016 passed in this case.

38. Mr. S. Sharma, learned counsel for the SSA, submits that nominations to undergo diploma course were made on the basis of merit and willingness. Though contractual appointees under the SSA were deputed to Krishna Kanta Handique State Open University for undergoing the two years diploma course, the contractual appointees had other options open to them to undergo the diploma course in any of the NCTE recommended institutions. Because of their lower comparative marks, petitioners were deputed to undergo the two years diploma course in the second batch, i.e., in the year 2013. Since they obtained the diploma after the date of advertisement or after the last date of submission of application in terms of the advertisement, they would not be entitled to the benefit of marks secured by them in the diploma course though they would otherwise be treated as eligible for the selection process because of the relaxed criteria. Only in the event of equality of marks, other candidates not having two years diploma, would they be entitled to "preference".

39. Mr. K.N. Choudhury, learned Senior counsel, appearing for the candidates who were petitioners in WP(C) Nos. 5450/2015 and 5878/2015, submits that the advertisement dated 30.10.2014 was issued in conformity with the relaxed eligibility norms. As per the advertisement, two years diploma course in Elementary Education or Elementary Education (Special Education) has not been

treated as an essential qualification. Essential qualification has been prescribed as those having 50% in Higher Secondary or its equivalent and TET passed or graduate and TET passed. Therefore, petitioners have the eligibility as per the essential qualification. In so far obtaining of two years diploma is concerned, the advertisement mentions that "preference" would be given to those who have two years diploma course. Therefore, those having diploma as on the last date of submission of application would be treated as having diploma. In this connection, learned Senior counsel has placed reliance on the decision of the Apex Court in the case of Ashok Kumar Sharma and others v. Chandra Shekhar and another, reported in (1997) 4 SCC 18. He submits that the contention advanced by Mr. Buzarbaruah, learned Senior counsel for the petitioners, that "preference" in the context of the advertisement and having regard to the provisions of the Right to Education Act and the 1977 Rules should be read as "priority" cannot be accepted. He submits that the decision relied upon by Mr. Buzarbaruah, i.e., Surinder Singh v. Union of India and others, reported in (2007) 11 SCC 599, is not on the proposition that "preference" would mean "priority". In turn, he refers to the decision of the Apex Court in the case of Sher Singh v. Union of India and others, reported in (1984) 1 SCC 107 and Secretary, A.P. Public Service Commission v. Y.V.V.R. Srinivasalu and others, reported in (2003) 5 SCC 341, in support of his contention that "preference" cannot be interpreted to mean "priority". He submits that last date of submission of application as mentioned in the advertisement has its own implication and any qualification acquired after that date cannot be taken into consideration. Mr. Choudhury submits that in a case of this nature, Court may take a pragmatic and equitable approach so that no injustice is caused to any of the candidates. For this purpose, Mr. Choudhury suggested that candidates who had responded to the advertisement dated 30.10.2014 may be divided into four categories, namely, (i) those who had diploma prior to 13.11.2014, i.e., the last date of submission of application, (ii) those who obtained diploma between 13.11.2014 to 31.03.2015, i.e., the cut-off date as per the relaxation granted by the NCTE, (iii) those who obtained diploma after 31.03.2015 and (iv) those without any diploma. He submits that in the case of the first category, marks obtained by them in the diploma course should be taken into account while computing the total marks as per Schedule-1 to the 1977 Rules, as amended. In the case of category Nos. (ii) and (iii), the candidates would be entitled to "preference" in the event of equality of marks with candidates belonging to category No. (iv). He, therefore, submits that if this procedure is followed, there would be fair resolution of the lis presented before the Court.

40. Submissions made by learned counsel for the parties have received the due consideration of the Court. Perused the materials on record including various documents, which were produced before the Court in the course of hearing. We have also considered the judgments cited at the Bar.

41. On due consideration, we are of the view that the fundamental issue which arises for consideration is whether the marks obtained by the candidates in the

diploma course are required to be added while computing the total marks of the respective candidates in the selection having regard to the preferential nature of the qualification.

42. Legality and validity of the advertisement dated 30.10.2014 is not under challenge. Therefore, we proceed on the basis that the said advertisement is valid being devoid of any challenge to its legality.

43. A careful reading of the said advertisement particularly the portion dealing with qualification and experience would go to show that under the heading "Essential Qualification and Experience", it is mentioned that 50% in Higher Secondary or its equivalent and TET passed or graduate degree from a recognised university and TET passed with 5% relaxation for the reserved categories. Below this, it is mentioned that preference would be given to those who have two years diploma in Elementary Education and two years diploma in Elementary Education (Special Education) from recognised institute. A logical interpretation of this requirement would be that 50% in Higher Secondary or its equivalent or graduation and TET passed are the essential qualifications. Two years diploma in Elementary Education/Elementary Education (Special Education) from recognised institute is a preferential qualification.

44. We may now examine the above qualifications as we have interpreted in the light of the statutory provisions governing the field. As already noticed above, under Section 23(2) of the Right to Education Act, where a State does not have adequate institutions offering courses or training in teacher education or teachers possessing the minimum qualification as laid down in Section 23(1) are not available in sufficient numbers, the Central Government may, if it deems necessary, relax the minimum qualification required for appointment as teacher for such period not exceeding five years as may be specified in that notification. Under Rule 18(1) of the Right to Education Rules, the State Government shall within six months from the commencement of the Right to Education Act estimate the teacher requirement as per the norms. Under Sub-Rule (2), where a State Government does not have adequate institutions offering the course or training in teacher education or where persons possessing minimum qualifications are not available in sufficient numbers in relation to the estimated teacher requirement, the State Government shall request the Central Government within one year of commencement of the Right to Education Act for relaxation of the prescribed minimum qualification. If such a request is made, the Central Government shall examine the same and thereafter by notification may relax the minimum qualification specifying the nature of relaxation and the time period of relaxation not exceeding three years but not beyond five years from the commencement of the Right to Education Act.

45. The NCTE vide notification dated 23.08.2010 prescribed the minimum qualifications for appointment as a teacher in class-I to class-V. A perusal of the said notification would go to show that Senior Secondary or its equivalent with 45% or 50% marks as the case may be is one of the minimum qualifications.

Two years diploma in Elementary Education/Elementary Education (Special Education) or four years Bachelor of Elementary Education is also one of the minimum qualifications. The third minimum qualification is TET passed.

46. The Assam Right of Children to Free and Compulsory Education Rules, 2011, also contains identical provision regarding minimum qualifications and relaxation of minimum qualifications as prescribed in the Central Rules, i.e., Right to Education Rules. Rule 15 provides that minimum qualifications to be eligible for appointment as a teacher in elementary school shall be as per notification of the NCTE dated 23.08.2010. In so far relaxation of minimum educational qualification is concerned, Rule 16 provides that if the State does not have adequate institutions offering course or training in teacher education or persons possessing minimum qualifications are not available in sufficient numbers, the State Government shall request the Central Government within one year of commencement of the Right to Education Act for relaxation of the prescribed minimum qualifications and thereafter the Central Government may relax the minimum qualifications by issuance of relevant notification.

47. Government of Assam submitted proposal to the Central Government on 16.06.2011 for relaxation of the requirement of minimum qualifications. The Central Government examined the proposal and accepted the same. Consequent thereto, Central Government notification dated 26.08.2011 was issued whereby it was notified that the Central Government relaxed in respect of the State of Assam the minimum qualification notified by the NCTE in respect of two years diploma in Elementary Education by whatever name called and one year degree in Education. The notification mentioned that relaxation granted would be valid for the period up-to 31.03.2015 subject to fulfilment of ten conditions mentioned therein. Some of the conditions were holding of TET, amendment of Recruitment Rules providing for minimum qualifications as laid down by the NCTE, etc. Three of the conditions which are relevant are conditions No. (iii), (vi) and (viii). As per condition No. (iii), in the matter of appointment, State Government shall give "priority" to those eligible candidates who possess minimum qualifications specified in the NCTE notification and thereafter consider other candidates who attained eligibility with the relaxed qualification. As per condition No. (vi), State Government shall ensure that teachers, who are appointed with the relaxed qualification, acquire the minimum qualifications specified in the NCTE notification within a period of two years from the year of appointment. As per condition No. (viii), relaxation specified in the notification dated 26.08.2011 would be a one-time relaxation and no further relaxation would be granted to the State of Assam.

48. A careful and conjoint reading of the aforesaid conditions would go to show that the minimum qualification relating to two years diploma or one year degree stood relaxed in respect of State of Assam for the period up-to 31.03.2015. This would mean that candidates not having the above qualifications would also be entitled to a consideration for appointment as L.P. school teacher during the

period up-to 31.03.2015. But in the matter of appointment, State Government is required to give "priority" to those eligible candidates possessing the above minimum qualifications and thereafter consider the other candidates who have become eligible by virtue of relaxation. In the event of selection and appointment of any candidate with the relaxed qualification, such candidate is required to acquire the qualification so relaxed within a period of two years from the date of appointment. Lastly, this relaxation is a one-time measure and that there would be no further relaxation in respect of the State of Assam.

49. We have already seen that the 1977 Rules, particularly, Rule 3 thereof, has been amended following the minimum qualifications laid down by the NCTE in its notification dated 23.08.2010. A conjoint reading of Rule 3(iii) and Schedule-1 of the 1977 Rules would go to show that the minimum qualifications for appointment as L.P. school teacher would be as per the NCTE norms with such relaxation as may be proposed by the State Government and granted by the Central Government. The selection shall be made on the basis of marks obtained out of the total marks of 330 which have been discussed above. The total marks of 330 includes 100 marks for the diploma/degree in Elementary Education/Elementary Education (Special Education).

50. In the light of the aforesaid statutory provisions, a reasonable and rational interpretation of the essential qualifications mentioned in the advertisement dated 30.10.2014 would be that to be eligible to apply, one must be a Higher Secondary or equivalent passed with 50% marks (relaxable to the extent of 5% for reserved category candidates) or a graduate from a recognised university and TET passed. If a candidate possesses these two qualifications, he would be eligible as per the said advertisement. In so far the preference clause is concerned, ordinarily, it would have meant that those candidates who have two years diploma would be given "preference". But if we look at condition No. (iii) of the Central Government notification dated 26.08.2011, which relaxed the minimum qualification of diploma/degree up-to 31.03.2015, it is evident that such relaxation has been granted subject to the condition that in the matter of appointment, the State Government shall give "priority" to those eligible candidates who possess the minimum qualifications specified in the NCTE notification and thereafter consider the other candidates who became eligible because of the relaxation. In the light of the said condition, the expression "preference" appearing in the advertisement dated 30.10.2014 would partake the character of "priority" in respect of those candidates who possess the minimum qualifications as per the NCTE norms. Question is at what stage such a candidate would be deemed to possess the minimum qualifications as per the NCTE norms in terms of the advertisement?

51. At this stage, it may not be out of place to mention that the Government of Assam made arrangement for in-service professional training of untrained teachers in collaboration with Krishna Kanta Handique State Open University. A two year diploma in Elementary Education through Open and Distance Learning

(ODL) mode was prepared which was approved by the NCTE. The ODL mode was adopted so that teacher position in the schools remains intact and that the selected teachers can continue their classes while pursuing the diploma course. By letter dated 16.07.2012, Mission Director, SSA, had informed the District Mission Coordinators of the districts that the first batch of the two year diploma course through ODL mode would commence in August, 2012. The District Mission Coordinators were directed to nominate the teachers against the Study Centers as per descending order of merit. The list of teachers mentioned district-wise for the first batch included 900 candidates from Dhubri district and 400 from Karimganj district. Therefore, contention advanced on behalf of some of the candidates belonging to South Salmara Mancachar Sub-Division of Dhubri district and Karimganj district in WP(C) Nos. 6827/2014 and 6315/2014 regarding non-availability of institutes to undergo the diploma course appears to be without any basis.

52. Coming back to eligibility, where a particular date is specified as the last date for submission of application, eligibility of the candidates have to be judged with reference to that date. In *Ashok Kumar Sharma (supra)*, a three-Judge Bench of the Supreme Court has held that the proposition that where applications are called for prescribing a particular date as the last date for filing of applications, the eligibility of the candidates shall have to be judged with reference to that date and that date alone, is a well established one. A person who acquires the prescribed qualification subsequent to such notified date cannot be considered at all. The reasoning given to justify the contrary proposition that by allowing candidates acquiring eligibility subsequently, the recruiting authority would have a greater pool of talent to choose from, was held to be impermissible.

53. Therefore, on due consideration, we are inclined to take the view that those eligible candidates who had responded to the advertisement dated 30.10.2014 and who possessed the minimum qualifications prescribed by the NCTE in its notification dated 23.08.2010 as on the last date of submission of application, i.e., 13.11.2014, would get "priority" and therefore the expression "preference" as finding place in the advertisement would mean "priority" in the case of such category of candidates who possessed the minimum qualifications as prescribed by the NCTE as on 13.11.2014. If they are to be given "priority", the marks secured by them in the diploma course would have to be counted while determining their merit. Stand taken by the State in this regard appears to be correct. It is the admitted position that result of the two year diploma course of the first batch, i.e., batch of 2012, was declared on 10.11.2014 before last date of submission of application. Therefore, in their case, they would be entitled to benefit of marks obtained by them in the diploma course. In so far petitioners or for that matter candidates belonging to the second group of diploma course is concerned, i.e., batch of 2013, it is the admitted position that result of the said diploma course was declared on 23.08.2015. In other words, as on 13.11.2014, i.e., the last date of submission of application as per advertisement, they did not have the diploma. To that extent, decision of the learned Single Judge in the

orders dated 09.09.2015 passed in WP(C) No. 5450/2015 and 22.09.2015 passed in WP(C) No. 5878/2015 reflects the correct view that marks obtained by such candidates in the diploma course would be taken into account only when there is equality of marks with other candidates not having diploma. This position has also been clarified by the Director of Elementary Education, Assam, in his affidavit that marks obtained by the petitioners in the diploma course would be added only if they secure equal marks with other candidates, which we are inclined to accept as the correct proposition in the facts and circumstances of the case. In so far candidates belonging to South Salmara Mancachar Sub-Division of Dhubri district and Karimganj district are concerned, having regard to the methodology adopted for undergoing the diploma course and nomination of candidates, there would be no justification for stalling the recruitment process in respect of the above two areas till declaration of result of the diploma course. To that extent, learned Single Judge in the present case was justified in directing the State to complete the recruitment process in terms of the advertisement dated 30.10.2014 in respect of Karimganj district and South Salmara Mancachar Sub-Division of Dhubri district.

54. That being the position, we deem it appropriate to issue the following directions:

(i) Candidates who obtained two years diploma in Elementary Education/Elementary Education (Special Education) prior to 13.11.2014 would be entitled to computation of marks obtained in such diploma course while determining their merit in the selection pursuant to the advertisement, dated 30.10.2014;

(ii) Those candidates who obtained two years diploma in Elementary Education/Elementary Education (Special Education) after 13.11.2014, they would not be entitled to computation of marks obtained in such course while determining their merit. Only when marks secured by them, excluding the marks earmarked for the diploma course, are at par with the other eligible candidates not having diploma, they would be given "preference" by taking into account the marks obtained in the diploma;

(iii) Any candidate selected and appointed with the relaxed qualification, i.e., not having two years diploma shall be required to acquire the minimum qualification as specified by the NCTE within a period of two years from the date of appointment;

(iv) Recruitment process pursuant to the advertisement dated 30.10.2014 for all the 10 districts including South Salmara Mancachar Sub-Division of Dhubri district and Karimganj district should now be completed expeditiously and in accordance with law.

55. Writ petition is accordingly disposed of.