

(2016) 01 RAJ CK 0042

In the Rajasthan High Court

Case No : SB Civil Writ Petition Nos. 4414, 13862, 14279, 14450, 14638, 14641, 15444, 15445, 15461, 15462, 15464, 15719, 15721, 15723, 15775, 15789, 15792, 15897, 16130, 16131, 16132, 16171, 16174, 16175, 16184, 16185, 16190, 16198, 16199, 16207, 16208, 16209, 1631

Ganesh Narayan Mali and Others

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 07-01-2016

Acts Referred:

Citation : (2016) 01 RAJ CK 0042

Hon'ble Judges : M.N. Bhandari, J.

Bench : Single Bench

Advocate : Ram Pratap Saini, Vigyan Shah, R.D. Meena, Sajid Ali, Dharmendra Jain, Iliyas Khan, Salim Khan, Anand Sharma, Raj Kumar Goyal, Sameer Sharma, Hemant Taylor, Kailash Choudhary, Rakesh Kumar Saini, Deepak Meena, Dushyant Singh, Sunil Kumar Sharma and Ashwan

Final Decision : Disposed off

Judgement

M.N. Bhandari, J.—1. This bunch of writ petitions involves common questions of law thus has been heard together and decided by this common judgment.

2. The Rajasthan Public Service Commission (for short "the Commission") issued advertisement on 18.9.2013 to invite applications for the post of Physical Training Instructor Gr II (PTI Gr II) and Physical Training Instructor Gr III (PTI Gr III). The Commission subsequently issued corrigendum on 2.9.2014 making further bifurcation of the posts. The petitioners as well as private respondents applied for the post and appeared in the selection. After selection, provisional result was declared by the Commission on 14.6.2015 and 5.10.2015. The petitioners have raised number of grievances for consideration, accordingly, they are formulated hereunder for its answer in the subsequent paras after discussing rival arguments of the parties. The issues are formulated as under-

1. The petitioners apprehend that ineligible candidates have been included in the select list and likely to be given appointment thus a direction may be given to the official respondents not to give appointment to ineligible candidates.
 2. The candidates holding the qualification of Bachelor of Physical Education (BPE-three years course) should not be held eligible for appointment to the posts in question.
 3. The candidates, who were not in possession of sports certificate/s while undergoing BPEd, CPEd or DPEd course should be declared ineligible.
 4. The candidates, who have already attained maximum age provided for appointment, may be treated as overage and should not be given appointment on the post of PTI Gr II/PTI Gr III.
 5. The candidates belonging to Jat community of districts Dholpur and Bharatpur should not be given benefit of reservation by treating them to be in the category of OBC candidates.
 6. The total numbers of posts calculated for reservation to the Special Backward Class (SBC) and Scheduled Tribes (ST) are at the district level, whereas, it should have been by taking total posts at the State level, accordingly, to provide them proper reservation.
 7. The marks towards sports have not rightly been awarded to the candidates.
 8. The non-petitioners may be directed to migrate those women candidates belonging to Other Backward Class (OBC) to open category who find place in merit at their own, thereby, not to be counted towards OBC (female) quota thus a direction for migration of reserve category women to open category may be given.
 9. The non-petitioners have failed to give age relaxation as per rules thus a direction may be given to extend relaxation in age strictly as per rules and specially for those who were previously in service and within age at the time of their initial appointment thus to be treated within age limit.
 10. The sports certificates submitted by the candidates after last date of submission of application forms may not be considered and candidates may not be held entitled to get marks towards sports certificates.
 11. The previous selection was made by issuing advertisement in the year 2011 and no advertisement was issued in the year 2012, yet age relaxation has been denied for one year in which no recruitment took place. The denial of age relaxation is contrary to the rules so amended in the year 1999.
3. The respective parties have made arguments on all the issues formulated above. There is no contest on some of the issues thus are taken up first and decided in the following manner, rather, on agreed terms.
1. The issue No. 1 raised by the petitioners is that no ineligible candidate should

be given appointment. It has been agreed by Mr. S.K. Gupta, Additional Advocate General, appearing for the State that no ineligible candidates would be given appointment. Accordingly, first issue stands concluded with direction to the official respondents that no ineligible candidate be given appointment on the posts in question.

2. The fourth issue for which no contest has been made is that appointment may not be given to those candidates who are overage. It is admitted by learned Additional Advocate General and, accordingly, it is directed that if any candidate is found to be overage, he/she would not be given appointment and scrutiny for it would be made in accordance with the rules applicable to the present selection.

3. The other issue where agreement has been made is issue No. 7 regarding award of marks towards sports certificates. It is submitted by learned counsel for petitioners that even after participation in sports at National level, award of marks is for State level sports participation. It is submitted that different marks are provided for different levels of sports participation. If a candidate has participated at the International level, award of marks are higher. In the same manner, if a candidate has participated at National level, he is entitled to get marks accordingly and, lastly, at the State level and so on. The prayer is accordingly made to award marks in accordance with the circular issued by the Government after making proper scrutiny of the sports certificate submitted by the candidates. Learned Additional Advocate General has agreed to the prayer made by learned counsel for petitioners.

The official respondents have agreed that marks towards sports would be accorded strictly as per their circular and, for that, they would make proper scrutiny of the sports certificates of the candidates. To make a specific scrutiny for it, the petitioners, who have been denied marks as per their sports certificates, would make a representation to the official respondents within a period of four weeks from today. This would make things specific and, thereupon, the government would make scrutiny for award of marks towards sports certificates in accordance with the circular and if any of the petitioners has not been given due marks, it would be awarded to him/her.

4. Issue No. 8 - The prayer is made to allow migration of meritorious female reserve category candidates to open category and resultant vacancy should be filled by those who are below them in merit. The prayer aforesaid needs no deliberation as has already been decided by the Division Bench of this court in the bunch of appeals led by "Neelam Sharma versus State of Rajasthan & ors", DB Civil Special Appeal (Writ) No. 472/2013, decided on 16.7.2015. Accordingly, Commission and the State Government are directed to allow migration of female reserve category candidates in the light of the judgment of the Division Bench in the case of Neelam Sharma (supra). Accordingly, resultant vacancies of female reserve category candidates would be filled from and amongst left out meritorious candidates.

5. The issue regarding denial of age relaxation (issue No. 9) has been raised by those candidates who were in service. It is submitted that despite their appointment in earlier services while they were within age, relaxation has not been allowed in accordance with the Rajasthan Education Subordinate Service Rules, 1971.

Learned Additional Advocate General submits that rules have been amended from time to time and, recently in the year 2013 thus scrutiny of the aforesaid issue would be made for grant of age relaxation strictly in accordance with rules, as amended and are applicable to the case. If any candidate is entitled for relaxation in age, it would be given and, for which, scrutiny would be made appropriately.

I find that if a candidate is entitled to the age relaxation, benefit should be extended to him strictly in accordance with the rules, as amended. The petitioners would make representation to the official respondents within four weeks from today so that their cases may be considered separately and strictly in accordance with the rules and if petitioners are found entitled for age relaxation as per rules, it would be given to them.

6. It is submitted that the sports certificates obtained and submitted after last date of submission of application forms (issue No. 10) have also been considered by the official respondents for award of marks. Learned Additional Advocate General has agreed not to consider those sports certificates for award of marks which were obtained and submitted after last date of submission of application forms. Accordingly, Commission/State Government would not award marks towards games/sports to such candidates who have obtained and submitted sports certificates after last date for submission of application forms. The issue aforesaid has not been debated or contested by the State Government or the private respondents.

4. There are few issues which have been contested and are required to be decided and, accordingly, those issues are now taken up for consideration.

1. The issue No. 3 is in regard to those candidates who were not in possession of sports certificates while undergoing BPEd, CPED or DPED course. Whether such candidates can be held eligible for appointment to the posts of PTI Gr II/PTI Gr III?

It is submitted that as per the Regulations of the National Council for Teacher Education (for short "the NCTE"), admission to BPEd, CPED or DPED course can be to those candidates who are in possession of sports certificate/s. There are many candidates who are not in possession of sports certificates and are awarded zero marks by the Commission yet held eligible though their course itself should not have been recognised by the Commission. For ready reference, Regulations of the NCTE, 2005 and subsequent amendment, as has been stated in CW 15897/2015, Vikas Mehra & ors versus State of Rajasthan & ors at page 5 are reproduced hereunder-

"C.P. Ed/D.P. Ed.-

Regulation 2005-

Senior Secondary Examination (+2) or its equivalent - 45% marks.

40% marks for those who have participated in State/National Level Sports Events.

Regulation 2007-

Senior Secondary Examination (+2) or its equivalent and have participated in sports/games.

Regulation 2009-

Senior Secondary Examination (+2) or its equivalent with 50% marks. 5% relaxation to those who have participated in International/National/SGFI/Sports Competition or position holder in Inter-Zone Sports Competition.

Regulation 2014-

Senior Secondary Examination (+2) or its equivalent with 50% marks. 5% relaxation to those who have participated in International/National/SGFI/Sports Competition.

B.P. Ed.-

Regulation 2005-

BPE of three year duration

or

Graduate represented State/University in sports/games/athletics

or

Graduate secured 1st, 2nd or 3rd position in inter-collegiate sports/games/tournaments/possessing NCC "C" certificate or passed basic course in adventure sports

or

Graduate one year training programme in sports science, sports management, sports coaching, yoga, Olympic education, sports journalism, etc

Regulation 2007-

B.P.E. with 40% marks.

or

Graduate with physical education as an elective subject with 40% marks

or

Graduate participated in National/State/Inter University sports/games/athletics/SGFI

or

Any Graduate who participated School, Inter collegiate in sports/games or Passed NCC "C" Certificate

or

For Deputed/in service candidates (trained Physical Education teachers/coaches) graduate with 40% marks

Regulation 2009-

B.P.E. with 50% marks

or

Bachelor's Degree with Physical Education as an elective subject with fifty percent marks

or

B.P.E. with 45% marks or Bachelor's Degree with physical education as an elective subject with 45% marks and participation in National/All India Inter-University/Inter University competitions in sports recognised by AIU or IOA

or

For deputed (in-service candidates i.e. trained physical education teachers/coached Graduate with forty five percent marks and at least three years of teaching experience.

Regulation 2014-

Graduate in any discipline with 50% marks and have at least participated in the inter-college/Inter Zonal/District/School competition in sports and games recognised by the AIU/IOA/SGFI/Government of India

or

BPE with 45% marks

or

Graduate in any discipline with 45% marks and studied physical education as compulsory/elective subject

or

Graduate with 45% marks and having participated in National/Inter University/State competition or secured secured 1st, 2nd or 3rd position in Inter College/Inter Zonal/District/School competition in sports and games as recognised by the

AIU/IOA/SGFI/Government of India

or

Graduate with participation in International competitions or secured 1st, 2nd or 3rd position in National/Inter University competition in sports and games as recognised by respective federations/AIU/IOA/SGFI/Government of India

or

Graduate with 45% marks and at least three years of teaching experience (for deputed in-service candidates i.e. trained physical education teachers/coaches."

It is submitted that without a required certificate of sport, a candidate was not eligible for admission in BPED, CPED or DPED courses in the State of Rajasthan. In view of aforesaid, the candidates from the State of Rajasthan are having sports certificates, whereas, candidates undertook course from other States are permitted to appear in the selection and held eligible though at the time of admission in above referred courses, they were not having sports certificate/s thus such candidates be held ineligible.

The issue aforesaid has been contested by the learned Additional Advocate General and also by learned counsel for private respondents. It is submitted that even as per Regulations of the NCTE, sports certificate is not a pre-condition in all the circumstances. As per the Regulations, admission in BPED/CPED/DPED is permissible even if one has not participated in sports and not having sports certificate. The extra benefit has been given to those who are in possession of sports certificate/s.

So far as BPED is concerned, Regulations show many qualifications for admission. If Regulations are considered in totality, it makes a candidate to be eligible without his participation in sports. For illustration; under the Regulations of the NCTE 2005, a candidate having qualification of BPE of three years duration was eligible without sports certificate. In the same manner, under the Regulations of the NCTE 2009, any candidate holding qualification of BPE with 50% marks was eligible. The Bachelor Degree of three years in Physical Education with 50% marks was also eligible. It is not that admission in BPED course was not permissible to the candidates who did not participate in the sports.

It is also submitted that even in the State of Rajasthan, many candidates have been given admission and undertaken BPED course without their participation in the sport events at any level.

I have considered above submissions and perused the record.

The issue about eligibility of those candidates who are not in possession of sports certificates while getting admission at the level of BPED/CPED/DPED has been raised as if Regulations of the NCTE postulates a condition for admission in those courses only of those candidates who were in possession of sports certificate/s. The perusal of the NCTE Regulations, referred above, reveals that there are

many qualifications on which admission in respective courses are permissible even if one has not participated in sports events at any level. The petitioners have not come with a specific case by naming the candidate that he was not in possession of required qualification at the time of taking admission in BPed/CPed/DPEd course yet he was given admission and his qualification has been recognised. The argument has been raised by learned counsel for petitioners as if no candidate was eligible to get admission in BPed/CPed/DPEd course unless participated in the sports events at some level.

The Regulations of the NCTE have been amended from time to time. If a candidate took admission in BPed/CPed/DPEd course based on such a qualification where the sports certificate is not a precondition then in those cases, it cannot be said that the candidate was ineligible to take admission in BPed/CPed/DPEd.

It is apart from the fact that the State Government and the Commission cannot be asked to make a scrutiny of the qualification at the time of admission in BPed/CPed/DPEd course. It is more so when their qualification has not been challenged or derecognised by the NCTE. It has not even de-recognised those institutions on the ground urged by the petitioners. In the light of the facts given above, prayer made by the petitioners that those candidates who are not in possession of sports certificate/s at the time of admission in the course, should not be held eligible for appointment on the post in question cannot be accepted.

It is further urged that in the State of Rajasthan, for admission in BPed/CPed/DPEd course, a precondition exist for sports certificate/s. In counter, Mr. S.P. Sharma, learned Senior Counsel submits that even many candidates in the State of Rajasthan have been given admission though they were not in possession of sports certificates.

I have considered the aforesaid submissions also and find that for appointment on the post of PTI Gr II/PTI Gr III what should prevail is the NCTE Regulations. If the State of Rajasthan has provided rules in conflict to the Regulations of the NCTE, they cannot be allowed to prevail. The issue aforesaid was otherwise considered by the Division Bench of this court at Principal Seat, Jodhpur in the case of "Sushil Sompura & ors versus State (Education) & ors", DB Civil Writ Petition No. 3964/2011, decided on 20.5.2011. Paras 18 and 19 of the said judgment are reproduced hereunder-

"18. It is submitted by the learned Counsel for the Petitioners, who have passed B. Ed. or its equivalent course from the Jammu and Kashmir that though they are resident of Rajasthan, but obtained admission in Jammu and Kashmir where prescription of minimum 45% marks in graduation or post graduation or equivalent qualification with effect from 27.9.2007 and 50% in graduation or post graduation or equivalent qualification with effect from 31.8.2009 etc. was not applicable and as such, even if they have obtained admission in requisite courses in Jammu and Kashmir after aforesaid prescription of minimum

percentage by NCTE, they should be permitted to stake their claim in the TET examination ignoring the eligibility criteria prescribed by NCTE with effect from 27.9.2007 and 31.8.2009.

19. We cannot accept the aforesaid submission. In case they have passed the B. Ed. or any other requisite course, which is prescribed by NCTE in the Notification dated 23.8.2010, obviously, they can stake their claim subject to the condition that they fulfill the eligibility criteria as prescribed by NCTE applicable in Rajasthan vide notifications dated 23.9.2007 and 31.8.2009. In our opinion, it was open to the NCTE to lay down such qualifications and they cannot be circumvented by the Petitioners in the manner they have suggested. They are bound by the qualifications prescribed in the notification dated 23.8.2010. Only in case they had obtained admission in the requisite course prior to 27.9.2007 or 31.8.2009 as the case may be, without violating the norms of NCTE, they can be permitted to appear in the TET not otherwise. In case they have not taken admission in the requisite course prior to 27.9.2007 or 31.8.2009 and they were not having minimum percentage and qualifications as prescribed vide notifications dated 27.9.2007 or 31.8.2009 even though such qualifications were not applicable in Jammu and Kashmir, they cannot stake their claim in TET which is being conducted in State of Rajasthan. It is open to NCTE to lay down eligibility criteria which is equally applicable to all. There cannot be different criteria for Rajasthan incumbents and incumbents from Jammu and Kashmir."

If the State of Rajasthan has made rules contrary to NCTE Regulations, it would be governed by the Regulations of the NCTE. It is apart from the fact that if a candidate belongs to other State and took education after seeking admission in accordance with the Regulations of the NCTE, they cannot be held ineligible for appointment by considering his case in reference to the rules existing in the State of Rajasthan for admission to BPED/CPED/DPED course. The rules prevalent in the State of Rajasthan cannot be applied to other State/s for admission in BPED/CPED/DPED thus for all the reasons given above, argument of learned counsel for petitioners cannot be accepted, rather, ground aforesaid is summarily rejected. The view is even supported by the judgment in the case of "Manu Kumari versus State of Rajasthan & ors", , 2014(3) CDR 1572 (Rajasthan).

2. A contest has been made regarding determination of the vacancies for ST and SBC candidates (issue No. 6). Learned counsel for petitioners submit that determination of the posts for reserve category candidates has been made by taking vacancies at the district level, whereas, not only the advertisement but the cadre is at the State level thus determination of the vacancies of SBC and ST category should have been made on the total posts so advertised.

Learned Additional Advocate General has contested the issue. He submits that determination of the posts of the reserve category has been made at the district level as the post of PTI Gr III is at the district level and the post of PTI Gr II is at the zonal level thus appointment would be made at the district level and for both the posts determination of vacancies for reserve category can be made at district

or zonal level, as the case may be, in accordance with the rules. As such, there is no illegality in the action of the State.

I have considered rival submissions of the parties and find that if a cadre is at the State level, determination of number of posts for reserve category candidates should not have been taken at the district level. However, out of two posts, cadre for one post is at the district level thus, there is no illegality in determination of posts at that level. In any case, the non-petitioners would redetermine the posts for ST and SBC category candidates at the level their cadre is maintained i.e. district or zonal level, however, while doing so, posts in excess to what has been determined in the advertisement, would be enhanced only if there is a short fall of SBC and ST candidates on the total cadre as reservation should be on total cadre and not on the vacancies. The exercise, as directed above for determination of posts for ST and SBC category, would be made before appointment. The issue stands concluded with the aforesaid.

3. Learned counsel for petitioners have raised an issue regarding reservation to Jat community of district Dholpur and Bharatpur (issue No. 5). It is submitted that after judgment by the Division Bench in the case of "Ratan Lal Bagri & ors versus State of Rajasthan & ors", DB Civil Writ Petition (PIL) No. 6046/1999, decided on 10.8.2015, reservation to the Jat community of districts Dholpur and Bharatpur should not be provided. It is looking to the fact that the notification issued for reservation to the Jat community of Dholpur and Bharatpur districts has been quashed thus after quashing of the notification, no basis remains to provide reservation to them. It is more so when the Division Bench of this court has not directed to provide reservation to Jat community candidates of Dholpur and Bharatpur districts in those cases where the advertisement has already been issued, rather, no such direction could have been given once the notification was struck down. The exemption is only to those who have already received the fruits in the shape of appointment and not otherwise.

Learned Additional Advocate General has contested the issue. It is submitted that reservation to Jat community candidates of Dholpur and Bharatpur districts should be permitted as initiation of the process was prior to the judgment rendered by the Division Bench of this court in the case of Ratan Lal Bagri (supra).

The issue aforesaid was considered by this court in the case of "Ummed Singh & ors versus State of Rajasthan & ors", SB Civil Writ Petition No. 17662/2015, decided on 1.12.2015. It is held that once the notification has been set aside, benefit of reservation cannot be continued because it is provided at the stage of appointment. It can be when the notification subsist and not otherwise. The analogy herein would be same which is applied when provision is repealed. It is a settled law that once a provision is repealed, claim pursuant to the repealed provision cannot be made even if prior to repealing of the provision, some proceedings or process was undertaken. A reference of the judgment of the Apex Court in the case of "Kolhapur Canesugar Works Limited & anr. versus Union of

India & ors", , AIR 2000 SC 811, would be relevant and applies to the facts of this case. The repealing of the provision has effect as of quashing of the notification because in both the situations, earlier provision does not subsist.

In the light of the discussion made above and looking to the earlier judgments in the case where the issue has been dealt with in detail, reservation to Jat community candidates of Dholpur and Bharatpur districts would not be available. Relevant para of the earlier judgment in the case of Ummed Singh & ors (supra) are quoted hereunder for ready reference-

"Learned counsel for the petitioners submit that judgment in the case of Ratan Lal Bagri & Ors. (supra) applies to the State Service but therein, protection has been given to those, who have already taken the benefit of reservation as the judgment is made prospective. When the judgment is held prospective, it would not apply to the recruitment of the year 2013 as the judgment was given in the year 2015.

The argument aforesaid needs consideration. Para No. 120 of the judgment in the case of Ratan Lal Bagri & Ors. (supra) is quoted hereunder for ready reference:

"120. - The writ petitions are partly allowed. The Notification dated 10.1.2000 issued by the State of Rajasthan including the Jats of Bharatpur and Dholpur, and deleting the words "except Dholpur and Bharatpur" from the original Notification dated 3.11.1999 issued by it, is quashed. The Jats of Bharatpur and Dholpur Districts will be excluded from the State List of OBCs. The quashing of Notification dated 10.1.2000 will however be prospective, and will not affect the benefit of reservation already given and received by the Jats of Bharatpur and Dholpur Districts."

The perusal of para, quoted above, shows that Notification dated 10th January, 2015 has been quashed, which provides reservation to Jat community of Bharatpur and Dholpur districts. It is, however, held to be prospective. It is with the direction not to affect the benefit of reservation already given and received by Jat community of Bharatpur and Dholpur districts. The outcome of the direction aforesaid is that if a benefit has already been given or received, it would not be effected even though the Notification has been quashed. In the instant case, though select list has been issued with the benefit of reservation but it is admitted that appointment order has not been issued.

The question would be as to whether placement of the name in the select list would create a vested right of appointment. It is settled law that mere inclusion of the name in the select list does not create a right of appointment. It is in view of the judgment of Apex Court in the case of Shankarsan Dash Vs. Union of India reported in , 1991(3) SCC 47. The judgment aforesaid is referred to find out as to whether a right can be said to have vested for appointment merely on inclusion of name in the select list.

The issue aforesaid needs to be elaborated. It is in reference to para No. 120 of the judgment in the case of Ratan Lal Bagri & Ors. (supra). Therein, while quashing the Notification, it is held to be prospective and not to take away the benefit already given and received by the Jat community of Bharatpur and Dholpur districts. The word "given and received" are of significance. It means that the right has been finally vested in the employee. It can be only when appointments have been made and not otherwise. It is for the reason that the provision for reservation is provided for appointment and it gets concluded when appointment order is issued, thus word "giving and received" gets concluded when order of appointment has already been issued. The Division Bench saved those, who have already taken benefit and would obviously in the form of appointment. The right of benefit vests in an employee when it is finally given and not when it is accrued only.

If an employee is appointed on the post having hierarchy of promotion, if having particular qualification. Such an employee continuous in service with required qualification for promotion and just before promotion, the establishment amends the Rules and provide higher qualification for promotion then required earlier. If an employee does not possess the higher qualification provided by the amended provision cannot claim the benefit of promotion based on existing right by saying that at the time of appointment, the qualification provided for the promotion was possessed by him, thus should be rendered eligible by subsequent amendment in the Rules. The Apex Court considered the issue aforesaid and held that unless right is finally vested in the employee by getting promotion, it cannot be said to be a vested right merely based on the eligibility as per un-amended Rule existing at the time of appointment. In the instant case, when Notification has been quashed by the Division Bench in the case of Ratan Lal Bagri & Ors. (surpa), can a direction be given by this Court to still make appointment with the benefit of reservation, which does not exist. It cannot be only for the reason that advertisement for it was issued in the year 2013. Mere issuance of the advertisement and appearance in the selection does not create a vested right of appointment unless it is culminated in the form of appointment order. The ratio propounded in the case of Ratan Lal Bagri & Ors. (supra) would apply in those circumstances, thus being having knowledge of the judgment of Division Bench, while adjudicating the issue raised by the petitioner, the aforesaid judgment cannot be ignored by this Court."

4. The other issue is as to whether candidates holding the qualification of Bachelor of Physical Education (BPE - three year degree course) are eligible for selection and appointment to the posts in question. Learned counsel for petitioners have relied on the judgment of this court in the case of "Manoj Kumar Verma versus Rajasthan Public Service Commission & ors", DB Special Appeal (Writ) No. 601/2014, decided on 22.8.2014 at Jaipur Bench.

Learned Additional Advocate General submits that the petitioners have unnecessarily raised the issue aforesaid. The candidate in possession of the

qualification of BPE is not eligible for the post in the light of the judgment aforesaid thus issue can be determined by holding that the candidates in possession of BPE qualification would not be eligible for appointment.

Learned Senior Counsel Mr. Ashok Gaur, however, contested the issue. It is submitted that candidates holding the qualification of BPE are also eligible for appointment. It is in the light of the notification issued by the NCTE to amend its Regulations. The qualification of BPE is added as one of the qualifications for appointment on the post in question. The notification for it was issued on 16.12.2014 thus would apply to the selection in question because appointments are yet to be made.

It is also stated that in the case of Manu Kumari (supra), this court made observations and gave liberty to the NCTE and the State Government to appropriately amend the rules. As per the observations and liberty given by this court, amendment in the rules have been made thus be applied to the selection in question also. The NCTE, vide their letter dated 15.7.2015 held BPE holder to be eligible. It was in response to the letter of the Commission seeking about eligibility of the candidates holding qualification of BPE.

It is also submitted that once the NCTE has amended the Regulations to incorporate qualification of BPE as one of the qualifications for appointment on the post in question then no reason remains to ignore it now at this stage.

I have considered the submissions and perused the record. The controversy involved herein was subject matter of litigation in earlier selection also. It was held that a candidate possessing qualification of BPE is not eligible for selection and appointment to the post referred therein. The judgment of the Single Bench has been upheld by the Division Bench in the case of "Manoj Kumar Verma versus Rajasthan Public Service Commission & ors", DB Special Appeal (Writ) No. 601/2014, decided on 22.8.2014 at Jaipur Bench. The relevant paras of the judgment of the Division Bench are quoted hereunder for ready reference-

"After hearing the parties, we do not find any error of law in the judgment of the learned Single Judge. The argument raised by the appellant is based on the fact that the degree of B.P.E., obtained by him from MDS University, Ajmer, is recognized by the NCTE. He had taken admission in the college in B.P.E. course in 1994 and had passed out on 07.06.1997, much before the qualification prescribed in the Schedule under the NCTE Regulations, 2001 had come into force. His submission that B.P.E. is three years course and that when the graduates with B.P. Ed. course are eligible for appointment as PTI Grade-II and PTI Grade-III, the appellant holding the Bachelor's Degree in Physical Education, cannot be held disqualified for the post, overlooks the qualifications prescribed in the NCTE Regulations, 2001. The object and purpose in enacting the National Council for Teacher Education Act, was to standardise the teachers education in the country. After the 42nd Amendment in the Constitution, the power to legislate on professional and technical institutions and determination of

standards of education therein can be traced to Entries 65 and 66 of List 1 of the 7th Schedule to the Constitution. The subject of "education including universities", included in Entry 11 in List II was deleted. The 42nd Amendment substituted it in Entry 25 in List III subject to the provisions of Entries 63, 64, 65 and 66 of List I. By virtue of re-allocation of power, the State also have power to legislate on education, regulate the establishment and maintenance of educational institutions, but in exercise of the power, the State Government cannot make rules contrary to the standards prescribed under the Central legislation.

In *Union of India Vs. Shah Goverdhan L. Kabra Teachers College*, , JT 2002(8) SC 269, the Supreme Court held;

"the NCTE is an expert body created under the provisions of the National Council for Teacher Education Act, 1993 and the Parliament has imposed upon such expert body the duty to maintain the standards of education particularly, in relation to the teachers education."

The NCTE Act was enacted in terms of Entries 65 and 66 of List I and having fixed the norms and qualification for recruitment of teachers, it is not open to the State Government to fix any qualification contrary to those laid down by the NCTE. All the States are supposed to modify/frame recruitment rules in conformity with the qualifications prescribed in the Schedule. Regulation 4 mandates that the existing recruitment rules may be modified within three years so as to bring them in conformity with the qualifications prescribed in the Schedules.

In the present case, on the enforcement of the NCTE Regulations, 2001, prescribing qualification for teachers including Physical Education Teachers, the Rules of 1971 framed by the State of Rajasthan were required to be amended. The Schedule in the NCTE Regulations, 2001, quoted as above, does not prescribe B.P.E. as qualification for PTI Grade-II and Grade-III for teaching in schools/high schools and Senior Secondary Schools, where physical education is an elective subject. For Secondary/High Schools, Graduates with Bachelor of Physical Education (B.P. Ed.), or its equivalent, is the requisite qualification. The appellant possesses B.P.E., which is a degree course in Physical Education. He did not pursue the degree course in Physical Education (B.P. Ed.) after doing graduation. He, therefore, does not hold the requisite qualification for appointment as PTI Grade-II or even PTI Grade-III. His contention that he had taken admission in B.P.E. course in 1994 and passed out in 1997, does not hold him eligible, as he was seeking recruitment in the schools in Rajasthan in pursuance of the advertisement issued, after the NCTE Regulations, 2001 came into force."

The State of Rajasthan has agreed to the prayer made by the petitioners, rather, according to them, the candidates holding the qualification of BPE would not be eligible in view of the judgment (supra). In the light of the aforesaid and the

decision taken by the government, no direction is required to be given other than to follow the earlier judgments. It would, however, be necessary to deal with the argument raised by Mr. Ashok Gaur, Senior Advocate, appearing for private respondents.

It is admitted by learned counsel that the issue of eligibility of those candidates holding qualification of BPE was decided earlier by this court. It is, however, a fact that subsequent to the earlier recruitment, NCTE has made amendment in the Regulations. As per amended provision, a candidate holding qualification of BPE is also eligible for appointment to the post of PTI Gr II/PTI Gr III. The question would however be as to whether amended provision can be applied to the recruitment initiated in pursuance to the advertisement dated 18.9.2013 i.e. much prior to the amendment in the Regulations. It is more so when amendment in the Regulations is not retroactive. It is being subordinate legislation, applies prospectively in the light of the judgment of the Hon"ble Supreme Court in the case of "P. Mahendran & ors versus State of Karnataka & ors", , AIR 1990 SC 405. It was held by the Apex Court that any amendment in the rules subsequent to the advertisement would not govern process of selection, rather, amendment would apply to the future selection. In the light of the aforesaid judgments, it can safely be held that though amendment under the Regulations have been made by the NCTE but much subsequent to the advertisement thus would not apply to the present selection.

It is even for the reason that rules of game cannot be changed in midst of selection as has been held by the Hon"ble Supreme Court in the case of "K. Manjusree versus State of Andhra Pradesh & anr", , AIR 2008 SC 1470. Therein, the government made changes in the conditions of selection in the midst of selection but was not approved by the Supreme Court. In view of above, if the non-petitioners are directed to make appointment in pursuance to the amended Regulations much subsequent to the advertisement then it would be nothing but to allow change in the rules of game in the midst. The State Government is not otherwise accepting the candidates holding the qualifications of BPE to be eligible thus for all these reasons, the plea raised by the private respondents cannot be accepted.

Learned Senior Advocate Mr. Ashok Gaur has made reference of certain paras of the judgment in the case of Manu Kumari (supra) where liberty was given to the NCTE and the State Government to make amendment or issue instructions for eligibility of BPE holder and, according to him, amendment in the Regulations of the NCTE has been made as was directed by this court or for which liberty was given thus to be applied to the present recruitment.

I find that even if in the earlier judgment, a liberty was given to the State Government or the NCTE to make amendment or issue instructions and in compliance thereof, necessary amendment has been made, it cannot be applied retrospectively.

It is even for the reason that while issuing advertisement, qualification of BPE was not included thus a candidate holding the qualification of BPE may not have applied for the post leaving others who applied for the post by default, like the private respondents. If, now, it is decided held that the candidates holding the qualification of BPE are also eligible, it would deprive those candidates who did not apply for the post in reference to the advertisement being law abiding. Thus, if the plea raised by private respondents is accepted, it will cause discrimination with those who did not apply after going through the qualification given in the advertisement though are similarly placed like the private respondents.

For all these reasons given above, I am unable to accept the plea raised by the learned counsel for private respondents and as the State Government has decided not to include the candidates holding the qualification of BPE to be eligible, no further direction is required on the aforesaid issue.

The last issue (No. 11) argument is to extend benefit of the amended rules of 1999 with regard to age relaxation. The last advertisement prior to the advertisement in question was issued in the year 2011 though the age required therein was as on 1.1.2013 but merely for that reason it cannot be said to be a recruitment even in the year 2012 but would be considered to be recruitment of the year 2011. As per the amended rules of 1999, petitioners would be entitled to get relaxation in age by one year i.e. in the year 2012 when no recruitment took place. If the age was taken into consideration as on 1.1.2013 for the advertisement of the year 2011, it was contrary to the rules and cannot be to the benefit of the non-petitioners. In substance, non-petitioners are required to follow the rules as amended in the year 1999 for relaxation in age to the candidates if they were within age in the year when no recruitment took place and, in the instant case, recruitment was initiated earlier in the year 2011 followed by the recruitment in question i.e. in the year 2013 thus no recruitment took place in the year 2012. Accordingly, last issue stands concluded in favour of the petitioners.

5. With the aforesaid observations/directions, all the writ petitions are disposed of.