

**(2015) 08 AHC CK 0082**

**In the Allahabad High Court**

**Case No :** Civil Misc. Writ Petition Nos. 57476 of 2013, 28003, 28977 of 2015, 58712, 62241, 50787, 57236 of 2013, 2999, 15541, 628 of 2015

Shiv Kumar Pathak and Others

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

**Date of Decision :** 18-08-2015

**Acts Referred:**

Constitution of India, 1950 — Article 13(1), 13(2), 14, 15(3), 16

**Citation :** (2015) 7 ADJ 553 : (2015) 5 AWC 4984 : (2015) 4 ESC 2213 : (2015) 4 SCT 157

**Hon'ble Judges :** Sudhir Agarwal, J

**Bench :** Single Bench

**Advocate :** Ashok Khare, Siddharth Khare, Kshetresh Chandra Shukla, Anil Kumar Aditya, Ajay Kumar Pandey, D.P. Singh, Vishnu Gupta, Shailesh Upadhyay, Radha Kant Ojha, Avinash Chandra Srivastav, Abhishek Srivastava, Ashish Tripathi and Ashish Kumar Singh, for the App

**Final Decision :** Disposed off

## Judgement

Sudhir Agarwal, J—Heard Sri Ashok Khare, and Sri Radha Kant Ojha, learned Senior Advocates, appearing for petitioners, learned Standing Counsel for State-respondents, Sri A.K. Yadav, Advocate, for Basic Shiksha Parishad; and, Sri Anoop Trivedi, Sri Seemant Singh, Sri Abhishek Srivastava and Sri S.K. Mishra, Advocates, who have appeared for interveners/selected candidates, in bunch of these cases. Though all these writ petitions are connected and have been nominated to this Bench by Hon'ble the Chief Justice for adjudication, but having heard learned counsels for parties, I find that these writ petitions need be categorised in five groups, namely, Writ Petitions No. 57476 of 2013, 28003 of 2015 and 28977 of 2015 are placed in "Group-A"; Writ Petitions No. 58712 of 2013, 62241 of 2013 and 50787 of 2013 are placed in "Group-B"; Writ Petitions No. 57236 of 2013 and 2999 of 2015 in "Group-C; Writ Petition No. 15541 of 2015 in "Group-D"; and, Writ Petition No. 628 of 2015 in "Group-E". In this judgment, I shall deal with these matters groupwise.

#### Group-A:

2. Writ Petition No. 57476 of 2013 (hereinafter referred to as "First Petition, Group-A") has been filed under Article 226 of the Constitution of India by 12 petitioners seeking a writ of mandamus directing for preparation of merit list for recruitment to the post of Assistant Teachers in Senior Basic School/Head Master in Junior Basic Schools, not only on the basis of academic qualification, but also by giving weightage to the scores obtained by candidates in Teachers Eligibility Test" (hereinafter referred to as "TET").

3. Sri Ashok Khare, learned Senior Advocate, contended that though in the writ petition, as was drafted and filed, the petitioners have challenged Notifications dated 30.8.2012 and 5.12.2012 (Annexures 1 and 3 to the writ petition), i.e., U.P. Basic Education (Teachers) Service (Fifteenth Amendment) Rules, 2012 (hereinafter referred to as "Fifteenth Amendment Rules, 2012") and U.P. Basic Education (Teachers) Service (Sixteenth Amendment) Rules, 2012 (hereinafter referred to as "Sixteenth Amendment Rules, 2012"), but he is not pressing the said relief in respect of Fifteenth Amendment Rules, 2012 for the reason that the offending provision having already been struck down, the Court has to consider only its consequential effect and to see whether a provision, struck down by this Court being ultra vires, can be allowed to operate pursuant to the aforesaid amending Rules, and if not, then to the extent amending Rules refer to a provision which has been declared ultra vires, the amending Rules to that extent are otiose/redundant/inoperative and have to be ignored by authorities concerned and that is how it is not necessary for petitioner to seek any relief for declaring the amending Rule of Fifteenth Amendment Rules, 2012 ultra vires. This Court has to declare only that part of Amending Rule, which refers to a provision which has already been struck down by this Court, inoperative and redundant, and respondents-authorities, would be required to prepare merit list accordingly, i.e., by ignoring such provision. In the alternative, he submitted that Rule 14(3)(a) of Sixteenth Amendment Rules, 2012, being pari materia to Rule 14(3) of Sixteenth Amendment Rules, 2012 suffers from the same vice and hence for the reasons given by Division Bench in its judgment dated 20.11.2013 in Special Appeal (Defective) No. 237 of 2013 (Shiv Kumar Pathak and others v. State of U.P. and others), it is also ultra vires and, hence, liable to be struck down.

4. Writ petition No. 28003 of 2015 (hereinafter referred to as "Second Petition, Group-A") has been filed at the instance of five petitioners, namely, Umesh Kumar Singh, Saroj Kumar Singh, Vimal Kumar Tiwari, Sanjay Kumar Verma and Dhananjay Singh and therein also the relief sought is similar to that as sought in writ petition No. 57476 of 2013.

5. Writ Petition No. 28977 of 2015 (hereinafter referred to as "Third Petition, Group-A") is at the instance of sole petitioner, Bhagwati Prasad, who has simply sought a mandamus commanding respondents to forthwith issue letter of appointment to petitioner, appointing him to the post of Assistant Teacher,

Science/Maths in Senior Primary School in District Auraiya on the basis of select list. His brief case is that he is a scheduled caste candidate, possessing qualification of Bachelor in Science and Bachelor of Education and has also passed U.P. Teachers Eligibility Test, 2011 (Upper Primary Level) with 82 marks. Pursuant to Government Order dated 11.7.2013 issued for recruitment of 29334 Assistant Teachers in Senior Primary Schools, he has been selected but his appointment has been deferred due to some litigation pending before this Court, though he is entitled to appointment.

6. Sri R.K. Ojha, learned Senior Advocate, pointed out that in some of these matters, question of validity of Rules is attracted and the cases in which validity of Statute is involved, are within the determination of Bench presided by Hon"ble the Chief Justice, and, therefore, this Court may not have jurisdiction to hear those matters. However, this Court finds that all these cases are cognizable by Single Judge and to this extent there is no dispute between the parties. The cases in which validity of Statute is involved, and cognizable by Division Bench, the same are within the determination of Bench presided by Hon"ble the Chief Justice, but in respect of matters cognizable by Single Judge, I do not find any such determination. Moreover, all these cases have come up before this Court on the nomination made by Hon"ble the Chief Justice and, therefore, in my view, this argument has no substance.

7. Learned counsels for parties proceeded to address the Court on merits in all these matters with request that since huge number of appointments are involved in these cases causing irreparable loss to eligible and selected candidates, therefore, these matters may be decided at an early date. I proceed accordingly.

8. Some facts in brief, as borne out from record of First Petition, necessary for adjudication of dispute are as under.

9. Recruitment to the post of Assistant Teacher in Primary Schools comprising of Junior Primary Schools (hereinafter referred to as "Jr. P.S.") and Senior Primary Schools (hereinafter referred to as "Sr. P.S.") as also for the post of Head Master in Jr. P.S., is governed by U.P. Basic Education (Teachers) Service Rules, 1981 (hereinafter referred to as "Rules, 1981"). Recruitment to the posts of Assistant Teacher in Jr. P.S. is open for direct recruitment only. Rest of the cadres, namely, Assistant Teacher in Sr. P.S. and Head Masters in Jr. P.S. and Head Masters in Sr. P.S. were all to be filled in by way of promotion. The Assistant Teachers of Jr. P.S. were entitled to be considered for promotion to the post of Assistant Teacher, Sr.P.S. and Head Master of Jr.P.S. Those who were working in the cadre of Head Master, Jr.P.S. or Assistant Teacher, Sr.P.S. were eligible to be considered for promotion to the post of Head Master, Sr.P.S.

10. vide Fifteenth Amendment Rules, 2012, issued vide Notification dated 30.8.2012, Rule 5 was substituted providing 50 per cent of posts of Assistant Teachers, Sr.P.S. and Head Master of Jr.P.S. by promotion and 50 per cent by direct recruitment. No change was made in the process of recruitment of

Assistant Teachers of Jr.P.S. and Head Masters of Sr.P.S.

11. As regard the procedure for preparing list for appointment to the post of Assistant Teacher, Sr.P.S./Head Master, Jr.P.S., Rule 14(3) as stood till Fifteenth Amendment Rules, 2012, provided for arrangement of names in descending order on the basis of marks obtained in TET, conducted by Government of Uttar Pradesh. However, the aforesaid Rule 14(3) was substituted by Fifteenth Amendment Rules, 2012, as follows:

"(3) The names of candidates in the list prepared under sub-rule (2) shall then be arranged in such manner that the candidate shall be arranged in accordance with the quality points specified in the appendix. In the said rules the following appendix shall be inserted at the end."

12. At the end of Rules, Appendix was inserted which reads as under:

"APPENDIX [See Rule 14(3)] Quality points for selection of candidates

13. Sixteenth Amendment Rules, 2012 sought to substitute Rule 14 in its entirety. The substituted Rule 14 reads as under:

"14(1)(a) Determination of vacancies and preparation of list

In respect of appointment, by direct recruitment to the post of Mistress of Nursery Schools and Assistant Master or Assistant Mistress of Junior Basic Schools under clause (a) of rule 5, the appointing authority shall determine the number of vacancies as also the number of vacancies to be reserved for candidates belonging to Scheduled Castes, Scheduled Tribes, Backward Classes, and other categories under rule 9 and at least two leading daily news papers having adequate circulation in the State as well as in concerned district inviting applications from candidates possessing prescribed training qualification from the district concerned and teacher eligibility test passed, conducted by the Government or by the Government of India.

14(1)(b) The Government may from time to time decide to appoint candidates, who are graduates alongwith B.Ed./B.Ed.(Special Education)/D.Ed. (Special Education) and who have also passed teacher eligibility test conducted by the Government or by the Government of India, as trainee teachers. These candidates after appointment will have to undergo six months special training programme in elementary education recognised by National Council of Teacher Education (NCTE). The appointing authority shall determine the number of vacancies as also the number of vacancies to be reserved for candidates belonging to Scheduled Castes, Scheduled Tribes, Backward Classes, and other categories under rule 9 and advertisement would be issued in at least two leading daily news papers having adequate circulation in the State as well as in concerned district inviting applications from candidates who are graduates alongwith B.Ed./B.Ed. (Special Education)/D.Ed. (Special Education) and who have also passed teacher eligibility test conducted by the Government or by the Government of India.

14(1)(c) The trainee teachers, after obtaining the certificate of successful completion of six months special training in elementary education, shall be appointed as assistant teachers in junior basic schools against substantive post in regular pay-scale. The appointing authority will be duty bound to appoint the trainee teachers as assistant teachers within one month of issue of certificate of successful completion of said training.

(2) The appointing authority shall scrutinize the applications received in pursuant of the advertisement under clause (a) or (b) of sub-rule (1) of Rule 14 and prepare a list of such persons as appear to possess the prescribed academic qualifications and be eligible for appointment.

(3) (a). The names of candidates in the list prepared under sub-rule (2) in accordance with clause (a) of sub-rule (1) of rule 14 shall then be arranged in such manner that the candidates shall be arranged in accordance with the quality points specified in the appendix-I.

Provided that if two or more candidates obtain equal marks, the candidate senior in age shall be placed higher.

(b) The names of candidates in the list prepared under sub-rule (2) in accordance with clause (b) of sub-rule (1) of rule 14 shall then been arranged in such manner that the candidate shall be arranged in accordance with the quality points specified in the appendix-II.

Provided that if two or more candidates obtain equal marks, the candidate senior in age shall be placed. higher.

(c) The names of candidates in the list prepared in accordance with clause (c) of sub-rule (1) of rule 14 for appointment as assistant teacher shall be same as the list prepared under clause (b) of sub-rule (3) of rule 14 unless the candidate under the said list is unable to successfully complete the six month special training course in elementary education in his first attempt. If the candidate successfully completes the six month special training in his second and final attempt, the candidate's name shall be placed under the names of all those candidates who have completed the said six months special training in their first attempt.

(4) No person shall be eligible for appointment unless his or her name is included in the list prepared under sub-rule (2).

(5) The list prepared under sub-rule (2) and arranged in accordance with clause (a) or (b) of sub-rule (3) of rule 14 shall be forwarded by the appointing authority to the Selection Committee."

(emphasis added)

14. The existing Appendix which came to be inserted vide Fifteenth Amendment Rules, 2012 was specified as Appendix-I, and, vide newly added Rule 14(3)(b), another Appendix i.e. Appendix-II was inserted which reads as under:

"APPENDIX-II [See Rule 14(3)(b)] Quality points for selection of candidates

15. Appendix-II, as inserted by Sixteenth Amendment Rules, 2012, would apply to the vacancies which are notified to be filled in by candidates, possessing qualifications mentioned in Rule 14(1)(b), as inserted by Sixteenth Amendment Rules, 2012, but if vacancies are notified with reference to Rule 14(1)(a) read with Sub-Rule 2 of Rule 14, then list has to be prepared as per Rule 14(3)(a) read with Appendix-I which means the Appendix as inserted by Fifteenth Amendment Rules, 2012.

16. By Government Order (hereinafter referred to as "G.O.") dated 11.7.2013, State Government determined 29334 vacancies of Assistant Teachers, i.e., 14667 Assistant Teachers (Maths) and 14667 Assistant Teachers (Science) in Sr.P.S. to be filled in under 50 per cent direct recruitment quota, in accordance with Rules, 1981, as amended from time to time. The eligibility qualifications mentioned in para 2 (1) of the G.O. 11.7.2013 read as under:

1. Eligibility for applying-

(A) Educational qualification-For the appointment on the post of Assistant Teacher of mathematics/science subject in upper primary schools, those candidates shall be eligible who have B.Sc. degree from a university established by law and have passed two-year B.T.C., Special B.T.C., and B.Ed., from institutions recognised by the NCTE (National Council of Teachers' Education) or B.Ed (Special Education) course recognised by the Rehabilitation Council of India (R.C.I.). Simultaneously, the candidate must have successfully qualified in the Teachers' Eligibility Test for classes 6 to 8 organised by the Government of U.P. or Government of India.

(B) Age-For the direct recruitment on the post of Assistant Teacher in Upper Primary Schools, the candidate should be aged at least 21 years and not more than 35 years on July 1, 2013.

Provided that in case of the candidates belonging to Scheduled Castes/Scheduled Tribes/Other Backward Classes, the upper age limit shall be relaxed by 5 years.

Provided that as for relaxation in upper age limit for such candidates who are ex-servicemen, "if total period of service rendered by any ex-servicemen is subtracted from his real age, and if so subtracted age exceeds the upper age limit by not more than 03 years, then he shall be treated to fulfil the conditions related to the age of recruitment for such services and posts" but it should not exceed the candidate's actual superannuation age (62 years).

Provided that in case of physically handicapped persons, the upper age limit shall be 10 years more, but the age of candidate shall not, in any case, be more than 50 years on the date of appointment."

(English Translation by the Court)

17. From perusal of above, it is clear that candidate possessing qualification of

B.Sc. degree and 2 years B.T.C., Special B.T.C. and B.Ed. or B.Ed. (Special Education) from institutions, recognized by National Council for Teachers Education or Bhartiya Punarvas Parishad, would be eligible to appear in the aforesaid selection.

18. Clause 9 of para 2 of G.O. Dated 11.7.2013 provides procedure for selection and reads as under:

"9- Selection process-

A - Selection/appointment of the candidates shall be undertaken according to Adhyapak Sewa Niyamawali 1981 (Teachers' Services Rules) (as amended & updated) and posting of the teachers after the selection shall be carried out under the provisions of Adhyapak Sewa Niyamawali 2008 (Teachers' Service Rules) (as amended & updated). For selection/appointment, the order of seniority shall be determined and prepared on the basis of the procedure specified in enclosure -"ka" of Adhyapak Sewa Niyamawali (Teacher's Services Rules).

B - After getting the list of the candidates selected as above issued through the District Basic Siksha Adhikari and getting their original educational records verified through counselling, the original records shall be caused to be deposited. Educational records of the candidates found correct shall be got verified by the concerned institutions.

C- It shall be mandatory for the District Basic Siksha Adhikari to go for medical tests for such eligible selected candidates by constituting a medical board.

D- Finally selected candidates shall be appointed on one year of probation in the pay-scale fixed for Assistant Teacher, Upper Primary Schools, in those schools of the district where the post for mathematics/science teacher is vacant."

(English Translation by the Court)

19. The grievance of petitioners is that under the Appendix inserted by two Amendment Rules of 2012, no provision giving any weightage in recruitment process, to the scores in TET has been made. TET has been considered only a qualifying examination conferring eligibility for appointment to the post of Assistant Teacher, Sr.P.S. and Head Master, Jr.P.S. but for the purpose of preparation of merit list, no weightage has been given to scores of TET.

20. It is said that a Full Bench of this Court in Shiv Kumar Sharma and Others Vs. State of U.P. and Others, (2013) 6 ADJ 310 : (2013) 6 ALJ 366 : (2013) LabIC 4295 : (2013) 3 UPLBEC 2156 , held that guidelines formed by NCTE providing weightage to TET have to be followed by State. It is binding. Since no such weightage was given under Fifteenth and Sixteenth Amendment Rules, 2012, the procedure prescribed in Appendix-I is bad. Attention of this Court is also drawn to the judgment dated 20.11.2013 in Shiv Kumar Pathak and others v. State of U.P. and others (supra) and other connected appeals, whereby

Division Bench of this Court struck down Rule 14(3) of Fifteenth Amendment Rules, 2012 and consequently set aside G.O. dated 31.8.2012 and the communication dated 31.8.2012.

21. It is submitted that once Rule 14(3) of Fifteenth Amendment Rules, 2012 has been struck down, it has taken away Appendix also, Sixteenth Amendment Rules, 2012 insofar as it declares the existing appendix as Appendix-1 and inserted Appendix-2 is clearly redundant since it seeks to substitute a provision which is/was not existing in the Statue book, having been declared ultra vires. Rule 14(3) as inserted by Sixteenth Amendment Rules, 2012 is inoperative and not possible to be implemented at all. In any case, it also suffers from the same vice as held in Shiv Kumar Pathak (Supra).

22. Sri Khare contended that it is in this background of facts this Court has to consider the consequence and effect of striking down of Rule 14(3) of Fifteenth Amendment Rules, 2012.

23. Since entire argument is confined now with respect to the manner in which list of candidates, who have applied, pursuant to an advertisement for appointment to the post of Assistant Teacher, Sr.P.S., and, Head Master, Jr.P.S. has to be prepared, scope of scrutiny by this Court is quite narrowed down. I would prefer simultaneously to quote Rules 14(2) and (3) as they stood before Fifteenth Amendment Rules, 2012, substituted by Fifteenth Amendment Rules, 2012 and further substituted by Sixteenth Amendment Rules, 2012, which read as under:

24. Prior to Fifteenth Amendment Rules, 2012, Rule 14(2) and (3) required preparation of list by appointing authority of such persons as appear to possess prescribed academic qualifications and eligible for appointment, in descending order on the basis of marks obtained in TET, conducted by Government of U.P. Where two or more candidates have obtained equal marks, the candidate senior in age was to be placed higher.

25. Fifteenth Amendment Rules, 2012 changed the criteria for preparation of list. It then provided that names shall be arranged in order of quality point marks prescribed in Appendix. The Appendix was inserted at the end of Rules. The said Appendix provided quality point marks based on High School, Intermediate and Graduation degree as also training including theory and practical. There is no description of TET for the purpose of determining quality point marks in the Appendix.

26. Sixteenth Amendment Rules, 2012 though maintained the same criteria, but has divided recruitment in clauses 14(1)(a) and (1)(b). The criteria for preparation of list in respect of vacancies under Rule 14(1)(a) has been given in Rule 14(3)(a) and Appendix-1 under Sixteenth Amendment Rules, 2012. The vacancies determined under Rule 14(1)(b) have to be arranged as per the criteria provided in Rule 14(3)(b) read with Appendix-II.



27. The difference is that for Appendix-II, since eligible candidate also possess qualification of B.Ed./B.Ed. (Special Education)/D.Ed. (Special Education), therefore, for the purpose of quality point marks, the said qualifications have been added in Appendix-II, otherwise, in substance, there is no difference in Appendix-I and II.

28. Interestingly, Sixteenth Amendment Rules, 2012 contains no Appendix-I. Instead, it refers to existing Appendix in Rules, 1981 as Appendix-I and inserted a new Appendix as Appendix-II. It is admitted by learned Standing Counsel that under Rule 14(3)(a) of Sixteenth Amendment Rules, 2012, what is talked of Appendix-I is nothing but the Appendix which was inserted vide Rule 14(3) of Fifteenth Amendment Rules, 2012. Thus it is not in dispute that what is talked of Appendix-I in Rule 14(3)(a) of Sixteen Amendment Rules, 2012 is the same as is referred and inserted vide Rule 14(3) of Fifteenth Amendment Rules, 2012.

29. Now what has come on record is that Rule 14(3) of Fifteenth Amendment Rules, 2012 has been struck down in Shiv Kumar Pathak and others v. State of U.P. and others (supra), deciding 29 appeals by a common judgment dated 20.11.2013 by Division Bench consisting of Hon'ble Ashok Bhushan and Hon'ble Vipin Sinha, JJ. The Division Bench has struck down Rule 14(3) on the ground that it is arbitrary, unreasonable and violative of Article 14 of the Constitution. The relevant discussion and findings are as under:

"The 15th amendment rules has been challenged on the ground of it being arbitrary and unreasonable being violative of Article 14 of the Constitution. The notification dated 23.8.2010 issued under Section 23(1) of the Act, 2009 being under a Parliamentary enactment has to prevail over any rules made by the State under a State Act. The Rules, 1981 right from 1993 contains an Appendix which provides a formula for selecting a teacher. Appendix indicates that selection was based only on the educational qualification of an candidate including the training qualification. After the notification dated 23.8.2010 and guidelines dated 11.2.2011 issued by the National Council for Teacher Education, the State amended its Rules, 1981 by 12th amendment rules to bring it in conformity with the above notification and guidelines. The 12th amendment rules was perfectly in accordance with law and the challenge to the aforesaid rules have also been repelled by this Court in two judgments of Seeta Ram and Govind Kumar Dixit's case (supra). The decision of the State Government not to give any weightage to the marks obtained in the Teacher Eligibility Test Examination-2011 cannot be said to be in conformity with the guidelines of the National Council for Teacher Education referred to above and was clearly arbitrary. The Full Bench of this Court in Shiv Kumar Sharma's case (supra) has already held that the State Government cannot disregard the guidelines of National Council For Teacher Education dated 11.2.2011. The 15th Amendment Rules is thus also contrary to law declared by this Court. The Teacher Eligibility Test (Examination-2011) which has been recognised as an essential qualification for the teachers selection, hence without giving any weightage to the said

examination the State cannot proceed with the selection. As noted above, the allegations made against few candidates of committing irregularities in the Teacher Eligibility Test or involvement in criminal offence cannot be a ground to deny benefit of Teacher Eligibility Test to lacs and lacs of the candidates against whom there is neither any allegation nor any charge. The State having not cancelled the Teacher Eligibility Test-2011 and having allowed the Teacher Eligibility Test to be utilised for qualification of candidates ought to have given full effect to the result of the Teacher Eligibility Test examination. The allegations of irregularities and involvement in criminal offence by some candidates was fully neutralised by the State's decision to debar any such candidates from the selection against whom there are allegations of irregularities or involvement in criminal offence. The High Powered Committee has further stated in its report that an undertaking be taken on an affidavit from all the candidates that in event anything adverse is found against them, their selection shall be cancelled. The State having given effect to the notification dated 23.8.2011 as well as the guidelines dated 11.2.2011 issued by the National Council for Teacher Education by amending its rules by 12th amendment rules, which was in consonance with the scheme under the Act, 2009, a Parliamentary enactment cannot be allowed to go back and resort to its old criteria for selection which was prevalent prior to the Act, 2009 and prior to the notification dated 23.8.2010 and guidelines dated 11.2.2011. We are, thus of the view that Rule 14(3) of the 15th amendment rules by which the criteria for selection was changed has to be held to be arbitrary and unreasonable and deserves to be struck down.....

In view of the foregoing discussions, we conclude that the decision of the State Government to change the criteria of selection by restoring the criteria of selection as prevalent prior to 12th amendment rules was not in conformity with law. The 15th amendment rules, in so far as Rule 14(3) as well as the Government Order dated 31.8.2012 were also not sustainable."

(emphasis added)

30. Having said so, Division Bench also set aside G.O. Dated 31.8.2012, issued consequent to the aforesaid amendment, holding that advertisement dated 30.11.2011 has become ineffective and stands cancelled. Thereafter the Court granted relief in the following manner:

"In the result all the Special Appeals are allowed to the following extent:

1. The Government Order dated 26.7.2011 insofar as it directs for restoration of criteria for selection as was prevalent prior to 12th amendment rules is set-aside.
2. The U.P. Basic Education (Teachers) Service Amendment Rules, 2012 (15th Amendment Rules dated 31.8.2012) in so far as Rule 14(3) is concerned is declared to be ultra vires to Article 14 of the Constitution and are struck down. Consequently, the Government Order dated 31.8.2012 as well as the communication dated 31.8.2012 issued by the board of Basic Education are set-aside.

3. Respondents are directed to proceed and conclude the selection as per the advertisement dated 30.11.2011 as modified on 20.12.2011 to its logical end within the time allowed by the Central Government vide its notification issued under Section 23(2) of the Act, 2009.

4. The judgment of the learned Single Judge is modified to the above extent."

(emphasis added)

31. This Court has no manner of doubt, when Rule 14(3) as inserted by Fifteenth Amendment Rules, 2012 has been struck down vide Court's judgment dated 20.11.2013, it would result in making this provision, non-est. By that time, G.O. dated 31.8.2012 providing for recruitment was already issued. It has referred to Appendix-A i.e. Appendix-I as inserted in Rules, 1981. Once it is struck down, it disappears from its very inception. Therefore, any preparation of list following Appendix-I of Rule 14(3) as inserted by Fifteenth Amendment Rules, 2012 would be clearly illegal and erroneous.

32. The case set up by respondent-State is that this selection has been finalized in accordance with Rules, 1981, as amended by Fifteenth Amendment Rules, 2012 and Sixteenth Amendment Rules, 2012. Admittedly they have followed Rule 14(3) and its Appendix, as substituted and inserted by Fifteenth Amendment Rules, 2012, read with Sixteenth Amendment Rules, 2012.

33. Thus, the only question up for consideration is, whether respondents-authorities are justified in preparing list of selected candidates in accordance, with Rule 14(3) read with its Appendix, as substituted by Fifteenth Amendment Rules, 2012 read with Rule 14(3) of Sixteenth Amendment Rules, 2012.

34. Whenever a provision, whether principal or subordinate legislation, is struck down, being ultra vires and/or violative of any provision of Constitution, and, in particular, fundamental rights under Part-III of the Constitution, in view of declaration contained in Article 13(2) of the Constitution, such provision is void-ab-initio. It is like a stillborn provision incapable of repeal or substitution of an existing provision.

35. In *M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another*, AIR 1958 SC 468 : (1958) 1 SCR 1422 : (1958) 9 STC 298 , considering the doctrine of still-born piece of legislation a Constitution Bench said:

"If a law is on a field not within the domain of the legislature, it is absolutely null and void, and a subsequent cession of that field to the legislature will not have the effect to breathing life into what was a still-born piece of legislation and a fresh legislation on the subject would be requisite. But if the law is in respect of a matter assigned to the legislature but its provisions disregard constitutional prohibitions, though the law would be unenforceable by reason of those prohibitions, when once they are removed, the law will become effective without re-enactment."

36. In *Saghir Ahmad Vs. The State of U.P. and Others*, AIR 1954 SC 728 : (1955) 1 SCR 707 , the Court examined challenge to the Constitutional validity of U.P. State Transport Act, 1951 under which the State was enabled to run Stage Carriage Service to the exclusion of others. In exercise of its power under the Act, the State Government made a declaration extending the Act to a particular area and frame a scheme for operation of stage carriage service on certain routes. At the relevant time, State did not have the power to deny citizen of his right to carry on transport service. However, after the Constitution (First) Amendment Act of 1951, the State became entitled to carry on any trade or business either by itself or through Corporation, owned or controlled by it, to the exclusion of private citizens wholly or in part. One of the question raised was whether Constitution (First) Amendment Act could be invoked to validate an earlier legislation. The Court held that the Act was unconstitutional at the time of enactment and therefore it was stillborn and could not be vitalized by a subsequent amendment of the Constitution removing constitutional objection and must be re-enacted. Hon''ble Mukherjea, J. speaking for the Court referred to Prof. Cooley in his work on "Constitutional Limitations" (Vol. I page 384) and said:

"a statute void for unconstitutionality is dead and cannot be vitalised by a subsequent amendment of the Constitution removing the constitutional objection but must be re-enacted."

37. The Hon''ble Court further observed that it is of the view that this is a sound law.

38. This view was reiterated in *Deep Chand v. The State of U.P. and others*, AIR 1958 SC 648, where the Court said that a plain reading of Article 13(2) indicates, without any reasonable doubt, that prohibition goes to the root of the matter and limits State's power to make law; the law made in spite of the prohibition is a stillborn law.

39. Again another Constitution bench in *Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others*, AIR 1963 SC 1019 : (1963) 1 SCR 912 Supp , reiterated the above view in para 22 of the report. It says.

"..it must be held that unlike a law covered by Art. 13(1) which was valid when made, the law made in contravention of the prohibition contained in Art. 13(2) is a still-born law either wholly or partially depending upon the extent of the contravention. Such a law is dead from the beginning and there can be no question of its revival under the doctrine of eclipse."

(emphasis added)

40. This view has been followed in *Rakesh Vij Vs. Dr. Raminder Pal Singh Sethi and Others*, AIR 2005 SC 3593 : (2005) 12 JT 1 : (2005) 141 PLR 676 : (2005) 8 SCALE 11 : (2005) 3 SCR 777 Supp : (2005) AIRSCW 4482 : (2005) 7 Supreme 345 .

41. Once a Rule is struck down as arbitrary, unreasonable and violative of Article

14, the effect is as if such a provision was never in effect, being "stillborn". Even if, in a given case, in subsequent amendment, there is a reference of such provision which has been struck down, yet it cannot be followed being non-est. The mere fact that before being struck down, it has been referred to in a subsequent amendment, would make no difference.

42. Respondents-authorities, in my view, therefore were not entitled to prepare list of candidates selected for appointment in accordance with Rule 14(3) of Fifteenth Amendment Rules, 2012, read with Appendix which has been referred to as Appendix-I in Sixteenth Amendment Rules, 2012, since the Appendix which has been subsequently referred to as Appendix-I in Sixteenth Amendment Rules, 2012, has rendered non-est. Rule 14(3) of Fifteenth Amendment Rules, 2012 in its entirety having been struck down by this Court as arbitrary and unreasonable, it disappears, as if, it never existed. Hence list prepared by taking into account aforesaid Appendix is clearly illegal.

43. The next question, which is though necessary but incidental, and of utmost importance arises whether Sub-rule (3) of Rule 14 as it stood before Fifteenth Amendment Rules, 2012 would stand revived or after striking down Rule 14(3) of Fifteenth Amendment Rules, 2012 it would result in a gap in the Rules requiring an appropriate legislation so as to bring on the Statute-book, valid Rule 14(3).

44. In *B.N. Tiwari Vs. Union of India (UOI) and Others*, AIR 1965 SC 1430 : (1965) 2 SCR 421 , question came up for consideration was, whether old Rule revives after substituted Rule is struck down. The Central Services Rules of 1952 provided for carry forward rule whereby unfilled reserved vacancies of a particular year could have been carried forward for one year. In 1955, the said Rules of 1952 were amended by substitution and another Rules providing that unfilled unreserved vacancies of a particular year can be carried forward for two years was brought in. 1955 amendment of Rule was declared ultra vires. The question was, whether this declaration would result in revival of 1952 Rules. A Constitution Bench said that 1952 Rules having already been repealed and substituted by 1955 Rules, after striking down of 1955 Rules, old Rule would not revive.

45. In *Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another*, AIR 1963 SC 928 : (1963) 2 SCR 435 Supp : (1963) 14 STC 355 , also the Court held, where an old Rule has been substituted by a new Rule, it ceases to exist and would not get revive when the new Rule is held invalid.

46. In *West Uttar Pradesh Sugar Mills Association and Others Vs. State of Uttar Pradesh and Others*, AIR 2002 SC 948 : (2002) 1 JT 619 : (2002) 2 SCALE 59 : (2002) 2 SCC 645 : (2002) 1 SCR 897 : (2002) 126 STC 190 : (2002) AIRSCW 644 : (2012) AIRSCW 1476 : (2002) 1 Supreme 537 , following the authorities in *B.N. Tiwari* (supra) and *A.T.B. Mehtab Majid and Co.* (supra) a three-Judge Bench also took the same view by showing its total agreement with the statement of law declared in the aforesaid decisions. The Court also said, if there would be still

a modification in existing law and subsequent modification is held to be void, it would mean as if earlier law has never been modified or repealed and may continue to be in force but where the earlier provision is repealed by substitution and another provision is brought in, earlier provision will not revive when subsequent provision is struck down. Para 15 of judgment in *West U.P. Sugar Mills Association* (supra) reads as under:

"15. It would have been a different case where a subsequent law which modified the earlier law held to be void. In such a case, the earlier law shall be deemed to have never been modified or repealed and, therefore, continued to be in force. Where it is found that the legislature lacked competence to enact a law, still amends the existing law and subsequently it is found that the legislature or the authority was denuded with the power to amend the existing law, in such a case the old law would revive and continue. But it is not the case here. It is not disputed that the State Government under Section read with Section of the Act, has power to frame rule prescribing the society commission. The State Government by substituting new Rule 49 never intended to keep alive the old rule. The totality of the circumstances shows that the old rule was deleted and came to be substituted by new Rule 49 and, therefore, we are of the view that after new Rule 49 ceased to be operative, the old Rule 49 did not revive."

(emphasis added)

47. When a provision is substituted by replacing another provision, substitution results in repeal of existing provision. Insertion of another provision brings the effect of replacement to new provision. When the Legislature substitute an existing provision by new one, it means it did not intend to keep alive old rule. There is a distinction between "supercession" and "substitution". "Substitution" has two steps. First the old rule is made cease to exist, and next, the new rule is brought into existence in its place, while supercession has single stroke of overriding the existing provision. This distinction has been discussed by a three-Judge Bench in *Koteswar Vittal Kamath Vs. K. Rangappa Baliga and Co.*, AIR 1969 SC 504 : (1969) 1 SCC 255 : (1969) 3 SCR 40 and followed in *Zile Singh Vs. State of Haryana and Others*, AIR 2004 SC 5100 : (2004) 8 JT 589 : (2005) 141 PLR 85 : (2004) 8 SCALE 659 : (2004) 8 SCC 1 : (2004) AIRSCW 5842 : (2004) 7 Supreme 385 .

48. Therefore, Rule 14(3) of Fifteenth Amendment Rules, 2012 having been struck down will not revive the earlier provision and Rule 14(3)(a) of Sixteenth Amendment Rules, 2012 having referred to a provision, i.e. Appendix, which has already been struck down, is inoperative and cannot be acted upon.

49. There is one more angle from which the matter can be examined. Rule 14(3) of Fifteenth Amendment Rules, 2012 was already struck down by Division Bench in *Shiv Kumar Pathak and others v. State of U.P. and others* (supra). Rule 14(3) (a) of Sixteenth Amendment Rules, 2012 in all respects is *pari-materia* to Rule 14(3). Therefore, the reasons which impelled this Court to declare Rule 14(3),

Fifteenth Amendment Rules, 2012 ultra vires equally apply to Rule 14(3)(a) and (b) of Sixteenth Amendment Rules, 2012 also. I have no hesitation in my mind that for the reasons contained in Shiv Kumar Pathak and others v. State of U.P. and others (supra), Rule 14(3) of Sixteenth Amendment Rules, 2012 also cannot be sustained and it is also arbitrary and ultra vires.

50. In view of the above, Writ Petitions No. 57476 of 2013 and 28003 of 2015 are allowed partly. Respondents are directed to prepare the list of candidates under Rule 14 of Rules, 1981 afresh, in accordance with law and thereafter proceed to make appointment accordingly.

51. Writ Petition No. 28977 of 2015 is disposed of with the direction that in case petitioner's name finds place in the list now re-prepared by respondents in the light of this judgment in First and Second Petition, respondents shall proceed to make appointment of petitioner without any further delay.

Group-B:

52. Writ Petition No. 58712 of 2013 (hereinafter referred to as "First Petition, Group-B") is at the instance of two petitioners, namely, Jayant Kumar Singh and Pramod Kumar, who have sought a writ of certiorari for quashing Notification dated 29.8.2013 published in daily newspaper dated 30.8.2013 for appointment of 151 Assistant Teachers of Maths and 151 Assistant Teachers of Science in Sr.P.S. (i.e. the Junior High School) and to declare the amendment made in Rule 5 providing 50 per cent recruitment by promotion and 50 per cent by direct recruitment as ultra vires on the ground that amendment is harsh, unjust and otherwise illegal being discriminatory.

53. Writ Petition No. 62241 of 2013 (hereinafter referred to as "Second Petition, Group-B") has been filed by four petitioners, namely, Sabarjeet Verma, Arun Kumar Singh, Manik Chandra Patel and Ram Ashraya Yadav, seeking a writ of certiorari for quashing GO dated 11.7.2013 insofar as it proceeds for recruitment of Assistant Teachers in Sr.P.S. by direct recruitment. The basic contention is that under Rules, 1981, earlier, recruitment on the aforesaid post of Assistant Teachers, Sr.P.S. was solely on the basis of promotion but by means of amendment, now 50 per cent vacancies have been made available for direct recruitment and only 50 per cent are available for promotion. This reduction in number of vacancies available for promotion is arbitrary and illegal. It is said that this amendment made by Sixteenth Amendment Rules, 2012 is bad.

54. Writ Petition No. 50787 of 2013 (hereinafter referred to as "Third Petition, Group-B") is at the instance of five petitioners, Satya Prakash Singh, Sanjay Kumar Dwivedi, Gyan Prakash Yadav, Anil Kumar Singh and Archana Kumari, who have challenged the advertisement dated 30.8.2013 published in daily newspaper "Amar Ujala" for making recruitment on the post of Assistant Teacher, Sr.P.S. in Science Group by way of direct recruitment. They have also assailed the GO dated 11.7.2013 as ultra vires to Rule 5 of Rules, 1981 providing for direct recruitment on the aforesaid post and they have sought a mandamus,

commanding respondents to proceed to make appointment only by promotion on the aforesaid posts.

55. For the purpose of having brief facts, with the consent of learned counsels for parties, I have taken Writ Petition No. 58712 of 2013 as leading case. In this writ petition, two petitioners, namely, Jayant Kumar singh and Pramod Kumar, both were appointed as Assistant Teacher in Jr.P.S. in 2006 and 30.12.2005 respectively. Under Rules, 1981, they were entitled to be considered for promotion to the post of Assistant Teacher, Sr.P.S. or Head Master, Jr.P.S after acquiring eligibility. District Basic Education Officer, Chandauli determined 151 vacancies of Assistant Teachers in Sr.P.s. for Science and 151 vacancies of Assistant Teachers in Sr.P.S. for Maths which were to be filled in by promotion. He initiated selection process by issuing Notification dated 13.8.2013 published in Daily News Paper "Dainik Jagran". All eligible and qualified candidates were to attend counseling at District Institute of Education and Training (DIET), Chandauli on 16.8.2003. When they reached the venue, it was informed that counseling has been cancelled and next date shall be informed but none was informed. Instead, another Notification dated 29.8.2013 was published for recruitment of 151 Assistant Teachers (Science) and 151 Assistant Teachers (Maths) in Jr.P.S. by direct recruitment. The aforesaid advertisement/Notification dated 29.8.2013 published in Daily Newspaper "Dainik Jagran" on 30.8.2013 has been issued pursuant to GO dated 11.7.2013 whereby Rules 5 and 8 of Rules, 1981 have been amended, providing 50 per cent posts to be filled in by promotion and 50 per cent by direct recruitment, though earlier all these posts of Assistant Teachers, Sr.P.S. were available for promotion only. Consequently, it is contended that this amendment in the Rules is arbitrary and violative of Articles 14 and 16.

56. It is, however, not disputed that Rule 5 was amended vide Notification dated 30.8.2012 and when advertisement dated 13.8.2013 was issued, this amendment of Rule 5 was not noticed. In fact, in ignorance of amendment of Rule 5, the authority issued notice of vacancies to be filled in by promotion, but did not proceed when this omission came to their knowledge.

57. Basic contention of learned counsel appearing in these three writ petitions (Group-B) is that alteration in the source of recruitment and to the extent recruitment is to be made from particular source is illegal and arbitrary inasmuch petitioners on the date of appointment in feeder cadre, i.e., Assistant Teacher, Jr.P.S. had a right to be considered for promotion to all the posts of Assistant Teachers available in various Sr.P.S. by way of promotion and that right stood vested in them which cannot be divested by reducing the number of vacancies of Assistant Teacher, Sr.P.S. available to Teachers in feeder cadre. Now it has been reduced from 100 per cent to 50 per cent.

58. In view of the above, the question, which has to be considered, is "whether an employee has a vested right in respect of quota determined for promotion in the higher post"; and, "whether the rule framing authority cannot change the



extent and strength of promotion quota by exercising power of amendment of Rules".

59. A perusal of Rules, 1981 as amended vide Fifteenth Amendment Rules, 2012 makes it clear that Rule 5 has now been substituted by another Rule 5 and it reads as under:

60. Whether this substitution and alteration in the source of recruitment is permissible? Instead of 100 per cent promotion on the post of Assistant Teacher, Sr.P.S. now 50 per cent shall be recruited by promotion and rest 50 per cent by direct recruitment whether it affects any vested right? In my view, none of the fundamental rights have been infringed nor any vested right has been divested.

61. The contention pre-supposes that an employee has a vested right to be governed by Rules as they stand on the date of his entry in service and rule framing authority would have no power to make amendment in the Rules in one or the other manner. Once the power of legislation is there, it can be exercised from time to time which includes new legislation or replacement of entire existing legislation by a new one. In the present case, Rule 5, as it stood earlier, provided for only source of recruitment on the post of Assistant Teacher, Sr.P.S. "by promotion". Now the rule framing authority has made a change that only 50 per cent shall be recruited by promotion and remaining 50 per cent by direct recruitment. An employee working in feeder cadre wherefrom promotion is to be made on higher post, has no vested right in respect to number of posts in higher cadre to be filled in from any particular source of recruitment. The reason being that the right conferred by Article 16 is only a fundamental right of consideration for promotion and not chance of promotion. Whenever, vacancy in higher cadre is available and under the Rules is liable to be filled in by promotion, it shall be filled in accordingly, but it cannot be said that rule framing authority cannot make any alteration with respect to quota to be determined by Rules.

62. In *Dwarka Prasad and Others Vs. Union of India (UOI) and Others*, AIR 2003 SC 2971 : (2003) 6 JT 113 : (2003) 5 SCALE 461 : (2003) 6 SCC 535 : (2003) SCC(L&S) 941 : (2003) 1 SCR 784 Supp : (2004) 1 SLJ 376 : (2003) AIRSCW 3626 : (2003) 5 Supreme 166 , the Court said:

"Articles 14 and 16 of the Constitution of India cannot be pressed into service to describe the fixation of lower quota for POs as discriminatory. It is well established in law that the right to be considered for promotion on fair and equal basis without discrimination may be claimed as a legal and a fundamental right under Article 14 & 16 of the Constitution but chances of promotion as such cannot be claimed as of right."

(emphasis added)

63. In *Reserve Bank of India Vs. N.C. Paliwal and Others*, AIR 1976 SC 2345 : (1976) 4 SCC 838 : (1977) 1 SCR 377 : (1976) 1 SLJ 569 , there was a integration of non clerical with clerical service. It was challenged as infringing the

principles of equality. Court held that it is entirely a matter of State to decide to have the several different cadres or one integrated cadre in its service. That is a matter of policy which does not attract the applicability of equality clause.

64. In *State of Mysore v. G.B. Purohit*, 1967 SLR 753, the Court said that though a right to be considered for promotion is a condition of service, mere chances of promotion are not and that a rule which merely affects chances of promotion cannot be regarded as varying a condition of service.

65. In *Mohammad Shujat Ali and Others Vs. Union of India (UOI) and Others*, AIR 1974 SC 1631 : (1974) LabIC 1103 : (1976) 2 LLJ 115 : (1975) 3 SCC 76 : (1975) 1 SCR 449 , a Constitution Bench said that mere chance of promotion is not a condition of service.

66. Here by altering the number of vacancies available for promotion by making amendment in Rules, only chances of promotion have been affected and not the right of promotion. Therefore, basic contention, in my view, stands on a fallacy and has to be rejected outright. No authority has been cited in favour of proposition that such alteration by amendment in Rules is not possible.

67. By amending Rules, the right to be considered for promotion to the post of Assistant Teacher, Sr.P.S. has not been denied at all but what the Rule provides is that availability of vacancies to higher post now stands reduced to 50 per cent, meaning thereby, it is the chance of promotion which has been affected and not the right of promotion. Besides, it is not the case that the Rule framing authority otherwise has any incompetency in framing the Rules, therefore, by amending Rules and changing source of recruitment by providing 50 per cent by direct recruitment and 50 per cent by promotion, in my view, no invalidity has been brought in Rules and Rule 5 cannot be said to be bad in law in any manner.

68. All these writ petitions, therefore, have no substance and deserve to be dismissed.

Group-C:

69. The two writ petitions in Group-C, i.e., Writ Petitions No. 57236 of 2013 and 2999 of 2015 are founded on patently fallacious submissions.

70. It is contended that in Sr.P.S., the post of Assistant Teacher should not be advertised subject wise. The submission is thoroughly misconceived. It cannot be doubted that in Sr. P.Sc., specified subjects are taught to students. The Teachers, who have no knowledge of Science or Maths cannot be expected to teach students in the subjects of Maths and Science with appropriate efficiency. Therefore, the contention that recruitment cannot be made subjectwise is wholly misconceived. In Writ Petition No. 2999 of 2015, an attempt has been made to read the words "Subject Teachers" as constituting a single group irrespective of the subject. It is urged that it should be treated in contradiction with "Language Teachers". Here also purposive reasonable interpretation has to be given. The rule framing authority has divided, broadly the category of Teachers as Language

Teachers, like, Hindi, Urdu, Sanskrit, English; and, for remaining subjects, it has used the words "Subject Teachers". This Court does not find any justification to read that for all subjects other than languages, there is no scope under Rules for making any distinction and even if the Teachers are required for imparting education in Science and Maths, recruitment can be made without specifying the aforesaid subjects and by recruiting persons who have no knowledge, whatsoever, in Maths and Science and are not competent at all to teach those subjects. These writ petitions, therefore, have no merit and deserve to fail.

#### Group-D:

71. The sole writ petition in Group-D is Writ Petition No. 15541 of 2015. It has been filed by 5 petitioners, namely, Rohit Kumar, Arvind Kumar, Mukesh Kumar Yadav, Buddhi Lal and Shailendra Kumar, seeking a mandamus directing respondents not to allow counselling to such professional degree holders, who are not eligible as per advertisement/notification dated 23.8.2013, as clarified by Secretary, Basic Education Board in its affidavit filed before Lucknow Bench of this Court in Writ Petition No. 5348 of 2013 and to exclude such candidates from the zone of consideration. It is suggested that the candidates possessing degree of B.Sc. (Agriculture), B.Tech., B.C.A., B.B.A., BUMS, MHMUS and B. Pharma are not eligible to apply for the post of Assistant Teacher in Sr.P.S. since these are professional degrees and cannot be treated to be Science graduation degree so as to make them eligible to participate in the aforesaid selection. Names of some of candidates are given in para 24 of the writ petition, though none of them has been made party in the writ petition.

72. I find basic submission absolutely fallacious and misconceived. Though degrees of B.Sc. (Agriculture), B.Tech., B.C.A., B.B.A., BUMS, MHMUS and B. Pharma etc. provide education in certain fields making the incumbents professional in a particular aspect, and, therefore, they are called "professional course", but it cannot be doubted at all that these all are bachelor degrees and, therefore, those, who possess these qualifications, are graduates in those disciplines. It, thus, cannot be said that when requirement is graduation, professional courses can be excluded. It is nothing but reading something which is not provided in the Rules, which, in my view, is neither permissible nor there is any compulsion to do so. In view thereof, this writ petition, in my view, lacks merits and deserves to be dismissed.

#### Group-E:

73. Now coming to sole writ petition in Group-E, i.e., Writ Petition No. 628 of 2015, here the question of benefit of reservation has been raised. It is said that those who have passed TET examination, taking advantage of reservation with lower marks cannot be considered against vacancies available for general category advertised for recruitment under Rules, 1981.

74. In my view, the submission is thoroughly misconceived.

75. TET examination is one of the qualifications. At the time of obtaining qualification, if some concessions are provided to the candidates belong to Other Backward Classes, Scheduled Castes or Scheduled Tribes, etc. as are permissible under Article 15(3) and 16(3)(4) read with Article 14, it cannot be said that those concessions will debar those candidates to participate in a recruitment process against general vacancies. Earlier benefit was only in the context of acquiring qualification, and rest is a matter of contest in recruitment and appointment availing equal opportunity of employment or as provided in the Rules for reserved category candidate. Recruitment commences with advertisement. Before that, while acquiring any qualification or eligibility test, if some concession have been availed by reserved category candidates, that will not deprive them of opportunity to contest for unreserved vacancies in the recruitment. The distinction in respect of eligibility conditions, qualifications and the concessions available therefor and the benefit of reservation in recruitment has been discussed in detail by a Division Bench of this Court in Sanjeev Kumar Singh Vs. State of U.P. and Deputy Inspector General of Police (Establishment) and Secretary Police, P.A.C. Selection Board and appellate judgment of Apex Court in Jitendra Kumar Singh and Another Vs. State of U.P. and Others, AIR 2010 SC 1851 : (2010) 1 JT 177 : (2010) 1 SCALE 358 : (2010) 3 SCC 119 : (2010) 1 SCC(L&S) 772 : (2010) 2 SLJ 108 : (2010) 1 SLR 526 .

76. In view thereof, the mere fact that some of the candidates have passed TET examination having benefit of reserved category candidates, cannot be treated to be an identity of those candidates to deny them participation in recruitment for the post of Assistant Teacher in question against general vacancies since it is a different phenomena and procedure vis-?-vis the TET examination. Holding of TET examination was not under Rules, 1981 while recruitment under Rules, 1981 commences with the advertisement and, therefore, it is different entirely.

77. In view thereof, I find no merits in this writ petition also and it deserves to be dismissed.

78. However, before parting, this Court finds something necessary to be said with respect to primary education in the State and shabby manner it is being dealt with by the Department and Officers responsible therefor which has resulted in multiple litigation also. It is a matter of common knowledge that basic education in State of U.P. is being administered through the Department of Basic Education, which is under the Secretary (Basic Education) and is under a separate ministry. Annual budget allocation for maintaining basic schools recognized by U.P. Board of Basic Education (hereinafter referred to as "Board") under the provisions of U.P. Basic Education Act, 1972 (hereinafter referred to as "Act, 1972") is one of the highest budgetary allocations. The total number of Primary Schools, i.e. Jr.P.S. and Sr.P.S. is around 1.4 lacs which are maintained by Board. The number of teaching staff and Head Masters, therefore, also come to be in lacs. Division Bench judgment in Shiv Kumar Pathak and others v. State of U.P. and others (supra) has noticed that about 2.70 lacs posts of Assistant Teachers in Primary

Schools run by Board are lying vacant. That was in November" 2013. The recruitment of thousands of posts at a time used to commence but got trapped in huge litigation due to unmindful, irregular and casual approach of the official(s) responsible for managing such recruitment, lack of accountability and credibility as well as sincerity. Unmindful and casual legislation by way of frequent amendment of Rules has worsened the situation.

79. Today, judicial cognizance can be taken of the fact that there are three categories of Primary Schools running in the State of U.P., imparting education to minor children of this State. One of such categories, which is catering to the need of almost 90 per cent of the population of minor children are run by Board and in the most shabby conditions.

80. There are a very few number of Primary Schools run by elite and highly privileged category of people which are branded public schools. Some English/Convent Schools are run by Christian minority wherein children of poor and lower-middle class have virtually negligible scope. This category of Schools basically cater to the need of highly rich people, high class Bureaucrats, Ministers, peoples" representatives, like, Members of Parliament, Members of Legislative Assemblies and high-middle class people. The wards of a limited class of elite society can get education therein. Most of the people cannot meet even financial standards of fees. Admission standards are very strict and mostly available due to high resources. These Schools have best kind of infrastructures, tutorial staff and all other facilities. These Schools can be termed as "Elite Schools".

81. In the second category comes, those Primary Schools which are run by normally some private bodies or individuals, catering to wards of lower middle class. Though infrastructure in these Schools is not so sophisticated and ultra modern as that of Elite Schools, still is much better and comparatively even tutorial staff is sufficiently good. They may be termed "Semi-Elite Schools".

82. However, in the third category comes almost all Primary Schools run and managed by Board under its administration. These can be termed as "Common-men"s Schools". They are the Schools, who cater to the entire category of rural class, urban rural class and those who cannot afford expenses of other two categories. The number of students therein constitute almost 90 per cent population of minor children in the State. The real catch lies here.

83. The Constitution has now recognized primary education as a fundamental right for children from 6 to 14 years of age, i.e., virtually upto Class-VIII. In the name of discharge of this constitutional obligation, as already said, more than 1.25 lac and odd Jr.P.S. and Sr.P.S. are being run by Board of Basic Education, for which funds are provided by State. The education in these Schools is supposed to be free, but that is how every thing is free. Virtually a complete lack of infrastructure one can find in these Schools. After more than 65 years of independence, these Schools are still struggling to have basic amenities for children, coming thereat, like drinking water, space for natural calls etc. Even

classrooms are in extremely shabby and bad conditions. At many places, classes are being run in open space. The structure, if any, is in dilapidated condition. Though huge money is being invested and spent every year in the name of welfare, of basic education to the wards of poor people but actually nothing has improved. It is not difficult to understand, why conditions of these Schools has not improved. The reason is quite obvious and simple, though the State Government is not able to see. There is no real involvement of administration with these Schools. Any person who has some capacity and adequate finances, sends his child/children in Elite and Semi-Elite Primary School. They do not even think of sending their wards for primary education to Schools run and managed by Board. Whether it is the District Collector or Police Chief in the District or any other Government Servant, they ensure that their children should get primary education in Primary Schools having better infrastructure and other facilities which obviously belong to first and second categories of Primary Schools, as noted above and completely exclude third category Schools, i.e. Common-men's Schools. The public administration therefore has no actual indulgence to see functioning and requirements of these schools. These schools have become a mode of earning political mileage instead of real catering to its need.

84. The common men's schools cater the need of Primary Education to only those poor people, whom Hon'ble Mr. Justice Krishna Iyer once said, "tiny million Indians", who find it difficult to make arrangement for two times of meals what to talk of other things. Whatever is made available by system they have no choice but to avail it in conditions "as and where it is". The Government at the level of State and Central, both, are harping every time and almost very frequently on the need of improved Primary School, but their intention has not resulted in execution and reality at grass root level.

85. The hard real fact is that these institutions, run by Board of Basic Education, are victim of highest level of misappropriation, maladministration and widespread corruption. Standard of teaching is the biggest casualty. Nobody cares for making improvement in the standard of tutorial staff. A competition is going on for political reasons to make lacs of vacancies available in Primary Schools as a source to create committed voters by appointing persons, if not illiterate, but not really competent to teach children of Primary School. A competition is going on to somehow get such persons appointed as teachers in these schools whom they would not like at all to teach their own children. Initially, after making statutory rules under Act, 1972, in 1975, 1978 and 1981, the State tried to fill up the gap of teachers vacancies by appointing much lesser qualified persons i.e. Shiksha Mitra, Anganbari Karyakatri etc. A persistent effort is going on now to absorb these persons as Teachers in Primary Schools run by the Board, if necessary, even by frequent amendments in Rules, without caring but compromising with standard. Is State not answerable to the people at large that competent Teachers should be appointed in Primary Schools by those who are administering institutions so as to make such institutions at par with those where they like to have their wards taught. Since bureaucrats, politicians, rich people and others,

all have their alternative channel by having their wards taught in Primary Schools falling in the category of Elite and Semi-Elite, nobody cares of the standard to be maintained in Primary Schools of the Board.

86. A competition is going on to bring standard of Common-men's Schools down, as much as possible. In my view, now the time has come where immediate attention need be drawn for improvement, not only of infrastructure in these institutions but first of all in respect of teaching staff. That is the basic purpose for which the entire system of Basic Education is, consuming huge public money from public exchequer. The time has come where State must make it compulsory to all those who gets salary, perks and other benefits from State exchequer to have their wards sent to Primary Schools maintained by Board which I have termed Common-men's Schools and not to Schools which, come in the category 1 and 2, i.e., Elite and Semi-Elite and are privately managed. In case, any one flouts this condition, a penal provision should also be made. It is only then the improvement of these institutions will be ensured by those who are responsible for its management in a proper way. It will also boost social equation. It will give an opportunity to children of common men to interact and mix-up with children of so-called high or semi high society, giving them a different kind of atmosphere, confidence and other opportunities. This would give a boost and bring revolution in changing Society from grass root level. The initial level mixing among all children will have a different consequences.

87. Moreover, when Officials/Government servants would be required to send their wards for primary education in institutions maintained by the Board, they would become serious enough to look into the requirements of concerned Primary Schools and would ensure that same are made available and Schools are run in good/best conditions and standard, else it may affect their own wards.

88. It is the lack of accountability and casual approach on the part of officials of Basic Education Department that mindless, negligent, casual amendments in Rules; defective Government Orders have been issued from time to time creating cause for multifarious litigations resulting not only in delay in appointment of Primary Teachers but also a very heavy pressure on this Court also. Had a little care been there on the part of responsible Officers in making legislation for making recruitment, huge litigation resulting in lacs of vacancies in Primary Schools maintained by Board would not have caused.

89. Therefore, the Chief Secretary, U.P. Government is directed to take appropriate action in the matter in consultation with other Officials, responsible in this regard, to ensure that the children/wards of Government servants, semi-Government servants, local bodies, representatives of people, judiciary and all such persons who receive any perk, benefit or salary etc. from State exchequer or public fund, send their child/children/wards who are in age of receiving primary education, to Primary Schools run by Board, He shall also ensure to make penal provisions for those who violate this condition; for example, if a child is sent to a Primary School not maintained by Board, the amount of fee etc. paid

in such privately managed Primary School, an equal amount shall be deposited in the Government funds, every month, so long as such education in other kind of Primary School is continued. This amount collected can be utilised for betterment of schools of Board. Besides, such person, if in service, should also be made to suffer other benefits like increment, promotional avenues for certain period, as the case may be. This is only illustrative. The appropriate provisions can be made by Government so as to ensure that ward(s)/child/children of persons, as detailed above, are compelled necessarily to receive primary education in the Primary Schools run by Board.

**Result:**

90. In the result, subject to directions as contained above, Writ Petitions No. 57476 of 2013 and 28003 of 2015 are partly allowed. Respondents shall re-prepare the list of candidates under Rule 14 of Rules, 1981 in accordance with law and in the light of observations made above and, thereafter proceed to make appointment accordingly.

91. Writ Petitions No. 58712 of 2013, 62241 of 2013, 50787 of 2013, 57236 of 2013, 2999 of 2015, 15541 of 2015 and 628 of 2015 are dismissed.

92. Writ Petition No. 28977 of 2015 is disposed of with the direction that in case petitioner's name finds mention in the list now prepared by respondent in the light of this judgment passed in First and Second Petition, Group-A, respondents shall proceed to make appointment of petitioner without any further delay. With regard to directions contained in Para 90, effective steps shall be taken by Chief Secretary within six months so as to make the aforesaid directions effective from the next academic session of Primary Schools, and, a compliance report shall be submitted to this Court by way of affidavit immediately after expiry of period of six months.