

**(2015) 09 AHC CK 0094**

**In the Allahabad High Court**

**Case No :** Civil Misc. Writ Petition Nos. 34833 of 2014, 32572 of 2014, 46000 of 2014, 58363 of 2015, 50574 of 2014, 53568 of 2014, 21180 of 2015, 23902 of 2015, 29674 of 2015, 44625 of 2015, 49108 of 2015, 49118 of 2015, 49123 of 2015, 49132 of 2015, 49136 of 2015,

Shivam Rajan and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

**Date of Decision :** 12-09-2015

**Acts Referred:**

Constitution of India, 1950 — Article 14, 16, 162, 21A, 21-A  
National Council for Teacher Education Act, 1993 — Section 12, 12A, 12-A, 16(3)(d), 2(1)  
Right of Children to Free and Compulsory Education Act, 2009 — Section 1(3), 12, 2, 2(1), 2(c)  
Uttar Pradesh Basic Education Act, 1972 — Section 11, 11(2)(g), 13, 13(1), 19

**Citation :** (2015) 3 UPLBEC 2297

**Hon'ble Judges :** D.Y. Chandrachud, C.J., Dilip Gupta and Yashwant Varma, JJ.

**Bench :** Full Bench

**Advocate :** Ashok Khore, Senior Advocate, Siddharth Khare, Saumya Mandhyan, Arvind Srivastava, Rahul Agarwal, Ashok Kumar Dubey, Himanshu Raghav, Indrasen Singh Tomar, Tarun Agrawal, Anand Nandan, Man Bahadur Singh, Navin Kumar Sharma and Neeraj Tiwari, for the Appellant; C.B. Yadav, Addl. Advocate General and Shashank Shekhar Singh, Addl. C.S.C., for the Respondent

**Final Decision :** Disposed Off

## Judgement

Dr. D.Y. Chandrachud, C.J.

1. This Full Bench has been constituted in pursuance of an order dated 27.7.2015 of the Hon'ble Supreme Court in State of Uttar Pradesh v. Shiv Kumar Pathak, [Civil Appeal Nos. 4347-4375 of 2014 and I.A. Nos. 2 and 3 in writ petition (Civil) No. 167 of 2015] and connected cases. The Supreme Court directed that all matters before the High Court of Judicature at Allahabad, both at Allahabad and Lucknow, relating to Shiksha Mitras shall be heard by a Full Bench at Allahabad. In pursuance of the order passed by the Supreme Court, the Writ Petitions

relating to Shiksha Mitras which were pending before the Lucknow Bench have been transferred to Allahabad in pursuance of the provisions of Clause 14 of the United Provinces High Courts (Amalgamation) Order, 1948.

## II Scope of the challenge

In the leading writ petition, [Writ A No. 34833 of 2014], the relief which has been sought, is for setting aside two notifications which were issued on 30.5.2014 by the Government of Uttar Pradesh for notifying the Uttar Pradesh Right of Children to Free and Compulsory Education (First Amendment) Rules, 2014 [RTE Rules of 2014] and the Uttar Pradesh Basic Education (Teachers) Services (Nineteenth Amendment) Rules, 2014 [Services Rules of 2014]. By and as a result of the amendment, Rule 16-A was introduced into the Rules framed by the State Government under the Right of Children to Free and Compulsory Education Act, 2009, [RTE Act of 2009] called the Uttar Pradesh Right of Children to Free and Compulsory Education Rules, 2011 [UPRTE Rules of 2011], to reserve to the State Government the power to relax the minimum qualifications prescribed for the appointment of Assistant Teachers in junior basic schools in the case of Shiksha Mitras for the purpose of their appointment in regular service. The second amendment which has been made by the State Government has the effect of amending the Uttar Pradesh Basic Education (Teachers) Services Rules, 1981 [Service Rules of 1981]. By the amendment, the State Government has enabled the appointment of Shiksha Mitras who were working on the date of commencement of the amended Rules into regular service as Assistant Teachers of junior basic schools. The reliefs which have been sought also include a challenge to a Government Order dated 7.2.2013 issued by the Principal Secretary, contemplating the absorption into service, of Shiksha Mitras working in junior basic schools in phases covering a total of 1,24,000 graduate Shiksha Mitras and 46,000 Shiksha Mitras who have completed the intermediate qualification. There is also a challenge to a further Government Order dated 19.6.2014 implementing the decision of the State Government to absorb Shiksha Mitras into regular service.

III. For convenience of exposition, the judgment has been divided into the following parts:

"(i) PART A : The legislative, regulatory and administrative framework

(ii) PART B : Submissions

(iii) PART C : Analysis

(iv) PART D : Operative orders"

PART A : The legislative, regulatory and administrative framework

The resolution of the controversy before the Court turns upon the relevant legislation, both Central and State, holding the field and the rules and notifications. It, is upon the interpretation of the regulatory framework that the

dispute would turn.

#### A1 Uttar Pradesh Basic Education Act, 1972

2. The Uttar Pradesh Basic Education Act, 1972 (Act of 1972) was enacted by the state legislature for the purpose of re-organising, reforming and expanding elementary education and, with that purpose in view, to enable the State Government to rest control over elementary education from Zila Parishads in rural areas and Municipal Boards and Mahapalikas in urban areas while vesting it in the Board of Basic Education. The expression "basic education" is defined in Section 2(b) to mean education upto the eighth class, imparted in schools other than high schools or intermediate colleges. By Section 4(1), the Board is vested with the function of organising, coordinating and controlling the imparting of basic education and teachers' training for the purpose of basic education in the State. Among the powers which are conferred by sub-section (2) upon the Board, is the power in clause (a) to prescribe courses of instruction and teachers' training in basic education and in clause (b) to conduct basic training certificate examinations.

3. The Act was amended by UP Act No. 18 of 2000 to introduce the provisions of Sections 9-A and 10-A and for the substitution of Section 10. As a result of the introduction of Section 9-A, control over teachers and properties of basic schools at the administrative level is entrusted to the gram panchayats or, as the case may be, municipalities within whose territorial limits each basic school is situated. Substituted Section 10, which defines the functions of Zila Panchayats and Section 10-A, as inserted, confers upon the Municipalities, certain statutory duties and functions in regard to basic education in the district or, as the case may be, the municipal area. Under Section 11, for each village or group of villages for which a gram panchayat is established under the UP Panchayat Raj Act, 1947, a Village Education Committee is contemplated to be established consisting of the Pradhan of the Gram Panchayat as its Chairperson. The Village Education Committee is conferred with the statutory function under sub-section (2)(a) to establish, administer, control and manage basic schools in the panchayat area and under clause (g) such other functions pertaining to basic education as may be entrusted by the Government. Section 19 vests a rule-making power in the State Government which comprehends, among other things, in clause (c) of sub-section (2) the power to frame rules in respect of the recruitment and conditions of service of persons appointed to posts of teachers and other employees of basic schools recognised by the Board.

#### A2 Uttar Pradesh Basic Education (Teachers) Service Rules, 1981

4. In exercise of the powers conferred by Section 19(1) of the Act of 1972, the Service Rules of 1981 were published on 3.1.1981. Under Rule 2(1)(b), the appointing authority in relation to teachers referred to in Rule 3 is defined to mean the District Basic Education Officer. A junior basic school under Rule 2(1)(h) is defined to mean "a basic school where instructions from classes I to V are

imparted". A senior basic school under Rule 2(1)(m) is a basic school where instructions from classes VI to VIII are imparted. Basic school comprehends a school imparting instructions from classes I to VIII. The expression "teacher" has been defined in Rule 2(1)(o) to mean " a person employed for imparting instructions in nursery schools, basic schools, junior basic schools or senior basic schools. The Rules incorporate a definition of "training institution" under Rule 2(1)(p) "as an institution imparting training for recognized certificate courses of teaching.

5. Part II of the Rules, of 1981 makes provisions for cadre strength. Rule 4(1) contemplates that there shall be separate cadres of service under the Rules for each local area which is defined under clause (i) of sub-section (1) of Section 2 to mean the area over which a local body exercises jurisdiction. Under sub-rule (2) of Rule 4, the strength of the cadre of the teaching staff pertaining to a local area and the number of posts in the cadre are to be such, as may be determined by the Board from time to time with the previous approval of the State Government. The Board of Basic Education is empowered, with the previous approval of the State Government, to create temporary posts.

6. Part III of the Rules of 1981 relates to recruitment. Rule 5 provides for the sources of recruitment and mode of recruitment to various categories of posts. Insofar as the present controversy is concerned, Rule 5(a)(ii) provides for recruitment of Assistant Masters and Assistant Mistresses of junior basic schools by direct recruitment as provided in Rules 14 and 15.

7. Qualifications for teachers of basic schools are defined in Part IV which, in Rule 6, provides for age. Provisions exist for the extent of relaxation in the case of candidates belonging to Scheduled Castes, Scheduled Tribes, Backward Classes, dependents of freedom fighters and ex-servicemen. Rule 8 deals with academic qualifications and is in the following terms:

"8. Academic qualifications.--(1) The essential qualifications of candidates for appointment to a post referred to in clause (a) of Rule 5 shall be as shown below against each:

8. Rule 8(1), as it was originally framed, provided that for appointment of an Assistant Teacher in a junior basic school, the required academic qualification was the intermediate of the Board of High School and Intermediate Education or a qualification recognised by the Government as equivalent and a training qualification consisting of a basic teacher's certificate or any other training course recognised by the government as equivalent (including Hindustani Teacher's Certificate, Junior Teacher's Certificate and Certificate of Training). The provisions of Rule 8(1) were modified by the State Government by an amendment to the Rules which came into force with effect from 9.7.1998. As modified, the intermediate qualification was substituted by a Bachelor's degree.

9. Rule 9 provides for reservations for candidates belonging to Scheduled Castes, Scheduled Tribes, Backward Classes, dependents of freedom fighters, ex-

servicemen and other categories in accordance with legislation in Uttar Pradesh and orders issued by the State Government issued from time to time. Under Rule 10, a provision for relaxation in the maximum age limit, educational qualifications and procedural requirements of recruitment are contemplated in the following terms:

"10. Relaxation for ex-servicemen and certain other categories.--Relaxation, if any, from the maximum age-limit, educational qualifications or/and any procedural requirements of recruitment in favour of the ex-servicemen, disabled military personnel, dependents of military personnel dying in action, dependents of Board's servants dying in harness and sportsmen shall be in accordance with the general rules or order of the Government in this behalf in force at the time of recruitment."

10. The Rules of 1981 make elaborate provisions in regard to the procedure for recruitment. Rule 14 requires the appointing authority, while making appointments by direct recruitment to posts of Assistant Teachers in junior basic schools, to determine the number of vacancies, vacancies set apart for reserved categories under Rule 9 and to notify the vacancies to the employment exchange, besides publication in at least two newspapers with an adequate circulation in the State and in the district concerned inviting applications from candidates possessing the prescribed training qualification from the district. Under sub-rule (2), the appointing authority is required to prepare a list of such persons who appear to possess the prescribed academic qualification and are eligible for appointment, from the applications received in pursuance of the advertisement or from the Employment Exchange. Under sub-rule (3), names of candidates are required to be arranged in such manner that a candidate who has passed the required training course earlier in point of time shall be placed higher, candidates having passed the training course in a particular year being required to be arranged in accordance with the quality points. Under Rule 16, a Selection Committee is constituted consisting of the Principal of the District Institute of Education and Training [DIET] as Chairperson and other members including the District Basic Education Officer. A separate procedure for recruitment to a teaching post in respect of a language is provided in Rule 17(1) where a written examination is contemplated. Under Rule 19, the appointing authority is required to make appointment to any post referred to in Rule 5 by taking the names of candidates in the order in which they stand in the list prepared under Rule 17. Hence, no appointment can be made except on the recommendation of the Selection Committee and in the case of direct recruitment only upon the production of a residence certificate. Rule 22 envisages the seniority of a teacher in a cadre as determined by the date of appointment in a substantive capacity. Rule 23 contemplates the appointment of all persons in a substantive vacancy on probation for a period of one year and a confirmation in service under Rule 24 subject to fitness and certification of integrity. Rule 25 provides for scales of pay in respect of persons appointed in a substantive or officiating capacity or as a temporary measure as may be determined by the government from time to time.

The manner in which quality points are to be computed is laid down in the Appendix to the Rules. Hence, in the Rules of 1981, comprehensive provisions were made by the rule-making authority while framing the subordinate legislation for prescribing the appointing authority, the unit of appointment, qualifications, determination of vacancies, extent of reservation, the procedure for recruitment and scales of pay, among other things.

#### A3 National Council for Teacher Education Act, 1993

11. On 29.12.1993, the National Council for Teacher Education Act, 1993 [NCTE Act] enacted by Parliament, received the assent of the President and was published in the Gazette of India on the following day. For the purpose of these proceedings, it would be necessary to understand the ambit of the NCTE Act of 1993 and RTE Act of 2009 which was enacted sixteen years later by Parliament. The scope of the NCTE Act, as its preamble indicates, is to establish a National Council for Teacher Education (NCTE) with a view to achieving planned and coordinated development for the teacher education system throughout the country and the regulation and proper maintenance of norms and standards. The ambit of teacher education covers pre-primary, primary, secondary and senior secondary stages in schools and has been comprehensively defined to include non-formal education, part-time education, adult education and correspondence education in Section 2(1) .

12. Chapter II provides for the establishment of a Council (NCTE), while Chapter III provides for its functions. Among the functions of the Council in clause (e) of Section 12 is to lay down norms for any specified category of courses or training in teacher education including the minimum eligibility criteria for admission, the method of selection of candidates, duration, contents and mode of curriculum. Under clause (g), the Council is empowered to lay down standards in respect of examinations leading to teacher education qualifications, criteria for admission to such examinations and schemes of courses or training.

13. Chapter IV provides for the recognition of teacher education institutions. A rule-making power is conferred upon the Central Government by Section 31(1) . Section 32 empowers the Council to frame regulations to carry out the provisions of the Act. Under clause (d) of sub-section (2) of Section 32 , the Council is empowered to frame regulations, inter alia, on:

"(d) the norms, guidelines and standards in respect of -

(i) the minimum qualifications for a person to be employed as a teacher under clause (d) of Section 12 ;

(ii) the specified category of courses or training in teacher education under clause (e) of Section 12 ."

#### A4 Contractual engagement of Shiksha Mitras

14. On 26.5.1999, a Government Order was issued by the State Government of

Uttar Pradesh for engagement of Shiksha Mitras. The Government Order stated that the Shiksha Mitra scheme was being implemented so as to provide for universal primary education and for the maintenance of the teacher-student ratio in primary schools. The salient aspects of the Shiksha Mitra scheme were as follows:

"(i) The appointment of Shiksha Mitras was to be against the payment of an honorarium;

(ii) The appointment was to be for a period of eleven months renewable for satisfactory performance;

(iii) The educational qualifications would be of the intermediate level;

(iv) The unit of selection would be the village where the school is situated and in the event that a qualified candidate was not available in the village, the unit could be extended to the jurisdiction of the Nyay Panchayat;

(v) The services of a Shiksha Mitra could be terminated for want of satisfactory performance;

(vi) Selection was to be made at the village level by the Village Education Committee; and

(vii) The scheme envisaged the constitution, at the district level, of a Committee presided over by the District Magistrate and consisting, inter alia, of the Panchayat Raj Officer and the District Basic Education Officer among other members to oversee implementation;"

15. Subsequently, Government Orders were issued by the State Government to amplify the nature and ambit of the Shiksha Mitra Scheme. Among them was a Government Order dated 1.7.2001 by which it was clarified that the scheme was not a scheme for employment in regular service since its object was to provide to educated rural youth an opportunity to render community service at the level of primary education. The Government Order also contemplated that persons would be selected on the basis of marks obtained in the high school, intermediate, Bed/LT.

#### A5 Sarva Shiksha Abhiyan

16. On 31.7.2001, the Union Government formulated the policy called the Sarva Shiksha Abhiyan [SSA] to universalize elementary education through the provision of community owned quality education in a mission mode. SSA was intended to provide useful and relevant elementary education for all children in the age group of 6 to 14 by 2010. Among the interventions contemplated by SSA, was the provision of one teacher for every forty children in primary and upper primary schools. Para 6.2 acknowledged that States possessed their own norms for recruitment of teachers. States were left free to follow their own norms as long as they were consistent with the norms established by NCTE.

#### A6 NCTE Regulations, 2001

17. On 4.9.2001, NCTE, while exercising its power to frame Regulations, notified and issued the National Council for Teacher Education (Determination of Minimum Qualifications for Recruitment of Teachers in Schools) Regulations, 2001. The Regulations provided for qualifications for teachers from the pre-school to the senior secondary stages including for teachers of elementary schools imparting instruction at the primary and upper primary/middle school stages. The qualifications for recruitment under Rule 3 read with the First Schedule in respect of teachers of elementary schools were defined in the following terms:

18. The Note appended to the First Schedule stipulated that for appointment of teachers for primary classes, a basic teachers' training programme of two years duration was required and that the BEd was not a substitute.

#### A7 Articles 21-A and 45 , The Eighty-sixth Amendment

19. The Eighty-sixth Constitutional Amendment substituted Article 45 , which forms a part of the Directive Principles of State Policy. Article 45 lays down that the State shall endeavour to provide for early childhood care and education to children below the age of six years. Article 21A of the Constitution was also inserted by the Eighty-sixth Amendment into the Chapter on fundamental rights to stipulate that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as it may, by law, determine.

#### A8 Right of Children to Free and Compulsory Education Act, 2009

20. Parliament enacted the Right of Children to Free and Compulsory Education Act, 2009. The Act received the assent of the President on 26.8.2009 and came into force on 1.4.2010. The long title to the Act provides that it is an Act "for free and compulsory education to all children of the age of six to fourteen years." Consistent with this ambit, "child" in Section 2(c) is defined to mean "a male or female child of the age of six to fourteen years". Chapter II of the Act makes a provision for the right to free and compulsory education; Chapter III for the duties of the appropriate government, local authority and parents; Chapter IV for the responsibilities of schools and teachers; Chapter V for the curriculum and completion of elementary education; Chapter VI for the protection of rights of children; and Chapter VII for miscellaneous provisions. Section 23 , which is a part of Chapter IV, provides as follows:--

"23. Qualification for appointment and terms and conditions of service of teachers.--(1) Any person possessing such minimum qualifications, as laid down by an academic authority, authorized by the Central Government, by notification, shall be eligible for appointment as a teacher.

(2) Where a State does not have adequate institutions offering courses or training in teacher education, or teachers possessing minimum qualifications as



laid down under sub-section (1) are not available in sufficient numbers, the Central Government may, if it deems necessary, by notification, relax the minimum qualifications required for appointment as a teacher, for such period, not exceeding five years, as may be specified in that notification:

Provided that a teacher who, at the commencement of this Act, does not possess minimum qualifications as laid down under sub-section (1), shall acquire such minimum qualifications within a period of five years.

(3) The salary and allowances payable to, and the terms and conditions of service of, teachers shall be such as may be prescribed."

#### A9 NCTE Regulations, 2009 : Open and Distance Learning

21. On 31.8.2009, NCTE issued the National Council for Teacher Education (Recognition norms and Procedure) Regulations, 2009 [NCTE Regulations 2009]. Regulation 3 provides that the Regulations shall be applicable to all matters relating to teacher education programmes covering norms and standards and procedures for recognition of institutions, commencement of new programmes and addition to sanctioned intake in existing programmes and other matters incidental thereto. Rule 5 provided for the manner in which an institution eligible and desirous of conducting a teacher education programme could apply to the Regional Committee of NCTE for recognition. Provisions have been made in the Regulations for the manner in which applications would be processed, in regard to the conditions for the grant of recognition and allied matters. Among the Appendices to the Regulations, Appendix-9 provides for the norms and standards for a diploma programme in elementary education through open and distance learning, leading to a Diploma in Elementary Education (D.El.Ed). Para 1 of Appendix-9 provides the Preamble and the rationale underlying the adoption of open and distance learning, thus:

"Preamble.--(i) The elementary teacher education programme through Open and Distance Learning System is intended primarily for upgrading the professional competence of working teachers in the elementary schools (primary and upper primary/middle). It also envisages bringing into its fold those teachers who have entered the profession without formal teacher training.

(ii) The NCTE accepts open and distance learning (ODL) system as a useful and viable mode for the training of teachers presently serving in the elementary schools. This mode is useful for providing additional education support to the teachers and several other educational functionaries working in the school system."

22. Clause 2 of Para 5 provides for eligibility of teachers entitled to be sent for training in the following terms:

"(2) Eligibility

(i) Senior Secondary (Class XII) or equivalent examination passed with fifty

percent marks.

(ii) Two years teaching experience in a Government or Government recognized primary/elementary school."

A10 NCTE Notification dated 23.8.2010

23. On 31.3.2010, NCTE was designated as the authority under Section 23(1) of the Act for laying down the minimum qualifications for appointment as a teacher. On 6.7.2010, a Government Order was issued by the State Government taking note of a judgment rendered by a Division Bench of this Court in *Devi Prasad v. State of U.P.*, [Misc. Bench (PIL) No. 2737 of 2009], to the effect that Shiksha Mitras could not be accorded leave for the purpose of acquiring higher qualifications. The Government Order provided that the Shiksha Mitras, if they so desire, may obtain a higher qualification by pursuing correspondence courses.

24. On 23.8.2010, NCTE issued a notification in exercise of powers conferred upon it, pursuant to the authorisation of the Central Government under Section 23(1), laying down the minimum educational qualifications for a person to be eligible for appointment as a teacher for Classes I to VIII. The minimum qualifications are as follows:

"1. Minimum Qualification.--

(i) Classes I-V

(a) Senior Secondary (or its equivalent) with at least 50 % marks and 2-year Diploma in Elementary Education (by whatever name known)

OR

Senior Secondary (or its equivalent) with at least 45% marks and 2-year Diploma in Elementary Education (by whatever name known), in accordance with the NCTE (Recognition Norms and Procedure), Regulations 2002

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year Bachelor of Elementary Education (B.El.Ed.)

OR

Senior Secondary (or its equivalent) with at least 50% marks and 2-year Diploma in Education (Special Education)

AND

(b) Pass in the Teacher Eligibility Test (TET), to be conducted by the appropriate Government in accordance with the Guidelines framed by the NCTE for the purpose.

(ii) Classes VI-VIII

(a) BA/BSc and 2-year Diploma in Elementary Education (by whatever name known)

OR

BA/BSc with at least 50% marks and 1-year Bachelor in Education (BEd)

OR

BA/BSc with at least 45% marks and 1-year Bachelor in Education (BEd), in accordance with the NCTE (Recognition Norms and Procedure) Regulations issued from time to time in this regard

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year Bachelor in Elementary Education (B El Ed)

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year BA/BSc, Ed or BA, Ed/BSc, Ed

OR

BA/BSc with at least 50% marks and 1-year BEd (Special Education)

AND

(b) Pass in the Teacher Eligibility Test (TET), to be conducted by the appropriate Government in accordance with the Guidelines framed by the NCTE for the purpose."

(emphasis supplied)

25. Clause 4 of the notification dealt with the teachers who had been appointed prior to the date of the notification and provided as follows:

"4. Teacher appointed before the date of this Notification.--The following categories of teachers appointed for classes I to VIII prior to date of this Notification need not acquire the minimum qualifications specified in Para (1) above:

(a) A teacher appointed on or after the 3.9.2001 i.e. the date on which the NCTE (Determination of Minimum Qualifications for Recruitment of Teachers in Schools) Regulations, 2001 (as amended from time to time) came into force, in accordance with that Regulation.

Provided that a teacher of class I to V possessing BEd qualification, or a teacher possessing BEd (Special Education) or DEd (Special Education) qualification shall undergo an NCTE recognized 6-month special programme on elementary education.

(b) A teacher of class I to V with BEd qualification who has completed a 6-month Special Basic Teacher Course (Special BTC) approved by the NCTE;

(c) A teacher appointed before the 3.9.2001, in accordance with the prevalent Recruitment Rules."

26. Clause 5 stipulates that where an appropriate government, local authority or school had issued an advertisement for initiating the process of appointment prior to the date of the notification, appointments could be made in accordance with the Regulations of 2001.

27. The notification dated 23.8.2010 basically stipulated two sets of minimum qualifications. The first is an educational qualification and the second a training qualification. Apart from these, the notification has made the passing of the Teacher Eligibility Test (TET), mandatory; the test being required to be conducted by the appropriate government in accordance with the guidelines framed by NCTE. For classes I to V, the minimum educational qualification prescribed is senior secondary (with a stipulated percentage of marks). The training qualification is a diploma in elementary education. For classes VI to VIII, the minimum educational qualification is a bachelor's degree in arts or, as the case may be, science (with a stipulated percentage) coupled with a diploma in elementary education or a bachelor's degree in education. For classes VI to VIII, a senior secondary is also treated as one of the permissible qualifications, provided a candidate has a four year's bachelor's degree in elementary education. Both for teaching students of classes I to V and for imparting instruction to students of classes VI to VIII, the passing of the TET is made mandatory. The notification dated 23.8.2010 was subsequently amended by a notification dated 29.7.2011. The minimum qualifications for a person to be eligible for appointment as an Assistant Teacher contained in sub-paras (i) and (ii) of Para (I) of the principal notification were substituted.

28. Clause 4 of the notification provides for the categories of teachers appointed prior to the date of the notification who were not required to acquire the minimum qualifications specified in Clause 1. Clause 4 basically deals with three categories. The first category consists of teachers appointed after 3.9.2001 which is the date on which the Regulations of 2001 came into force. Teachers who were appointed prior to 23.8.2010 but "in accordance with that Regulation" (meaning thereby the Regulations of 2001) were exempted from the acquisition of the minimum qualifications prescribed by Clause 1, The second category comprises of teachers of classes I to V with a BEd qualification who had completed a six months Special BTC course approved by NCTE. The third category comprises of teachers appointed prior to 3.9.2001; such of them who were appointed in accordance with the prevalent recruitment rules, that is to say, the rules in existence on the date of the appointment of the teacher, were exempted from the requirement of complying with the minimum qualifications prescribed in the notification. After the date of the notification, the minimum qualifications became mandatory, save and except for the exceptions which were carved out. Clause 5

is to the effect that where an advertisement had been issued prior to the date of the notification, the appointment process could be completed on the basis of the Regulations of 2001 which had held the field until then.

#### All Relaxation of minimum qualifications

29. On 8.11.2010, the Union Government called upon the States to submit proposals, if any, for relaxation of the norms fixed by NCTE. The power of relaxation, it must be noted, was vested in the Central Government alone by virtue of the provisions of sub-section (2) of Section 23. The Union Government, by its communication to the State Governments, clarified that the requirement of holding the TET would not be relaxed. In order to enable the Union Government to exercise its powers in a considered manner, information was specifically sought from the States on the following aspects in the communication:

"(a) Quantitative information as per the format prescribed in the Annexure to this Guideline;

(b) Nature of relaxation sought, separately for classes I to V and VI to VIII, along with justification;

(c) The time period for which relaxation is sought;

(d) The manner in which and the time period within which the State Government would enable teachers, appointed with relaxed qualification, to acquire the prescribed qualification;

(e) The manner in which and the time period within which the State Government would enable existing teachers, not possessing the prescribed qualification, to acquire the prescribed qualification. Reference in this regard is invited to para 4 of the aforementioned Notification of the NCTE.

(f) Any other information the State Government may like to furnish in support of its request for seeking relaxation under Section 23(2) ."

#### A12 Proposal of State Government for distance learning

30. On 24.12.2010, the State Government addressed a communication to the Union Government in the Ministry of Human Resource Development, by which it disclosed that 1,78,000 Shiksha Mitras were working in the State, of which 1,24,000 held graduate degrees. The State Government noted that these Shiksha Mitras had been appointed on a contractual basis with an intermediate qualification as the prescribed norm, whereas the required qualification for teachers engaged in primary schools in the State was a graduate degree. The State Government proposed a schedule for imparting training to 1,24,000 graduate Shiksha Mitras and, for that purpose, sought the grant of permission so as to enable training to be commenced from 2010-11.

#### A 13 Section 23(2) relaxation

31. On 10.9.2012, the Union Government issued an order under Section 23(2) of

the RTE Act of 2009, by which it granted a relaxation to the categories of persons falling in Para 3 of NCTE's notification dated 23.8.2010. The categories of persons covered by this category comprised of persons with BA/BSc degrees with at least 50% marks and BEd qualifications and persons with DEd (Special Education) or BEd (Special Education). The period for obtaining the minimum qualifications was extended by the Central Government from 1.1.2012 until 31.3.2014.

#### A14 Open and Distance Learning proposal: NCTE permission

32. On 3.1.2011, a revised proposal was submitted by the State Government for the training of Shiksha Mitras to NCTE. The proposal envisaged that there were 1,78,000 untrained teachers (graduate Shiksha Mitras) engaged on a contract basis by Village Education Committees, working in primary schools. Of these, it was stated that 1,24,000 Shiksha Mitras were graduates and if the untrained graduate Shiksha Mitras were given teacher training, the shortage of qualified teachers in schools would be met. The operational plan which was envisaged by the State, provided that 62,300 untrained graduate Shiksha Mitras would be imparted a two year BTC training during 2011-12 and 2012-13, while the remaining 62,000 would be trained in 2013-14 and 2014-15. The proposal envisaged that the training would be imparted at seventy District Institutes of Education and Training (DIETs) and at twenty Block Resources Centres (BRCs).

33. On 14.1.2011, the NCTE specifically on the basis of the permission which was sought by the State Government in terms of its letter dated 3.1.2011, acceded to the proposal for training of untrained graduate Shiksha Mitras and, for that purpose, for conducting a two year diploma in elementary education through the open and distance learning mode. NCTE, however, clarified in Clause 13 of its letter that the State Government shall ensure that no appointment of untrained teachers is made in whatsoever manner. On 11.7.2011, details of the training programme were issued by the State Government.

#### A15 Central Rules under RTE Act, 2009

34. The Union Government had issued the Right of Children to Free and Compulsory Education Rules, 2010 (RTE Rules of 2010), under the RTE Act 2009. The RTE Rules of 2010 dealt with the acquisition of minimum qualifications in Part VI. Rule 17 empowered the Central Government to notify an academic authority for laying down the academic qualifications for a person to be eligible as a teacher. Once the minimum qualifications were prescribed, they would mandatorily apply to every school governed by Section 2(n) of the RTE Act of 2009. Rule 18 governs a relaxation of the minimum qualification, under which the State Government was required to estimate its teachers' requirement in accordance with the norms prescribed in the Schedule for all schools covered by Section 2(n). Under sub-rule (2) of Rule 18, it is contemplated that the State Government could request the Union Government for a relaxation of the prescribed minimum qualifications in either of two eventualities, namely: (i)

where the State did not have adequate institutions offering courses of training in teacher education; or (ii) the State did not have adequate persons possessing the minimum qualifications notified under Rule 17(2) by the authority authorised by the Central Government. On receiving such a request, the Central Government was empowered to specify the nature of the relaxation and the period of time, not exceeding three years but not beyond five years from the commencement of the Act within which the minimum qualifications would have to be acquired. Sub-rule (5) of Rule 18 stipulated that after six months from the commencement of the Act, no appointment of a teacher for any school can be made in respect of a person not possessing the minimum qualifications notified in sub-rule (2) of Rule 17 without a relaxation of qualifications under sub-rule (3), Rule 19 made it mandatory for the State Government to provide adequate training facilities to ensure that all teachers in schools acquired the minimum qualifications within a period of five years from the commencement of the Act.

#### A16 State Rules under RTE Act 2009

35. On 27.7.2011, the UPRTE Rules, 2011 were issued. The UPRTE Rules of 2011 which were framed by the State of Uttar Pradesh under the RTE Act of 2009 were in accordance with the provisions which were contained in the Central Rules. The salient provisions of the UPRTE Rules of 2011 were as follows :

"(i) Under Rule 15, the minimum educational qualifications for teachers laid down by an authority authorised by the Central Government were to be applicable to every school under Section 2(n) ;

(ii) For the purpose of applying for a relaxation of the minimum qualifications under Section 23(2) , Rule 16 envisaged the same procedure as was contemplated by Rule 18 of the Central Rules of 2010;

(iii) Rule 16 contemplated that the State Government could move the Union Government for the grant of a relaxation of the minimum qualifications and provides that no appointment of a teacher to any school could be made of a person not possessing the minimum educational qualifications without the issuance of a notification of relaxation by the Central Government."

#### A17 State amendment to Service Rules

36. The State Government by a notification dated 9.11.2011 amended. the Services Rules which were framed in 1981 under the Basic Education Act. By the Rules as amended, which were called the Uttar Pradesh Basic Education (Teachers) Service (Twelfth Amendment) Rules, 2011, the qualifications which were prescribed in Rule 8 were modified so as to make the passing of the TET compulsory. This was as mandated by the notification dated 23.8.2010 issued by NCTE. The notification of the State Government dated 9.11.2011 provided the following academic qualifications for appointment of an Assistant Teacher in a junior basic school:

37. These amendments which were made by the State Government were

intended to ensure that the qualifications which were prescribed in the Service Rules of 1981 accord with the mandatory requirement of passing the TET which was stipulated by NCTE from 23.8.2010.

#### A18 Amendments to NCTE Act

38. On 12.10.2011, [Published in Gazette of India on 13.10.2011] the provisions of the NCTE Act were amended by Parliament by Amending Act 18 of 2011 which was brought into force with effect from 1.6.2012. The amendments, inter-alia, included an amendment to Section 1(3) to make the Act applicable to the following categories:

"(a) Institutions;

(b) students and teachers of the institutions;

(c) schools imparting pre-primary, primary, upper primary, secondary or senior secondary education and colleges providing senior secondary or intermediate education irrespective of the fact, by whatever names they may be called; and

(d) teachers for schools and colleges referred to in Clause (c)."

39. A definition was inserted in Section 2(ka) of the expression "school" in the following terms:

"(ka) "school" means any recognized school imparting pre-primary, primary, upper primary, secondary or senior secondary education or a college imparting senior secondary education, and includes-

(i) a school established, owned and controlled by the Central Government, or the State Government or a local authority;

(ii) a school receiving aid or grants to meet whole or part of its expenses from the Central Government, the State Government or a local authority;

(iii) a school not receiving any aid or grants to meet whole or part of its expenses from the Central Government, the State Government or a local authority."

40. These amendments to the NCTE Act were intended to clarify the intent of Parliament that the Act would apply to schools from the stage of pre-primary education through to the senior secondary or intermediate education covering also all stages between. Section 12-A was introduced into the NCTE Act to provide as follows:

"12-A. Power of Council to determine minimum standards of education of school teachers.--For the purpose of maintaining standards of education in schools, the Council may, by regulations, determine the qualifications of persons for being recruited as teachers in any pre-primary, primary, upper primary, secondary, senior secondary or intermediate school or college, by whatever name called, established, run, aided or recognised by the Central Government or a State Government or a local or other authority;



Provided that nothing in this Section shall adversely affect the continuance of any person recruited in any pre-primary, primary, upper primary, secondary, senior secondary or intermediate school or colleges, under any rule, regulation or order made by the Central Government, a State Government, a local or other authority, immediately before the commencement of the National Council for Teacher Education (Amendment) Act, 2011 solely on the ground of non-fulfilment of such qualifications as may be specified by the Council:

Provided further that the minimum qualifications of a teacher referred to in the first proviso shall be acquired within the period specified in this Act or under the Right of Children to Free and Compulsory Education Act, 2009 (35 of 2009)."

41. An amendment was also made to Section 32(2) so as to empower NCTE to frame regulations in regard to the qualifications of teachers under Section 12-A , by the introduction of clause (dd) in sub-section (2) of Section 32 .

#### A19 ODL Training and absorption

42. On 14.7.2012, a Government Order was issued by the State of Uttar Pradesh recognising that various Shiksha Mitras had obtained graduate degrees during the course of their employment. The Government Order contemplated that such persons would be imparted training through the mode of distance education. This was to apply to those candidates who had obtained their graduate degrees by 25.7.2012. On 7.2.2013, the State Government issued a training schedule for 64,000 Shiksha Mitras. The Government Order recorded that 60,000 Shiksha Mitras had already received their training. The Government Order further referred to the existence of an additional 46,000 Shiksha Mitras who had passed the intermediate stage. The Government Order provided for the absorption of 1,70,000 Shiksha Mitras (comprised of 1,24,000 who had completed their graduate degrees and 46,000 who were expected to complete their graduation by September 2015).

#### A20 Amendment to State RTE Rules

43. On 30.5.2014, the State Government amended the UP RTE Rules of 2011 by the First Amendment Rules, 2014. By the amendment, the State Government introduced a definition of the expression "Shiksha Mitra" to cover those Shiksha Mitras who had been selected and were working in accordance with the Government Orders in junior basic schools conducted by the Basic Education Board. Rule 16-A as introduced into the UP RTE Rules of 2011 by way of amendment, is in the following terms:

"16-A. Notwithstanding anything contained in rules 15 and 16, the State Government may, in order to implement the provisions of the Act, by order make provisions for relaxation of minimum educational qualification for appointment of such Shiksha Mitras as Assistant Teachers in Junior Basic Schools as are considered otherwise eligible."

44. Rules 16-A contains a non obstante provision. Under it, the State

Government assumed the power to relax the minimum educational qualifications prescribed in the case of those Shiksha Mitras who were considered to be otherwise eligible so as to facilitate their appointment as Assistant Teachers in junior basic schools.

#### A21 Amendment to State Service Rules

45. On 30.5.2014, the State Government notified the amended Service Rules of 1981. The amended Rules retain the definition of the expression "teacher" in Rule 2(o) of the original Rules. The expression "teacher" is defined to mean "a person employed for imparting instructions in nursery schools, basic schools, junior basic schools or senior basic schools". The expression "Shiksha Mitra" is defined in Rule 2(v) as follows:

"(v) "Shiksha Mitra" means a person working as such in junior basic schools run by Basic Shiksha Parishad under the Government Orders prior to the commencement of Uttar Pradesh Right of Children to Free and Compulsory Education Rules, 2011."

46. In the sources of recruitment in Rule 5, a provision is now made in the Rules, as amended, for the appointment of Shiksha Mitras. Rule 5, as amended, reads as follows:

"5. Sources of recruitment.--The mode of recruitment to the various categories of posts mentioned below shall be as follows:

47. In Rule 6, the upper age limit in the case of a Shiksha Mitra is provided as sixty years. Rule 8, which defines the qualifications for eligibility for appointment of an Assistant Teacher in a junior basic school, has been amended so as to provide as follows:

The striking aspect is the absence of a requirement for a Shiksha Mitra to hold a TET certificate. This requirement is made mandatory by NCTE. In fact in the State Service Rules of 1981, it has been applied in clause (a) to other teachers holding a bachelor's degree and a basic teacher's certificate but has been consciously omitted in the case of Shiksha Mitras.

48. Rule 14(6)(a) envisages the appointment of Shiksha Mitras against substantive posts of Assistant Teachers. Rule 14(6)(a) contemplates that all Shiksha Mitras shall be appointed against substantive posts of Assistant Teachers in junior basic schools after obtaining a certificate of the successful completion of the two years' distance education BTC course, or other equivalent courses stipulated therein. Rule 14(6)(a) provides as follows:

"14(6)(a). he Shiksha Mitrai after obtaining the certificate of successful completion of two years distant BTC course or Basic Teacher's Certificate (BTC), Basic Teacher's Certificate (BTC) (Urdu) or Vishisht BTC conducted by State Council of Educational Research and Training (SCERT) shall be appointed as assistant teachers in junior basic schools against substantive post. To appoint the

Shiksha Mitras as assistant teachers in junior basic schools, the appointing authority shall determine the number of vacancies including the number of vacancies to be reserved for candidates belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes and other categories under rule 9."

49. Rule 14(6)(b) provides that the appointing authority shall draw a list of Shiksha Mitras possessing the prescribed qualification in Rule 8. Under Rule 14(6) (c), the names of Shiksha Mitras are to be drawn up in an ascending order according to their dates of birth. The system of providing for quality-point marks, which is mandatory for other categories, has not been prescribed for Shiksha Mitras.

A22 NCTE Regulations, 2014

50. On 12.11.2014, NCTE issued the National Council for Teacher Education (Determination of Minimum Qualification for Persons to be recruited as Education Teachers and Physical Education Teachers in Pre-primary, Primary, Upper Primary, Secondary, Senior Secondary or Intermediate Schools and Colleges) Regulations, 2014. The Regulations of 2014 provide that for primary classes (classes I to VIII), the minimum qualifications shall be those as have been laid down by NCTE by its notification dated 23.8.2010, as amended from time to time. Regulation 5 empowers NCTE, on receipt of a reference from the State Government, to relax the provisions of the Regulations subject to satisfaction of the existence of special circumstances. However, the proviso to Regulation 5 stipulates that no relaxation shall be granted with regard to the minimum qualifications for appointment of teachers for classes I to VIII as specified in the Schedule.

51. Now, it is in this background that we would have to consider the nature of the challenge in these proceedings.

PART B : Submissions

B1 Area of challenge

52. Broadly, the area of challenge in these proceedings has traversed four areas, which are:

"(i) The nature of the appointment of Shiksha Mitras and the object and purpose of the selection;

(ii) The validity of the notification which has been issued by NCTE on 14.1.2011 accepting the request of the State Government for the grant of training through the open and distance learning mode to graduate Shiksha Mitras;

(iii) The process of relaxation and absorption of Shiksha Mitras which is stated to have commenced on 14.1.2011; and

(iv) The exemption which has been granted from the passing of the TET by the State Government by amending the Service Rules of 1981."

The submissions which have been urged on behalf of the petitioners can now be summarised:

## B2 Submissions for the petitioners

"(I) The Service Rules framed by the State Government in 1981 to govern teachers employed in schools conducted by the Basic Education Board contain statutory requirements in regard to the creation of the cadre, possession of qualifications, applicability of reservations, pay scales, and conditions for relaxation of the requirement contemplated in the Rules. These Rules uniformly govern the services of all teachers who were employed in junior basic schools;

(II) The object and purpose of the Shiksha Mitra Scheme which was adopted by a Government Order dated 26.5.1999 would indicate that these were essentially contractual appointments which were not made against sanctioned posts. In the case of Shiksha Mitras: (a) there was no requirement of obtaining a teacher's training certificate and the qualification prescribed was only intermediate in comparison with a graduate qualification required for regularly appointed teachers; (b) appointments were made at the village level, failing which at the unit of the Nyay Panchayat; and (c) the appointments were envisaged to be for a contractual term of eleven months with a renewal contemplated in the event of satisfactory service. Every person appointed as Shiksha Mitra was placed on notice of the fact that the appointment was not in the nature of a regular employment in the service of the State but was an appointment of a stipulated duration for the purpose of enabling the person engaged to render community service;

(III) The appointments of Shiksha Mitras were clearly de hors the statutory Service Rules of 1981 which have held the field at all material times;

(IV) After the enforcement of the Regulations by NCTE on 3.9.2001 under the provisions of the NCTE Act, minimum qualifications required for appointment as a primary school teacher were to be stipulated. Between 3.9.2001 and 23.8.2010, when NCTE issued its notification under the RTE Act of 2009, no Shiksha Mitra fulfilled the training qualification prescribed under the central regulations. Upon the enforcement of the notification dated 23.8.2010, every primary school teacher was required to comply with the minimum qualifications prescribed by NCTE. Shiksha Mitras did not fall within the purview of the exemption granted either by clause (4) or by clause (5) of the notification dated 23.8.2010;

(V) The Regulations framed in 2009 by NCTE permitting the grant of a training qualification through the open and distance learning mode, properly construed, apply to a person who is validly appointed as a teacher. A "working teacher" as defined in Appendix-9 to the Regulations of 2009 would govern a person whose appointment has been validly made under the applicable recruitment rules. In the context of the 1981 Service Rules which have held the field in the State of UP, this would cover only those teachers who were appointed after relaxing the norms governing eligibility and qualifications under Rule 10;

(VI) The proposal which was submitted by the State Government to NCTE for training of untrained Shiksha Mitras was for the provision of training to 1,24,000 graduate Shiksha Mitras. NCTE's approval dated 14.1.2011 was in response to this proposal of the State Government of 3.1.2011 for the training of graduate Shiksha Mitras. Yet, when the Government issued a Government Order dated 27.7.2012, it incorporated, in addition, training for 46,000 Shiksha Mitras who were only intermediate passed persons and were not covered by the permission which was granted by NCTE. The State violated the permission which was granted by NCTE which did not cover training through the open and distance learning mode to Shiksha Mitras;

(VII) The guidelines which have been framed by the Central Government under Section 35(1) of the RTE Act of 2009 on 8.9.2010 specifically provide that there can be no exemption from the acquisition of a TET as a minimum qualification for eligibility as a primary school teacher. The notification issued by NCTE on 23.8.2010 makes the holding of a TET certificate a mandatory requirement. Initially, when the State Government framed RTE Rules in 2011 under the RTE Act of 2009, the Rules followed the Central Rules of 2010. The Central Rules as well as the original Rules of 2011 framed by the State Government were made in view of the provisions of Section 23(2) of the RTE Act of 2009 which vests the power to grant a relaxation only in the Central Government. Initially, the State Government also amended the Service Rules of 1981 to bring them into conformity with the notification dated 23.8.2010 issued by NCTE by making the holding of a TET qualification mandatory. However, as a result of successive amendments which have been made to the Service Rules of 1981 as well as to the UP RTE Rules of 2011, the State Government has arrogated to itself the power to grant an exemption from the holding of minimum qualifications. This is a power which can be exclusively exercised by the Central Government and by the Central Government alone. The assumption of such a power by the State Government under Rule 16-A, as newly inserted, is ultra vires the provisions of Section 23(2) of the NCTE Act;

(VIII) The State Government has simultaneously purported to amend the Service Rules of 1981 so as to provide for the absorption of all Shiksha Mitras. The absorption of Shiksha Mitras is in violation of the principles which have been laid down by the Hon'ble Supreme Court in Secretary, State of Karnataka and Others Vs. Umadevi and Others, , and by a long line of precedents which has emerged thereafter. The State Government has purported to absorb 1,70,000 Shiksha Mitras in the face of the fact that these appointments were (i) made contrary to and de hors the Service Rules of 1981 which govern the services of teachers in junior basic schools; (ii) not made against sanctioned posts; (iii) in breach of the normal rule of recruitment and selection which apply to regularly appointed teachers; (iii) made without following norms of reservations in regard to the Schedule Castes, Scheduled Tribes and Other Backward Classes and other categories including horizontal reservation. The grant of regularisation or, as the case may be, absorption is fundamentally violative of Articles 14 and 16 of the

Constitution; and

(IX) The Union Government in its counter affidavit which has been filed in these proceedings has indicated that there can be no exemption from passing the TET. NCTE has in its counter affidavit specifically made a grievance of the fact that the State Government had not informed it as to whether Shiksha Mitras were regularly appointed teachers or were appointed only for a specified duration."

### B3 Submissions for the State Government

53. The learned Additional Advocate General, who has addressed arguments on behalf of the State/has urged the following submissions:

"(I) The Scheme which was envisaged by the State Government of appointing Shiksha Mitras was in order to implement the provisions of Article 45 of the Constitution and in pursuance of the policy of SSA which was implemented by the Union Government. This will not fall within the mischief of the back door entry principle which has been laid down by the Supreme Court;

(II) Shiksha Mitras are teachers like other teachers in the service of the State and are engaged for imparting teaching in institutions conducted by the Basic Education Board since 1999. All Shiksha Mitras fall within the definition of the expression "teacher" as provided in the Service Rules of 1981. Hence, they would be beneficiaries of clauses (4) and (5) of the notification issued by NCTE on 23.8.2010. As against a sanctioned strength of 3,28,220 teachers, there is a working strength of 2,32,136 Assistant Teachers including 1,70,000 Shiksha Mitras. There are 96,084 vacancies at present of which 87,825 vacancies have been advertised;

(III) Appointments of Shiksha Mitras were made in pursuance of the recommendations of Village Education Committees which have a statutory status under the provisions of Section 11 of the Basic Education Act of 1972;

(IV) Appendix-9 to the Regulations framed by NCTE in 2009 for open and distance learning courses provided for the imparting of training to "working teachers". Working teachers would mean not only teachers regularly employed by the State in pursuance of the Service Rules of 1981 but would also cover Shiksha Mitras. The eligibility as specified in Appendix-9 is a senior secondary certificate. Consequently, there was no infraction on the part of the State Government in mooted a proposal before NCTE for the training of Shiksha Mitras. The correspondence on the record would indicate that before the NCTE granted its approval on 14.1.2011, the State Government had mooted a proposal on 10.8.2010 which was followed up on 24.12.2010 and 3.1.2011 and by discussions with the officials of the Ministry of Human Resource Development of the Union Government. In seeking permission for the grant of training to Shiksha Mitras through the open and distance learning mode, the State Government duly disclosed that these were contractual appointments of persons who did not, at the relevant time, hold the qualifications prescribed in the Service Rules of 1981.

There was no suppression of fact from the Union Government;

(V) The main objective of undertaking the training course was to deal with a shortage of teachers in the State of Uttar Pradesh which was remedied by training 1,70,000 Shiksha Mitras;

(VI) Shiksha Mitras engaged by the State Government, albeit on a contractual basis, were persons who fulfilled the qualifications prescribed in the Regulations of 2001 and in Appendix-9 of the Regulations of 2009 framed by NCTE, save and except for the training requirement which they did not possess. Subsequently, the training requirement has been duly completed in accordance with the permission granted by NCTE on 14.1.2011;

(VII) Approval and relaxation having been granted by a body competent to do so, there is no illegality in their absorption;

(VIII) The purpose of the guidelines issued by the Union Government on 2.2.2011 for conducting the TET under Section 35 has been fulfilled by the State Government by imparting training qualifications and hence, there is no illegality in the deviation made by the State Government from the norm of passing the TET;

(IX) Shiksha Mitras have worked for nearly 16 years and there was nothing arbitrary in the decision of the State Government seeking to absorb them into regular service. The mode of recruitment has been amended in the Rules so as to bring Shiksha Mitras into regular service of the State in pursuance of its Scheme; and

(X) The amendments made to the Service Rules of 1981 are not ultra vires."

#### B4 Submissions of NCTE

54. The learned Counsel appearing for the NCTE has submitted that:

"(I) NCTE was not apprised of the true nature and character of the appointment of Shiksha Mitras. Shiksha Mitras had evidently been appointed in violation of the Service Rules of 1981 and therefore their absorption was clearly unjustified;

(II) NCTE is the body/academic authority enjoined to prescribe the minimum qualifications required of teachers working in schools covered by the RTE Act. NCTE did not and never intended to exempt teachers in primary schools from obtaining the TET certification;

(III) The Central Government by its order dated 10.9.2012 has clarified that TET as a qualification has not been relaxed;

(IV) The amendments made in the Service Rules of 1981 are clearly beyond the domain of the state authorities as the power of relaxation stands reserved exclusively in favour of the Central Government under the provisions of the RTE Act;

(V) Admittedly the appointment of Shiksha Mitras was contractual for a period of 11 months and therefore it was incorrect to describe them as untrained teachers. Acquiring the TET qualification is essential with reference to the aims and objects of the RTE Act and the need for adherence to a national standard and benchmark liable to be possessed by all persons aspiring to be appointed as teachers of primary schools; and

(VI) There is no challenge to the inclusion of TET as a qualification either by the State or by the Shiksha Mitras."

#### B5 Submissions of Shiksha Mitras

55. The submissions which have been urged before the Court by the learned Additional Advocate General have been followed and adopted by learned Counsel appearing on behalf of the respondent Shiksha Mitras.

56. The submissions urged by the supporting learned Counsel are summarised hereafter:

"(1) The proviso to Section 12-A would cover persons, such as the Shiksha Mitras in the State of Uttar Pradesh. The effect of Section 12-A is that their services should not be adversely affected by the introduction of a statutory provision empowering NCTE to lay down minimum qualifications for appointment of teachers of primary schools;

(2) NCTE obtained the power to frame Regulations under Section 12-A by the amendment of 2011 and actually exercised that power by notifying Regulations on 16.12.2014. Section 12-A contemplates that there must be a Regulation under the substantive provision. The proviso to Section 12-A protects the continuance of any person recruited under an order of the State Government whose services would not be adversely affected solely on the ground of non fulfillment of qualifications specified by NCTE. However, the qualifications would have to be acquired within the period specified in the RTE Act of 2009. Before NCTE notified its Regulations on 16.12.2014, the Shiksha Mitras had obtained their bachelor's degrees, and the training qualifications with permission of NCTE;

(3) There was no imbalance in the principle of reservation in the recruitment of Shiksha Mitras since, broadly, the appointments of Shiksha Mitras followed the same category for which the post of Gram Pradhan was reserved in the case of each Gaon Sabha;

(4) Shiksha Mitras were not recruited through the back door but by the procedure prescribed by the State itself; and

(5) Clause (4) of the notification issued by NCTE contemplates the grant of an exemption to persons with a BEd (Special Education) and DEd (Special Education) qualification. These are not qualifications maintained in the Regulations of 2001. Since such persons were basically untrained and have yet been given an exemption from the requirement of passing the TET, Shiksha



Mitras should, by parity of reasoning, be entitled for the same benefit."

57. Moreover, it has also been urged that, as a part of the exercise which has been conducted by the Court in these proceedings, the following issues would require determination:

"(1) Whether the appointment of Shiksha Mitras in pursuance of the Government Order dated 26.5.1999 was of a statutory character;

(2) Whether the State Government did have the power, by virtue of Section 13(1) of the Basic Education Act 1972 and having due regard to the provisions of Entry 25 of the Concurrent List to the Seventh Schedule, to issue the Government Order dated 26.5.1999;

(3) Whether the Government Order dated 26.5.1999 can be regarded as a valid exercise of power under Article 162 of the Constitution, where the Service Rules of 1981 were silent in regard to the appointment of untrained teachers;

(4) Whether the Village Education Committees had a statutory character by virtue of Section 11 of the UP Basic Education Act, 1972;

(5) Whether the appointment of Shiksha Mitras can be regarded as being made against substantive posts, since the number was determined in the ratio of students to teachers in the proportion of 1:40;

(6) Whether the permission granted by NCTE on 14.1.2011 is a valid permission under Section 16(3)(d) of the NCTE Act;

(7) Whether the petitioners could be regarded as being persons aggrieved to challenge the permission granted by NCTE;

(8) Whether the effort on the part of the State to grant training to untrained teachers can be regarded as a reasonable effort and not mala fide;

(9) Whether the appointment of Shiksha Mitras has been duly protected by the proviso to Section 12-A and could be validly brought into the regular cadre of Assistant Teachers by amendment of the Service Rules of 1981;

(10) Whether the power of NCTE to lay down minimum qualifications could only be exercised by framing Regulations under Section 32 of the NCTE Act; and

(11) Would the effect of the insertion of Section 12-A suspend the effect and operation of the notification dated 23.8.2010."

#### PART C : ANALYSIS

58. The submissions now fall for consideration.

##### C1 Nature of appointment of Shiksha Mitras

59. The Uttar Pradesh Basic Education Act was enacted in 1972 to regulate the imparting of education up to the eighth standard. The Board of Basic Education

was constituted by the Act to regulate the imparting of basic education teachers' training and the conduct of basic training certificate examinations. When it was enacted, the Act envisaged transfer of control over basic schools from Zila Parishads in the rural areas and the Municipal Boards and Mahapalikas in the urban areas to the Basic Education Board. Subsequently, as we have noted, by the amendment which the state legislature brought about in 2000, statutory duties in regard to the conduct of basic education including control over basic schools was transferred to gram panchayats and municipalities subject to the over all control of the State Government. When the State Government formulated the Uttar Pradesh Basic Education (Teachers) Service Rules 1981, specific provisions were made in regard to the services of teachers to be engaged for imparting instruction in basic schools, junior basic schools or senior basic schools. The junior and senior basic schools covered the entire canvas of primary education from classes I to VIII. The Service Rules of 1981 contemplate the creation of a separate cadre of service for each local area under Section 4 . Consistent with the norm of government control over basic education, the strength of the cadre of the teaching staff for each local area and the number of posts in the cadre are required to be determined by the Board of Basic Education with the previous approval of the State Government. Recruitment to the posts of Assistant Teachers in junior basic schools is to take place by direct recruitment as provided in Rule 5(a)(2). Rule 8 spells out the academic qualifications required for appointment of Assistant Teachers in a junior basic school. As it was originally framed, the requirement was of an intermediate qualification and a basic teacher's certificate or a qualification equivalent. Since under the Rules, cadres to govern the service of teachers of basic schools were created, a provision is made in Rule 9 for reservation for the Scheduled Castes, Scheduled Tribes, Other Backward Classes as well as for other categories provided in governmental orders including dependents of freedom fighters and ex-servicemen. Rule 10 stipulates the grant of a relaxation in favour of certain specified categories from the age and qualification norms laid down in the rules as well as in regard to the procedural requirements for recruitment. The Rules contain specific provisions in regard to the manner in which the appointing authority would determine the number of vacancies, the extent of vacancies reserved, the manner in which vacancies would be advertised, the placement of candidates for the purpose of selection, the constitution of Selection Committees and the manner of appointment. Provisions are also made in regard to other consequential matters of an essential nature associated with the constitution of a service including seniority, placement on probation, confirmation, scales of pay and superannuation. In the case of teachers recruited through direct recruitment for teaching a language, the Rules make a provision for a written examination and the evaluation of candidates on the basis of marks obtained in the examination and quality points. This is the statutory framework which has consistently held the field in the State of Uttar Pradesh at all material times after the Service Rules came to be framed in 1981.

60. The Shiksha Mitra Scheme was introduced by the Government Order dated 26.5.1999. Clause 1 deals with the concept of Shiksha Mitra. It provides that a person possessing educational qualifications upto intermediate level be engaged by the Village Education Committee constituted under the Act of 1972 Act on a contractual basis and on the payment of honorarium taking into consideration the local requirement at the Gram Sabha level. Such a person shall be called a Shiksha Mitra. Clause 7 provides that the engagement of a Shiksha Mitra would be only for an academic year on a contractual basis and the engagement shall automatically come to an end on 31 May.

61. The subsequent Government Order dated 1.7.2001, however, provides that the term of a Shiksha Mitra can be extended provided the teaching work and conduct are found to be suitable. This Government Order also contains two proformas. The first is in regard to the application to be submitted by a Shiksha Mitra for seeking engagement, while the second is in connection with the acceptance letter to be submitted by a Shiksha Mitra. The application to be submitted requires applicants to mention that they are applying for seeking engagement in community service. The acceptance letter requires the applicant to specifically state that he/she would perform teaching work as a social worker and will not consider himself or herself to be in the employment of the State Government/Board. The applicant has also to state that for this social service, he/her would not claim any wages and would be entitled only to payment of honorarium.

62. The essential characteristics of the Shiksha Mitra Scheme envisaged, firstly, that each appointment was made on a contractual basis for a stipulated term of eleven months, renewable subject to satisfactory performance and on an honorarium. Secondly, the Scheme, as notified, contemplated that the engagement of Shiksha Mitras was not in the regular service of the State, as indeed it could not have been, having due regard to the provisions of the Service Rules of 1981 which held the field in regard to the constitution of a cadre of teachers imparting basic education and regularly engaged for that purpose. Thirdly, each of the persons appointed as Shiksha Mitras was placed on notice of the fact that this was a Scheme envisaging service by the unemployed youth for the benefit of the community against the payment of an honorarium. Shiksha Mitras were not entitled to the payment of a salary in the regular pay scale but would only receive a Mandeya (honorarium). The application form which every prospective candidate was required to fill up in terms of the Government Order dated 1.7.2001, envisaged a statement of acceptance that the candidate would be bound by the terms and conditions governing the Scheme. The consent form required to be filled in by every candidate envisaged that he/she would not be treated as a regular employee of the State Government and would only be entitled to the payment of honorarium. Moreover, Clause 3 of Form-II appended to the Government Order stipulated that the training which was imparted to a candidate was only to enable him or her to render community service in the capacity of a Shiksha Mitra. Fourthly, appointments as Shiksha Mitras were not

against sanctioned posts as determined by the Board of Basic Education with the previous approval of the State Government under Rule 4 of the Service Rules of 1981. Fifthly, the manner of making appointments and the procedure for recruitment was not in conformity with the provisions contained in Rules 14, 15, 16 and 17 of the Service Rules of 1981. Instead, what the Shiksha Mitra Scheme envisaged, was that appointments should be made by Village Education Committees at the village level. At the district level, there was a Committee chaired by the District Collector and consisting, inter alia, of the District Panchayat Raj Officer and the Basic Education Officer. The District Level Committee was constituted to oversee the implementation of the Scheme in the district. Sixthly, the qualification which was prescribed for appointment as a Shiksha Mitra under the Government Order dated 26.5.1999 was the possessing of an intermediate qualification. Prior thereto, an amendment was made in the Service Rules on 9.7.1998 by which Rule 8 was amended to prescribe the holding of a graduate degree for appointment as a regular teacher. Under the Service Rules of 1981, a regular teacher was required to also possess a basic teacher's certificate. This was not a requirement for Shiksha Mitras under the Government Order. Shiksha Mitras did not fulfill the qualifications for a regular teacher under the Service Rules of 1981. Seventhly, the manner in which reservations were to be worked out under the Rules of 1981 was evidently not the manner in which reservations in the recruitment of Shiksha Mitras would operate. At the highest, what has been urged before the Court by the Additional Advocate General and supporting Counsel is that the selection of Shiksha Mitras at the village level envisaged that a Shiksha Mitra to be appointed should belong to the same category as the Gram Pradhan, thereby resulting in a rough and ready adoption of the norm of reservation. This is certainly not the manner in which the policy of reservation as envisaged by the State is implemented in the case of regularly selected candidates, including by the application of the roster and implementing horizontal and vertical reservations. Rule 9, it must be noted, envisages reservation not only for the Scheduled Castes, Scheduled Tribes and Other Backward Classes, but other categories also including the dependents of freedom fighters and ex-servicemen. Moreover, the orders of the State Government also contemplate horizontal reservation across various classes. These aspects leave no manner of doubt that the engagement of Shiksha Mitras was envisaged under an administrative scheme by the State Government on a contractual basis with a specified purpose and object and de hors the governing provisions of the applicable Service Rules of 1981.

63. The object and purpose of engaging Shiksha Mitras, the learned Additional Advocate General stated before the Court, was to implement the Sarva Shiksha Abhiyan in relation to the State of Uttar Pradesh. While notifying the SSA policy, the Union Government, in fact, envisaged a mission mode for the provision of community owned modalities for propagating universal elementary education. SSA acknowledged that States had their own norms for recruitment of teachers and would consequently be free to follow their own norms so long as they were

consistent with the norms established by NCTE.

64. The fact that the number of persons engaged as Shiksha Mitras may have been determined on an application of a teacher-student ratio of 1:40, is not an indicator that the Shiksha Mitras were appointed to sanctioned posts. They did not belong to the regular cadre and were contractual appointees. They were not appointed against sanctioned posts. The Union Government, in formulating SSA, envisaged the application of the Gujarat model of recruitment of fully trained teachers on fixed pay, as an interim strategy in states with large scale teacher vacancies. The policy was envisaged to improve the accountability of teachers vis-?-vis the local community without diluting the standards for selection of teachers as laid down from time to time by NCTE. Persons who were engaged as Shiksha Mitras in the State of Uttar Pradesh were engaged on the basis of their possessing only the intermediate qualification, without possessing a certificate of training as prescribed by Rule 8 of the Service Rules of 1981. By the time Sarva Shiksha Abhiyan was circulated as a policy for implementation by the Union Ministry of Human Resource Development on 31.7.2001, the Regulations of 3.9.2001 had also been notified by NCTE. The SSA policy document, therefore, clearly envisaged that there would be no dilution of the standard for selection of teachers as laid down from time to time by NCTE.

65. The nature of the appointment of Shiksha Mitras in the State of Uttar Pradesh came up for consideration before a Full Bench of this Court in Kumari Sandhya Singh and Others Vs. State of U.P. and Others, . The Full Bench held as follows:

"It could not be disputed by the petitioners that the scheme for appointment of Shiksha Mitra came into being through the government orders i.e. executive instructions. To put it differently, the petitioners' appointment/selection is contractual appointment as Shiksha Mitra. Meaning thereby, there is no statutory backing to the petitioners' claim. The petitioners' argument proceeds on the footing that the post of Shiksha Mitra is a civil post and is governed by the principle of statutory service rules. The scheme itself provides that a person shall be allowed to function as Shiksha Mitra under a contract for a fixed period which will come to an end on 31st of May of the next year. No honorarium shall be payable for the month of June. The scheme shows that it will commence in the month of July of each year and will end on 31st of May i.e. for eleven months. By modification it has been provided that if nothing is there against a person he may continue as Shiksha Mitra for the next academic session, subject to receiving a short refresher training. All this cumulatively shows that the tenure of Shiksha Mitra is a fixed term tenure, maximum up to the period of eleven months which, of course, in view of the subsequent amendments by the Government Order can be renewed for subsequent academic sessions."

The Full Bench cited with approval the observations contained in a judgment of a Division Bench of this Court presided over by Chief Justice HL Gokhale (as His Lordship then was) in Sanjay Kumar Singh v. State of U.P., Special Appeal No.

305 of 2008, decided 3.3.2008) (All) (DB), where it was held as follows:

"Everybody is forgetting that the scheme of Shiksha Mitra is to spread education and it is not a scheme for employment. What is being given is an honorarium to the concerned teacher. The appointment comes to an end at the end of the academic year, with right to continue if the performance is good."

These observations of the Division Bench in Sanjay Kumar Singh's case and of the Full Bench in Km Sandhya Singh are we say with respect, a correct assessment of the Shiksha Mitra Scheme.

66. The submission which has been urged on behalf of the State and by some of the supporting Counsel, is that Section 11 of the UP Basic Education Act, 1972 contemplates the constitution of Village Education Committees. This does not render the Shiksha Mitra Scheme a statutory scheme. The function of Village Education Committees as defined in sub-section (2) of Section 11 is to establish, administer, control and manage basic schools in the Panchayat area and to discharge such other functions pertaining to basic education as may be entrusted by the State Government. This, in our opinion, does not render the Scheme of appointing Shiksha Mitras of a statutory nature or character. If such a Scheme was to be intended to have a statutory flavour, there could have been no escape from the requirement of complying with the norms which govern the regular teachers of basic schools as prescribed in the Service Rules of 1981. On the contrary, compliance with the Service Rules of 1981 was sought to be obviated by engaging barefoot volunteers across the State on a contractual basis for which an administrative scheme was envisaged under the Government Order dated 26.5.1999. Similarly, the power of the State Government to issue directions to the Board of Basic Education in Section 13 was not the power which the State Government wielded while issuing diverse Government Orders that govern the Shiksha Mitra Scheme. The power to issue directions under Section 13 could not have been exercised contrary to the provisions of the Service Rules of 1981 which were made by the State Government in exercise of the subordinate law-making power. Even if it is held that Village Education Committees were entrusted with the duty of selecting Shiksha Mitras in pursuance of the provisions of Section 11(2)(g) , the fact remains that appointments of Shiksha Mitras were independent of and not subject to the discipline of the provisions of the Service Rules of 1981. Neither was the engagement against sanctioned posts nor were the provisions for recruitment envisaged in the Service Rules of 1981 followed. They were not qualified candidates. Understanding the true nature and purpose of Shiksha Mitras lies at the heart of the dispute in the present case.

67. Having elaborated on this aspect, it would now be necessary to deal with the regulatory provisions contained, firstly in the NCTE Act and the later enactment of the RTE Act of 2009.

C2 NCTE Act 1993 and RTE Act 2009: The effect of Section 23

68. The NCTE Act, 1993 was enacted by Parliament in order to achieve planned and coordinated development of teacher education. The expression "teacher education" in Section 2(1) covers programmes of education, research or training in order to equip individuals to teach at the pre-primary, primary, secondary and senior secondary stages, and to include non-formal education, part-time education, adult education and correspondence education. NCTE, as a statutory body, is constituted in accordance with the provisions of Chapter II of the Act to ensure planned and coordinated development of teachers and for maintenance of norms and standards of teacher education. The functions of NCTE under Section 12 are not confined to primary education alone and this would assume significance having due regard to the ambit and sweep of the NCTE Act when it is considered in juxtaposition to the RTE Act of 2009 which was made specifically in the context of providing the right of free and compulsory elementary education. The powers of NCTE under the NCTE Act, 1993 include the grant of recognition to teacher education institutions for which provisions are made under Chapter IV. By the Act, NCTE is given a substantive power to frame Regulations in Section 32. Included in the range of its regulatory powers in clause (d) of sub-section (2) of Section 32 is the power to lay down norms, guidelines and standards in respect of the minimum qualifications for a person to be appointed as a teacher and in respect of specified categories of courses or training in teacher education under clause (e) of Section 12. A broad range of statutory powers is entrusted to NCTE in the legislation enacted by Parliament in 1993. The range of its functions is evident from the nature of the subjects brought within the control of NCTE by Section 12.

69. NCTE framed, on 3.9.2001, Regulations in the exercise of its statutory powers. In the Regulations which were notified and published in the Gazette of India on 4.9.2001, NCTE laid down qualifications for the recruitment of teachers including at the elementary level. The elementary level included primary school teachers where the prescribed qualification was (i) a senior secondary school certificate or intermediate or its equivalent and (ii) a diploma or certificate in basic teacher's training of a duration of not less than two years or a bachelor's degree in elementary education. For the upper primary Sections, the prescribed educational qualification is the same as for the primary level and a diploma or certificate in elementary teachers training of a duration of not less than two years or a graduate degree with a Bachelor of education or its equivalent. In a Note which is appended to the First Schedule, NCTE clarified that for teaching in primary schools, a basic teachers training programme of two years' duration is required and that the BEd is not a substitute. The striking aspect, insofar as the present case is concerned, is that Shiksha Mitras who were engaged after 1999 did not when they were appointed fulfill the requirement which was spelt out in the NCTE Regulations of 3.9.2001. None of them fulfilled the requirement of a two year basic teachers training certificate.

70. Parliament enacted the RTE Act of 2009 to implement the provisions of Article 21-A of the Constitution which mandates the State to provide free and

compulsory education to all children between the ages of six and fourteen. The definition of the expression "child" in Section 2(c) covers children in this age group and the expression "elementary education" in Section 2(f) makes it abundantly clear that education from classes I to VIII forms the subject matter of the enactment of 2009.

71. Section 23 of the RTE Act of 2009 provides in sub-section (1) for eligibility for appointment as a teacher. Under sub-section (1) of Section 23, to be eligible for appointment as a teacher, a person has to possess such minimum qualifications as are "laid down" by an academic authority authorised by the Central Government by a notification. NCTE was designated as the authority under sub-section (1) on 31.3.2010. Sub-section (2) of Section 23 recognises that a state may not have adequate institutions offering courses or training in teacher education. Sub-section (2) also constitutes an acknowledgement by Parliament of a situation where teachers possessing the minimum qualifications laid down under sub-section (1) may not be available in sufficient numbers in a state. Having due regard to this eventuality, the Central Government was statutorily vested with the authority under sub-section (2) to relax the minimum qualifications laid down under sub-section (1) for appointment as a teacher. The Central Government was left with the discretion to define the period over which the relaxation is to remain operative subject to the stipulation that this would operate for a period not exceeding five years. The proviso to sub-section (2) of Section 23 envisages that a teacher who, at the commencement of the Act, does not possess the minimum qualifications as laid down in sub-section (1) would acquire them within a period of five years. The provisions contained in subsection (1) and those in the substantive part of sub-section (2) and the proviso comprise of a composite statutory scheme. By sub-section (1), an authority which is notified by the Central Government is to prescribe qualifications defining the conditions of eligibility for appointment as a teacher. Under sub-section (2), the Central Government is permitted to grant a relaxation of those qualifications for a period of not more than five years. While the laying down of qualifications is entrusted to the authority under sub-section (1), the power to grant a relaxation is conferred upon the Central Government under sub-section (2). The proviso deals with those teachers who, on the date of the commencement of the Act, did not possess minimum qualifications prescribed under sub-section (1) and to such teachers a window of five years was granted to acquire the minimum qualifications.

72. The Central Government authorised the NCTE as the academic authority to lay down the minimum qualifications for a person to be eligible for appointment as a teacher by a notification dated 31.3.2010 issued in exercise of the powers conferred by Section 23(1) of the RTE Act of 2009. NCTE notified the minimum qualifications required for appointment as a teacher in terms of sub-section (1) of Section 23 by its notification on 23.8.2010 defining eligibility for appointment as a teacher to classes I to VIII in a school covered by Section 2(n) of the RTE Act of 2009. The minimum qualifications prescribed by NCTE envisaged broadly



(i) a senior secondary certificate; (ii) a diploma in elementary education; and (iii) passing of the TET to be conducted by the appropriate government in accordance with NCTE guidelines. These were the qualifications prescribed for teachers of classes I to V and corresponding qualifications were also prescribed in the notification dated 23.8.2010 in relation to teachers of classes VI to VIII. Both for teachers of classes I to V and for those of classes VI to VIII, NCTE made the passing of the TET mandatory. Clause 3 of the notification provided for a post-appointment training under an NCTE recognized six month special programme in elementary education in the case of two categories: the first being for those with a BA/BSc degree and BEd qualification, and the second for those with a BEd (Special Education) or DEd (Special Education).

73. While laying down the minimum qualifications in clause (1) of the notification, NCTE dealt in Para 4 with the issue of those teachers appointed for classes I to VIII prior to the date of the notification. In their case, it was mandated that acquisition of minimum qualifications in Para 1 would not be necessary in three categories. The first category was of teachers appointed on or after 3.9.2001 when the Regulations of 2001 had come into force, in accordance with those Regulations. The expression "in accordance with that Regulation" meant that in order to avail of the benefit of clause (a) of Para 4, a teacher had to be appointed in accordance with the Regulations of 3.9.2001 and after the date of enforcement of the Regulations. To be a teacher appointed "in accordance with that Regulation", a person had to have both the educational qualifications prescribed (senior secondary school certificate or intermediate or an equivalent) and a diploma or certificate in basic teachers training (for primary classes from standard I to V.) Similarly, in the case of a teacher of the tipper primary classes for standards VI to VIII, the teacher was required to possess both a senior secondary school certificate or intermediate or its equivalent and either a diploma or certificate in elementary teachers' training of two years or a graduation with BEd or its equivalent. In other words, in order to avail of the benefit of clause (a) of Para 4 of the notification dated 23.8.2010, the mandatory condition was that the appointment had to be made after 3.9.2001 in accordance with the Regulations.

74. The second category to which it was provided that the minimum qualification would not apply, were teachers of classes 1 to V with a BEd qualification who had completed a six months' special BTC course approved by NCTE.

75. The third category comprised of teachers appointed before 3.9.2001. These teachers were appointed before the Regulations came to be notified for the first time by NCTE under the NCTE Act of 1993. Teachers appointed in accordance with the prevalent recruitment rules were governed by clause (c) of Para 4 of the notification.

The notification dated 23.8.2010 was subsequently amended by a notification dated 29.7.2011. The minimum qualifications for a person to be eligible for appointment as an Assistant Teacher contained in sub-paras (i) and (ii) of Para

(I) of the principal notification were substituted.

Evidently, Shiksha Mitras could not either seek the benefit of clause (a) or clause (c) of Para 4 of the notification dated 23.8.2010. They were not teachers appointed in accordance with the Regulations of 3.9.2001 since, admittedly they did not possess the BTC qualification. Moreover, Shiksha Mitras did not have the benefit of clause (c) of Para 3 since any appointment made prior to 3.9.2001 had to be in accordance with the prevalent recruitment rules. The engagements of Shiksha Mitras were de hors the recruitment rules and were not in accordance with the Service Rules of 1981 which apply to appointments of basic teachers in the State of Uttar Pradesh. The proviso to sub-section (2) of Section 23 governs persons who are teachers and who, at the commencement of the RTE Act of 2009, did not possess the minimum qualifications prescribed under sub-section (1). They were given a period of five years to acquire the minimum qualifications. The proviso would govern persons who were recruited as teachers in the State of Uttar Pradesh under the Act and the Service Rules of 1981 and can have no application to Shiksha Mitras.

### C3 Amendments of 2011 to NCTE Act

76. Now, at this stage, it would be necessary for the Court to dwell, briefly, on the legislative history which led to the amendments to the NCTE Act of 1993 in 2011.

77. In *Basic Education Board, U.P. Vs. Upendra Rai and Others*, , a Bench of two learned Judges of the Supreme Court held that the NCTE Act deals only with teachers training institutions and had nothing to do with ordinary educational institutions, such as primary schools, high schools and intermediate colleges. The view which was taken was that qualifications for appointment as teachers in "ordinary" educational institutions, like primary schools, could not be prescribed under the NCTE Act. The correctness of the judgment in *Upendra Rai* was referred to a Larger Bench of the Supreme Court in *Irrigineni Venkata Krishnanand v. Government of Andhra Pradesh*, 2010(1) ESC 42 (SC).

78. During the pendency of the reference to the Bench of three learned Judges of the Supreme Court, Parliament enacted Amending Act 18 of 2011 to provide for the insertion of Section 12A into the NCTE Act of 1993. Section 12-A contemplates that NCTE may by Regulations determine the qualifications of persons for being recruited as teachers in any pre-primary, primary, upper primary, secondary, senior secondary or intermediate schools or colleges run, aided or recognised by the Central Government, State Government or a local authority. Section 12A was introduced by Parliament to explicitly provide for a power in NCTE of a nature that the Act had contemplated in the power to frame regulations under Section 32(2)(d) . The Statement of Objects and Reasons accompanying the introduction of the Bill in Parliament clarified that the intent of Parliament in introducing the amendment was of a clarificatory nature. The proviso to Section 12-A stipulated that nothing in the Section shall affect

adversely the continuance of any person recruited under a rule, regulation or order of the Central or State Government or local or other authority, immediately before the commencement of the Amending Act, on the ground of non-fulfillment of such qualifications as may be prescribed by the NCTE. However, the minimum qualifications were required to be acquired within the period specified under the NCTE Act or under the RTE Act of 2009. The effect of the proviso was to ensure that while NCTE was recognised to possess a regulatory power to determine the qualifications for recruitment of teachers including in primary or upper primary schools, the insertion of Section 12-A would, by itself, not affect the continuance of a person who was recruited in pursuance of rules, regulations or orders of the government or authority concerned. Section 12-A was a provision which was introduced by way of abundant caution so as not to affect the continuance of such persons. Section 12-A is not a validation of the appointments of Shiksha Mitras nor, for that matter, does it elevate the engagements of such persons from a pure contractual level to anything higher. Section 12-A is intended to ensure that the objection to the regulatory power of NCTE over teachers of educational institutions other than teacher training institutions which had found acceptance in a judgment of two learned Judges of the Supreme Court in *Upendra Rai*, was placed beyond the pale of controversy. Hence, when the reference before a Larger Bench of the Supreme Court came up for consideration, the Bench of three learned Judges held that, as a result of the subsequent amendments, the questions which were referred to the larger Bench had become academic and did not require any answer. Section 12-A does not deal with the nature of the appointments of Shiksha Mitras nor does it place them on a higher or surer legal footing than as contractual appointees.

#### C4 Training imparted to Shiksha Mitras

79. The next aspect of the matter which needs to be analysed is the training which was imparted to Shiksha Mitras in the State of Uttar Pradesh in pursuance of the permission which was granted by NCTE on 14.1.2011. NCTE framed Regulations in 2009 to prescribe recognition norms and procedures. Regulation 3 provides that the Regulations apply to all matters related to teacher education programmes covering norms, standards and procedure for recognised institutions, the commencement of new programmes and the addition of sanctioned intake to existing programmes. Appendix-9 to the Regulations of 2009 lays down standards for a diploma in elementary education through the open and distance learning system. As the Preamble to Appendix-9 indicates, this was intended primarily for upgrading the professional competence of "working teachers" in elementary schools and for bringing into its fold those teachers who had entered into the profession without formal teacher training. NCTE accepted the open and distance learning system as a viable mode for the training of teachers presently serving in the elementary schools and for additional educational support to the teachers and educational functionaries working in the school system. Eligibility is defined in sub-clause (2) of Clause 5 of Appendix-9 to cover (i) senior secondary (class XII) or equivalent

examinations passed with fifty percent marks; and (ii) two years" teaching experience in a government or government recognised primary/elementary school.

80. The State Government moved the Central Government for the grant of permission on 24.12.2010 in which it disclosed the functioning of 1.78 lac Shiksha Mitras of whom 1,24,000 were stated to be graduates. The State Government indicated in its letter that these persons were engaged on a contract basis and with a stipulation of a minimum qualification of intermediate though, under the service rules, the prescribed qualification was a graduate degree. Subsequently, on 3.1.2011, a revised proposal was submitted which envisaged training being imparted to 1,24,000 graduate Shiksha Mitras out of a total complement of 1,70,000. The permission which was granted by NCTE on 14.1.2011 was specifically in the context of the request made on 3.1.2011 for granting permission for the training of 1,24,000 untrained graduate Shiksha Mitras. Eventually, what seems to have transpired was that the State Government issued a Government Order on 14.8.2012 so as to provide for training to those Shiksha Mitras who had acquired graduate degrees by 25.7.2012. However, it is not in dispute before this Court that training was imparted not only to graduate Shiksha Mitras who were within the terms of the permission granted by NCTE by its letter dated 14.1.2011, but also to 46,000 Shiksha Mitras holding the intermediate qualification which was not within the purview of the permission which was granted by NCTE on 14.1.2011. NCTE had not permitted the State of UP to train the non-graduate Shiksha Mitras through the open and distance learning methodology. NCTE, we must note, has stated in its counter affidavit filed in these proceedings, that it was not specifically apprised of the nature of the engagement of Shiksha Mitras by the State. The counter affidavit which has been filed by NCTE, insofar as is material, reads as follows:

"That the rationale for including the T.E.T. as minimum qualification for a person to be eligible for appointment as a teacher is that it would bring national standards and benchmark to quality teaching before the recruitment process is completed for appointing a candidate as a trained teacher.

That it is pertinent to mention here that since the State Authorities have not clearly sent the report that initial engagement of Shiksha Mitras was for a period of 11 months, as such the nomenclature of these Shiksha Mitras as untrained teacher was not in consonance with the provisions so issued after the Right of Children to Free and Compulsory Education Act, 2009 came into effect."

The State has disputed this.

81. However, the fact which remains is that the NCTE did not proceed to revoke the permission which was granted by it on 14.1.2011 at any stage. The eligibility qualification prescribed in Appendix-9 is intermediate. Hence, at this stage, this Court deems it inappropriate, in the considered exercise of its writ jurisdiction

under Article 226 of the Constitution, to issue a direction which would have the effect of nullifying or abrogating the training qualifications which have been imparted to a large body of persons by the State Government. However, this would not preclude NCTE from duly verifying compliance with the conditions prescribed by it and particularly whether the training imparted is in accord with NCTE norms and standards.

C5 Amendments to the State RTE Rules 2011 and the Service Rules of 1981

82. That leads the Court to the final aspect of the matter which relates to the amendment made by the State Government in the RTE Rules of 2011 framed under the RTE Act 2009 and in the Service Rules of 1981.

83. The basic premise with which the discussion on this aspect must commence is that under Section 23(2) of the RTE Act 2009, the power to grant a relaxation from the minimum qualifications which are laid down by NCTE is vested exclusively in the Central Government. Parliament while enacting the legislation has carefully envisaged that minimum qualifications would be prescribed by NCTE under sub-section (1) of Section 23. The nature and extent of the relaxation under sub-section (2) is to be determined by the Central Government. In deciding whether to grant a relaxation, the guiding principles are laid down in the substantive part of sub-section (2). The Central Government has to determine whether or not the state has adequate institutions offering courses or training in teacher education or teachers possessing the minimum qualifications as laid down under sub-section (1).

84. The Central Government has exercised powers under sub-section (2) of Section 23 on 10.9.2012. The Union Ministry of Human Resource Development, in its notification, has granted a relaxation until 31.3.2014 only in respect of persons referred to in sub-clause (a) of Clause (1) of Para 3 of the notification dated 23.8.2010 as amended. This category covers persons with BA/BSc degrees with at least fifty percent marks and holding a BEd qualification. While issuing a notification on 10.9.2012 for the purpose of relaxing the qualifications under Section 23(2) in regard to a limited category of persons, the Central Government has also clarified that this shall be a "one time relaxation" and that no further relaxation under Section 23(2) shall be granted in the State of Uttar Pradesh. The Union Government has also directed that the State Government shall take steps to increase institutional capacity for preparing persons with specified qualifications so as to ensure that only persons possessing the qualifications laid down under the said notification are appointed as teachers for classes I to V after 31.3.2014. No relaxation has been granted by the Central Government in terms of the provisions of sub-section (2) of Section 23 to obviate compliance by Shiksha Mitras with the minimum qualifications laid down. NCTE has also issued Regulations on 12.12.2014 under the NCTE Act stipulating that the qualifications for primary and upper primary teachers shall be those as prescribed by its notification dated 23.8.2010 under Section 23(1) of the RTE Act of 2009.

85. Rules were formulated by the Central Government in 2010 under the RTE Act of 2009. The Rules being subordinate legislation could not have and did not prescribe any norm at variance with what was prescribed under sub-section (2) of Section 23. Rules 15, 16 and 17 of the Rules framed by the State Government in 2011 under the RTE Act of 2009 envisage that (i) the State Government would move the Central Government for relaxation of the prescribed minimum qualifications if teachers possessing the prescribed minimum qualifications are not available; and (ii) no appointment of a teacher for any school shall be made in respect of a person not possessing the minimum educational qualifications prescribed under Rule 15 without a notification of the Central Government under sub-rule (3) of Rule 16.

86. What has happened in the State of Uttar Pradesh is that the State Government, in a clear violation of the mandate of Section 23(2) which vests the power to relax the minimum qualifications in the Central Government, has arrogated to itself a power which it lacks, to grant exemption from the mandatory qualifications which are laid down by NCTE in their application to Shiksha Mitras in the State. The State Government has, in our view, acted in clear violation of its statutory powers. Parliament has legislated to provide, in no uncertain terms, that any relaxation of the minimum educational qualifications can only be made by the Central Government. However, Rule 16-A which has been introduced by the State Government by a notification dated 30.5.2014 purports to provide a non-obstante provision which will operate notwithstanding anything contained in Rules 15 and 16 of the State Rules. Rules 15 and 16 of the State Rules were originally formulated in a manner consistent with the provisions of Section 23(2) and the provisions contained in Rules 17 and 18 of the Central Rules of 2010. However, as a result of the introduction of Rule 16-A, the State Government has assumed to itself the power to make provisions for relaxing the minimum educational qualifications for appointment of Shiksha Mitras as Assistant Teachers in junior basic schools "as are considered otherwise eligible and in order to implement the provisions of the Act". There can be no manner of doubt that far from implementing the provisions of the Act, the State Government by its amendment of the subordinate legislation has purported to negate the very object and purpose of the RTE Act of 2009.

#### C6 Extent of the rule-making power

87. The provisions of Section 38 of the RTE Act of 2009 confer a rule making power on the appropriate government. In exercise of the above powers the State had framed the Uttar Pradesh Right of Children to Free and Compulsory Education Rules, 2011. A reading of sub-section (2) of Section 38 establishes that the only clause which could be said to touch upon the issue raised before us would be clause (1) thereof.

88. Clause (1) confers a power upon the State to frame rules on the following subject matter:

"The salary and allowances payable to, and the terms and conditions of service of, teacher, under sub-section (3) of Section 23 ."

89. Sub-section (3) of Section 23 provides as follows:

"(3) The salary and allowances payable to, and the terms and conditions service of, teacher shall be such as may be prescribed."

90. The power to frame a rule like Rule 16-A as inserted by the Uttar Pradesh Right of Children to Free and Compulsory Education (First Amendment) Rules, 2014 is liable to be tested in the above background.

91. The power to fix qualifications is conferred upon an authority to be designated by the Central Government under Sub-section (1). The power to relax as we have found stands conferred upon the Central Government alone under sub-section (2) of Section 23 . The subject of qualification of teachers and relaxation thereof stands encompassed in sub-sections (1) and (2) of Section 23 .

92. In our view, the subject matter of qualification of teachers cannot fall within the expression "salary and allowances" or "terms and conditions of service" as employed in sub-section (3) of Section 23 . This is not just because the "qualification of teachers" would not fall within the above expressions when accorded their plain and literal meaning but also on account of the fact that the power to fix such qualifications stood conferred on two different authorities specified as such in sub-sections (1) and (2) of Section 23 . The field thus stood occupied completely. Obviously, therefore, when the State framed a rule under Section 38(2)(1), the same could not have been utilized to fix a qualification or to relax one fixed by the authority under sub-section (1). For these reasons also we are unable to sustain the provision made in Rule 16-A.

C7 Extent of State power under Article 162 to order regularisation

93. In State of U.P. Vs. Neeraj Awasthi and Others, , the Supreme Court considered the issue of a State direction refusing to accord approval to a regulation sought to be framed for regularization of illegal appointments. The Supreme Court approved the principles enunciated in the following cases:

"(a) A A. Umarani Vs. Registrar, Cooperative Societies and Others, , where it was held that:

"45. No regularization is, thus, permissible in exercise of statutory power conferred under Article 162 of the Constitution if the appointments have been made in contravention of the statutory rules."

(b) Mahendra L. Jain and Others Vs. Indore Development Authority and Others, , where it was held that:

"... An illegal appointment cannot be legalized by taking recourse to regularization. What can be regularized is an irregularity and not an illegality..."

In Neeraj Awasthi, the Supreme Court observed that:

"57. If no appointment could be made by the State in exercise of its power under Article 162 of the Constitution as the same would be in contravention of the statutory rules, there cannot be any doubt whatsoever that the Board or for that matter the Market Committee cannot make an appointment in violation of the Act and Regulations framed thereunder."

C8 Experience on the job is not a substitute for qualification

94. The contention that the experience gained by Shiksha Mitras over the course of their engagement should obviate the need of obtaining the essential qualification cannot be accepted for more than one reason. Firstly, the essential qualification must be held by the person on the date of entry into the service. If the entry be preceded by a selection process it is liable to be tested with reference to the date of advertisement. Viewed from any angle, the Shiksha Mitras did not possess the requisite qualification on either of the relevant cut off dates. Secondly, the experience that may have been gained by a person has never been construed as a substitute for an essential qualification that is statutorily prescribed. Acceptance of this contention would have grave ramifications, fall foul of settled precedent on the subject and be against the basic tenets of Article 16 and principles governing public employment.

95. While dealing with a similar contention, the Supreme Court in State of Madhya Pradesh and Another Vs. Dharam Bir, , observed:

"31. The plea that the Court should have a "human approach" and should not disturb a person who has already been working on this post for more than a decade also cannot be accepted as the Courts are hardly swayed by emotional appeals. In dispensing justice to the litigating parties, the Courts not only go into the merits of the respective cases, they also try to balance the equities so as to do complete justice between them. Thus the Courts always maintain a human approach. In the instant case also, this approach has not been departed from. We are fully conscious that the respondent had worked on the post in question for quite a long time but it was only in ad hoc capacity. We are equally conscious that a selected candidate who also possesses necessary educational qualification is available. In this situation, if the respondent is allowed to continue on this post merely on the basis of his concept of "human approach", it would be at the cost of a duly selected candidate who would be deprived of cleared the selection. In fact, it is the "human approach" which requires us to prefer the selected candidate over a person who does not possess even the requisite qualification. The Courts as also the Tribunal have no power to override the mandatory provisions of the Rules on sympathetic consideration that a person, though not possessing the essential educational qualifications, should be allowed to continue on the post merely on the basis of his experience. Such an order would amount to altering or amending the Statutory provisions made by the Government under Article 309 of the Constitution.

32. "Experience" gained by the respondent on account of his working on the post



in question for over a decade cannot be equated with educational qualifications required to be possessed by a candidate as a condition of eligibility for promotion to higher posts. If the Government, in exercise of its executive power, has created certain posts, it is for it to prescribe the mode of appointment or the qualifications which have to be possessed by the candidates before they are appointed on those posts. The qualifications would naturally vary with the nature of posts or the service created by the Government."

#### C9 Significance of TET

96. The importance of the TET and its mandatory nature and character have been dealt with in a judgment of a Full Bench of this Court in Shiv Kumar Sharma and Others Vs. State of U.P. and Others, . The Full Bench has observed as follows:

"...the purpose of a teacher eligibility test is to ensure that the candidate claiming himself to be possessed of such attributes and abilities, has actually acquired his academic and training qualifications genuinely. The capacity of a candidate claiming to be possessed of the educational and training qualifications has therefore to be screened to treat him to be qualified and then eligible for being appointed as a teacher. This is in tune with the object of 2009 Act to provide good and quality education at the elementary level with the aid of the best teachers. If the Council, duly authorised by the Central Government, has prescribed this norm which is for the purpose of ensuring the implementation of the Act, then the argument that the prescription is ultra vires to Section 23 of the Act has to be rejected."

The Full Bench has held that the object of the TET is to ensure that a teacher is qualified in the field which he is about to enter. Affirming the view which was taken in an earlier judgment of a Division Bench, the Full Bench affirmed the power of NCTE to prescribe qualifications and held that after the coming into force of the RTE Act of 2009 and the prescription of qualifications by NCTE, the State is not a free agent to do as it wills. The failure of the State Government to timely implement the qualifications which were laid down by NCTE, it was held, would not dilute or take away the impact of the notification which was mandatory. In the view of the Full Bench:

"...In our opinion, however, merely because the State incorporated these provisions in its rules later on would not take away the impact of the norms prescribed by the National Council for Teacher Education that stood enforced w.e.f. 23.8.2010. The delegated legislation of the State Government was subject to the primary legislation of the Central Government. The framing of rules as a subordinate legislation is subservient to the provisions framed by the Central Government. The notification dated 23.8.2010 therefore has an overriding effect and it could not have been ignored. If the State Government has proceeded to make appointments after 23.8.2010 without complying with the provisions of teacher eligibility test then such appointments would be deficient in such

qualification."

97. The State Government could not have been unaware of the law laid down by the Full Bench of this Court. Yet, the effect of the amendment which was brought in by the introduction of Rule 16-A is to negate the prescription of norms laid down by NCTE and to allow the State Government to grant a relaxation. This power is conferred not upon the State Government by the statute but upon the Central Government.

#### C10 Validity of amendment to the Service Rules of 1981

98. On 30.5.2014 - the same day on which the UPRTE Rules of 2011 were amended, the State Government amended the Service Rules of 1981. Significantly, even the Service Rules, as amended, continue with the same definition of a teacher in Rule 2(o) to mean "a person employed for imparting instructions" in nursery schools, basic schools, junior basic schools or senior basic schools. By and as a result of an amendment to Rule 5, an additional source of recruitment has been provided by allowing the appointment of such Shiksha Mitras as were engaged and were working on the date of the commencement of the amended Rules of 2014. By Rule 6, as amended, the upper age limit for the engagement of Shiksha Mitras has been enhanced to sixty years. As a result of the amendment of Rule 8, the requirement of passing the TET has been completely done away with in the case of Shiksha Mitras. For the recruitment of Assistant Teachers from amongst Shiksha Mitras, it has been provided that the only requirement would be the possession of a bachelor's degree and the completion of a two year distance learning BTC course or a course equivalent thereto. The State Government has acted ultra vires the scope of the statutory powers conferred upon it by laying down qualifications for appointment of Shiksha Mitras as Assistant Teachers in direct conflict with what has been prescribed by NCTE both in pursuance of its powers under Section 23(1) of the RTE Act, 2009 (by the notification dated 23.8.2010) and in pursuance of its power to frame Regulations under Section 32(2) of the NCTE Act of 1993 (by the Regulations of 12.12.2014 which adopt the notification dated 23.8.2010 for primary and upper primary teachers). The prescription of qualifications by the State Government by an amendment of its service rules in conflict with the minimum qualifications prescribed by NCTE is ultra vires. NCTE has the sole and exclusive authority to prescribe minimum qualifications. The encroachment by the State Government on the domain of NCTE is illegal and ultra vires.

99. Rule 14(6)(a) provides that Shiksha Mitras, after the completion of two years' training through the distance BTC course, would be appointed as Assistant Teachers in junior basic schools against substantive posts. The appointing authority is under a mandate under clause (b) of Rule 14(6) to prepare a list of such Shiksha Mitras who possess the prescribed qualifications. Their names are to be arranged in ascending order on the basis of their dates of birth.

100. The object and purpose of introducing the TET is to ensure that a teacher who embarks upon instructing students of primary and upper primary classes is duly equipped to fulfil the needs of the students, understands the relevance of education for a child at that stage and can contribute to the well rounded development of the child. Teaching a child is not merely a matter of providing information. Deeply embedded in the process of imparting education is sensitivity towards the psyche of the child, the ability to understand the concerns of a young student of that age, the motivations which encourage learning and the pitfalls which have to be avoided. The emphasis on clearing the TET is to ensure the maintenance of quality in imparting primary education. These requirements which have been laid down by NCTE fulfil an important public purpose by ensuring a complement of trained teachers who contribute to the learning process of children and enhance their growth and development. These requirements should not be viewed merely as norms governing the relationship of a teacher with the contract of employment. These norms are intended to fulfil and protect the needs of those who are taught, namely, young children. India can ignore the concerns of its children only at the cost of a grave peril to the future of our society. The effort of the State Government to by-pass well considered norms which are laid down by NCTE must be disapproved by the Court. We have done so on the ground that the State Government lacks the legislative power and competence to do so. Equally, fundamental is the concern that a relaxation of the norms prescribed by an expert body will result in grave detriment to the development and growth of our young children and the provision of quality education to them. Providing quality education is crucial for students belonging to every strata of society. Education which is provided in schools conducted by the Basic Education Board should not be allowed to degenerate into education of poor quality which it will, if the norms which are prescribed by an expert body under legislation enacted by Parliament in the national interest are allowed to be ignored by the State Government on the basis of parochial or populist perceptions. Such an attempt is ultra vires the statutory powers of the State and is arbitrary and violative of Article 14 of the Constitution.

#### C11 Validity of absorption

101. The issue before the Court is in regard to the legality of the absorption. Articles 14 and 16 of the Constitution provide for equality in matters of public employment. The limit on the power of the State to grant regularization was considered by a Constitution Bench of the Supreme Court in a judgment in *Secretary of State of Karnataka v. Umadevi* (supra). Emphasizing the principle of the "rule of equality" in public employment, the Constitution Bench Court held as follows:

"...Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to

comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment," this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued."

(emphasis supplied)

102. The Supreme Court held that there may be cases where certain appointments were not illegal but were irregular. These are situations where an appointment has been made (i) of duly qualified persons; and (ii) in duly sanctioned vacant posts and the employees would have continued to work for more than ten years without the intervention of the orders of the Court or tribunal. In those cases, the judgment of the Supreme Court in *Umadevi* left it open to the State Governments, the Union Government and their instrumentalities to take steps to regularize, as a one time measure, the services of such irregularly appointed persons. The relevant observation in that regard is as follows:

"One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *S.V. Narayanappa* (supra), *R.N. Nanjundappa* (supra), and *B.N. Nagarajan* (supra), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of Courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of Courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."

103. The observations of the Constitution Bench in paragraph 53 of the decision in *Umadevi* were elaborately explained in a subsequent decision of a Bench of two learned Judges of the Supreme Court in *State of Karnataka and Others Vs. M.L. Kesari and Others*, . The exception which the judgment contemplated to

the general principle which militated against regularization was laid down as follows:

"It is evident from the above that there is an exception to the general principles against "regularization" enunciated in Umadevi, if the following conditions are fulfilled:

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any Court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular."

(emphasis supplied)

104. In M.L. Kesari's case, the Supreme Court emphasized that the period of six months as "a one time measure" would have to be considered in its-proper perspective. At the end of six months from the date of the decision in Umadevi, cases of several daily wagers/casual employees were still pending before the Court, as a result of which the one time regularization process was not undertaken. In many cases, regularization was not undertaken because cases were pending in Courts or due to sheer oversight. The Supreme Court held that such persons will not lose their right to be considered for regularization because the one time exercise was completed without considering their cases or because the six months period stipulated in Umadevi had expired.

105. In Amarendra Kumar Mohapatra and Others Vs. State of Orissa and Others, , the principles which were laid down in Umadevi and M.L. Kesari were applied by the Hon"ble Supreme Court while considering the validity of a legislative enactment by which regularization was granted. In the case before the Supreme Court, it was held that degree holder junior engineers were qualified for appointment as assistant engineers and they were appointed against sanctioned posts. All of them had worked for more than ten years and, in some cases, as long as for twenty years and some of them had, in fact, retired from their respective departments. In this background, it was held that the legislative enactment granting regularization did not call for interference at that late stage. Thus, the validity of a legislative provision providing for regularisation has also been judged on this touchstone. An illegal appointment cannot be regularised because that would infringe Articles 14 and 16 .

106. The decision of the Constitution Bench in Umadevi as well as the subsequent decisions have circumscribed the power of the State Government to grant regularization by making a distinction between the illegal and irregular appointments. The Supreme Court has held that where appointments are not made or continued against sanctioned posts or where the persons appointed did not possess the prescribed minimum qualifications, such appointments would be considered to be illegal. However, if the person employed has possessed the prescribed qualifications and was working against a sanctioned post but was selected without going through the process of open competitive examination, such an appointment would be considered as irregular.

107. In deciding upon the validity of the provisions made by the State Government in the amended Rules for regularization, it is these decisions which have to be applied by the Court.

108. The submission of the learned Additional Advocate General was that Shiksha Mitras had continued to work in schools for a long period of 16 years and, therefore, there is no requirement of asking them to clear the Teachers Eligibility Test. It was also submitted that since there was a paucity of qualified Assistant Teachers and there may not be a sufficient number of eligible candidates, the State is justified in granting appointment to the Shiksha Mitras as Assistant Teachers.

109. These submissions cannot be accepted.

110. The Supreme Court in Yogesh Kumar and Others Vs. Government of NTC, Delhi and Others, , held that mere paucity of candidates holding a TTC qualification would not justify a departure from the prescribed qualifications.

111. Teachers Eligibility Test is conducted to ensure that a person has the required knowledge and aptitude to teach students studying in classes I to V. This is an important test which cannot be ignored even if a person has been engaged in teaching students of classes I to V for a number of years as Shiksha Mitra. In Dilip Kumar Ghosh and Others Vs. Chairman and Others, , the Supreme Court formulated the following principle:

"(i) In the case of the junior basic training and primary teachers training certificate the emphasis is on the development of the child. The primary education is up to IVth standard. Thereafter there is middle education and then the secondary and higher secondary education. But in the primary school one has to study the psychology and development of child at a tender age. The person who is trained in B.Ed. Degree may not necessarily be equipped to teach a student of primary class because he is not equipped to understand the psychology of a child at that early stage."

112. The concept of relaxation which was explained by the Supreme Court in Umadevi's case requires that a person at the time of engagement must possess the requisite qualifications under the service rules. It is, therefore, important that

Shiksha Mitras at the time of initial engagement should have possessed the requisite qualifications contained in the service rules. This is also what was observed by the Supreme Court in *Pramod Kumar Vs. U.P. Secondary Education Services Commission and Others*, . The Supreme Court held that if the essential qualification for recruitment to a post is not satisfied, ordinarily the same cannot be condoned and an appointment which is contrary to the Statutes/statutory rules would be void in law.

113. From the material which has emerged before the Court, it is clear that Shiksha Mitras to whom the benefit of regularization has been granted neither fulfilled the prescribed minimum qualifications nor were they appointed against sanctioned posts. The fact that Shiksha Mitras did not fulfill the qualifications prescribed by NCTE which has the unquestioned jurisdiction under the NCTE Act of 1993 and RTE Act of 2009 is evident from the fact that the State Government, by inserting Rule 16-A into the Rules of 2011 has assumed to itself a power to relax the minimum qualifications required to be observed, in the case of Shiksha Mitras. In other words, by Rule 16-A, the State Government has created an island of exclusion for the benefit of Shiksha Mitras who, in the exercise of the rule-making power of the State under Rule 16-A, would not have to fulfil the minimum qualifications prescribed by NCTE. The State Government has sought to get over the inseparable obstacle that the Shiksha Mitras do not fulfil the TET requirement by unlawfully conferring power on itself to relax the requirement. Having committed that illegality, the State has proceeded to do away with the TET qualification in its application to Shiksha Mitras, by unlawfully amending the service rules. These amendments have been held to be ultra vires and an impermissible encroachment on the exclusive domain of NCTE. Having done this the State Government has compounded its illegality by regularising/absorbing the Shiksha Mitras as Assistant Teachers. As a consequence, qualified candidates fulfilling the NCTE norms are denied the equality of opportunity to seek appointment as Assistant Teachers. We have earlier held Rule 16-A to be ultra vires the rule-making authority of the State Government since the power to grant a relaxation from the minimum qualifications is vested exclusively in the Central Government. In assuming to itself a power to relax the minimum qualification and thereafter by diluting the minimum qualifications in the case of Shiksha Mitras, the State Government has patently acted in a manner which is arbitrary, ultra vires the governing central legislation and in breach of the restraint on the limits of its own statutory powers. By this exercise, the State Government has sought to grant regularization to persons who failed to fulfil the minimum qualifications and who were never appointed against sanctioned posts. In these circumstances, the grant of largesse by the State Government to Shiksha Mitras cannot be upheld and the amendment to the Rules is ultra vires and unconstitutional.

114. The Additional Advocate General submitted that Shiksha Mitras were appointed in pursuance of a scheme implemented by the State Government and hence their appointments cannot be regarded as a backdoor entry. This

submission will not support the absorption of Shiksha Mitras as Assistant Teachers in the regular service of the State. In *Grah Rakshak, Home Guards Wel. Asso. Vs. State of H.P. and Others*. Home guards appointed by the States of Himachal Pradesh, Punjab and NCT of Delhi sought regularisation of their services but their writ petitions were dismissed by the High Court. The Supreme Court held that the enrolment of the Home guards may not have been a back door engagement, but that would not entitle them to regularisation of service or the grant of regular appointments. They were never paid a regular salary and were engaged only as volunteers. They were not regular appointees in the service of the State. They had agreed to the conditions of engagement, by making declarations.

115. In the present case, it is evident that the Shiksha Mitras do not fulfil any of the norms laid down by the Supreme Court for regular absorption into the service of the State. They were at all material times appointed as and continued to be engaged as contractual appointees. Their appointments were not against sanctioned posts. They did not fulfil the minimum qualifications required for appointment as Assistant Teachers.

#### C12 Locus of the petitioners

116. Admittedly, all the petitioners were qualified to apply for and be considered for appointment as Assistant Teachers. Their right of consideration was clearly affected and is in fact eclipsed by the absorption of Shiksha Mitras. It cannot therefore be said that the petitioners lacked locus to maintain the writ petitions.

#### PART D : OPERATIVE ORDERS

117. For all these reasons, we allow the writ petitions in the following terms:

"(i) The amendment made by the State Government by its notification dated 30.5.2014 introducing the provision of Rule 16-A in the Uttar Pradesh Right of Children to Free and Compulsory Education Rules, 2011 by the Uttar Pradesh Right of Children to Free and Compulsory Education (First Amendment) Rules 2014 is held to be arbitrary and ultra vires and is quashed and set aside;

(ii) The Uttar Pradesh Basic Education (Teachers) Service (Nineteenth Amendment) Rules 2014, insofar as they prescribe as a source of recruitment in Rule 5(2) the appointment of Shiksha Mitras; the academic qualifications for the recruitment of Shiksha Mitras in Rule 8(2)(c) and for the absorption of Shiksha Mitras as Assistant Teachers in junior basic schools under Rule 14(6) are set aside as being unconstitutional and ultra vires; and

(iii) All consequential executive orders of the State Government providing for the absorption of Shiksha Mitras into the regular service of the State as Assistant Teachers shall stand quashed and set aside."

The batch of writ petitions shall stand disposed of in the aforesaid terms. However, there shall be no order as to costs.