

(2020) 09 JH CK 0143

In the Jharkhand High Court

Case No : Writ Petition (C) No. 1387 Of 2017, 1700, 1701, 1702, 1745 Of 2019, I. A. Nos. 5118, 8077 , 8438, 8451, 9795, 10005, 10064, 10073, 10074, 10109, 10116, 10134, 10168, 10169, 10225, 10226, 10301, 10302, 10350, 10351, 10665 Of 2019, 41, 450, 3219, 3294, 3405

Soni Kumari And Ors

APPELLANT

Vs

State Of Jharkhand And Ors

RESPONDENT

Date of Decision : 21-09-2020

Acts Referred:

Andhra Pradesh Public Employment (Requirement as to Residence) Act, 1957 — Section 3

Constitution Of India, 1950 — Article 12, 13(2), 14, 15, 15(2), 16, 16 (1), 16(2), 16(3), 16(4), 16(5), 21, 29, 32, 33, 34, 35(a), 35 (a-i), 38, 46, 51A, 162, 244, 309, 371D

Citation : (2020) 09 JH CK 0143

Hon'ble Judges : H.C. Mishra, J;Shree Chandrashekhar, J;Deepak Roshan, J

Bench : Full Bench

Advocate : Vigyan Shah, Lalit Kumar Singh, Harindra Neel, Akshit Gupta, Ritu Kumar, Sumeet Gadodia, Suraj Prakash,?? Samavesh Bhanj Deo, Ritu Raj Sinha, Jitendra Sharma,?? P.K. Rahul, Varun Prabhakar, Vikash Kumar, Vikash Kumar Trivedi, Anjani Kumar, Kamdeo Pandey,?? Ankit Apurva, Ranjan Kumar Singh, Abhijit Kumar,?? Shailendra Kumar Tiwari, Rituraj Sinha, Sanjay Prasad?? Kaushik Sharkhel, Sujit Kumar Singh, Jitendra Sharma,?? Ravi Kumar, Akta Anand, Sujeet Kumar Singh, Ajit Kumar, Rajeev Ranjan, Rajiv Anand, Dr. Ashok Kumar Singh, Sanjay Kumar Piprawal, Tejo Mistri, Anil Kumar Sinha, Indrani Sen Choudhary, Shreshtra Gautam, Rajeev Nandan Prasad, H.K. Mahto, Sanjay Kumar Pandey, C.S. Singh, Prashant Kr. Rahul, Prabhash Kumar, Pooja Kumari, Mukesh Kumar Mehta, Vijay Ranjan Singh, Ravindra Nath, Rohan Kashyap,?? Shubham Mishra, Govind Roy Karn, Ashwini Bhaskar,??Sunil Kumar Mahto, Durga Charan Mishra, Prafull Jojo,??Suchitra Pandey, Arbind Kumar, Amritansh Vats,?? Ankit Kumar, Nikhil Ranjan, Saumya Pandey,??Binod Kumar, Piyush Chandra, Dipika Roy, S.K. Mahato, Gaurav Abhishek, Nagmani Tiwari,??Anjani Kumar, Vishal Kumar Singh, Binod Singh,??Bijay Ranjan Sinha, S.K. Samanta, Savita Kumari

Final Decision : Allowed

Judgement

1. All these five writ applications have been filed for the same relief and as such, we take W.P.(C) No. 1387 of 2017 as the lead writ application, in which, all the intervention applications, other interlocutory applications, counter affidavits and supplementary affidavits have been filed.

2. Heard learned counsels for the petitioners in all these writ applications, learned counsels for the intervenor petitioners, learned Advocate General for the State and the learned counsel for the Jharkhand State Staff Selection Commission (hereinafter referred to as the "JSSC"), as also the learned counsels for the intervenor respondents.

3. It may be stated at this place itself that the petitioners and the intervenor petitioners are the aspirants for the post of Trained Graduate Teachers in various subjects in the Government Secondary schools, for which they underwent selection process, but could not be appointed in the schools situated in thirteen scheduled districts in the State, because they were not the residents of the scheduled districts. The intervenor respondents are in three categories, the first being those who were selected and appointed in the scheduled districts pursuant to the impugned advertisement, secondly, those who were selected but could not be appointed due to the interim order dated 18.09.2019 passed by this Court and lastly, those whose selection / appointments have been affected in other services due to the aforesaid order.

4. In the present set of writ applications, the constitutional validity of the notification and order issued by the State Government, bearing Notification No. 5938 and Order No. 5939 dated 14.07.2016 issued in its Department of Personnel, Administrative Reforms and Rajbhasha, as contained in Annexures-6 and 6/1 to the lead writ application is under challenge. By the said notification and order, it has been stated inter alia that in the 13 scheduled districts of the State, i.e., the districts of Sahebganj, Pakur, Dumka, Jamtara, Latehar, Ranchi, Khunti, Gumla, Lohardaga, Simdega, East Singhbhum, West Singhbhum and Seraikella-Kharsawan, only the local residents of the concerned scheduled districts shall be eligible for appointment on the District Cadre Class-III and Class-IV posts for a period of ten years from the date of issuance of the notification. Thereafter, Advertisement No. 21 / 2016 was published on 28.12.2016, as modified by the Advertisement No. 21 / 2016 published on 04.02.2017, by the State Government in its Department of Personnel, W.P.(C) No. 1387 of 2017 and analogous matters Administrative Reforms and Rajbhasha, inviting applications for appointment to the posts of Trained Graduate Teacher in the Government Secondary schools. The said advertisement was issued through the JSSC, wherein in paragraph 5(iii), it has been stated that so far as the vacancies in the scheduled districts of the State are concerned, only the local residents of those scheduled districts shall be eligible to apply. As for example, it has been mentioned that so far as the vacancies of Ranchi District are concerned, only the local residents of Ranchi District may apply. It may further be pointed out that in all, 8423 posts were advertised for filling up the vacancies

in the aforesaid 13 scheduled districts in the State of Jharkhand, whereas 9149 posts were advertised for the remaining non-scheduled districts in the State. As regards the vacancies in the non-scheduled districts were concerned, it was mentioned in paragraph 5(i) of the advertisement that a candidate could apply against the vacancies in only one district of his / her choice. It may further be stated that out of 24 districts, 13 districts as mentioned above are the scheduled districts in the State of Jharkhand as notified by the Presidential Notification issued in the year 2007, which is still in force.

5. Several candidates applied for the posts and underwent the selection process. The results were published and process of appointment was initiated by the State Government. The cause of heart burning to the writ petitioners is that the candidates having higher marks than those selected in the scheduled districts, could not be appointed due to the fact that they were not allowed to apply in those districts as they were not the local residents of the scheduled districts. By order dated 21st February 2019, a Division Bench of this Court, taking into consideration the importance of the subject involved, directed that the notices be published in the Daily Newspaper, "The Telegraph" (Jharkhand Edition) and Hindi Daily Newspaper, "Prabhat Khabar" about the institution of these writ applications so that the persons interested may intervene in these writ applications. Pursuant to the publication of these notices, several interlocutory applications or intervenor applications were filed and were allowed by order dated 24.04.2019. Still more intervenor petitions were filed and this Court in its order dated 18.09.2019 made it clear that all the pending intervenor petitions shall be allowed and all the concerned persons shall be given due hearing in this case. As such, we have heard all the parties concerned.

6. By the same order dated 18.09.2019, taking into consideration the question of Constitutional importance involved in these matters, i.e., the candidates residing outside the concerned scheduled districts or the candidates residing outside the State were deprived from submitting their applications and being considered for appointment to district cadre Class-III and Class-IV posts in the Government Offices in the scheduled districts, which is prima facie violative of equality of opportunity in the matters of public employment, which is a fundamental right of a citizen of India, guaranteed by Articles 14 and 16 of the Constitution of India, the Division Bench referred the matter to be decided by a Larger Bench of this Court. It was further directed that pending the final decision by the Larger Bench, the operation of the Notification No. 5938 dated 14.07.2016 issued by the State Government in its Department of Personnel Administrative Reforms and Rajbhasha, as contained in Annexure-6 to the lead writ application, shall remain stayed, subject to the appointments already made, if any.

7. The impugned Notification No. 5938 and Order No. 5939 dated 14.07.2016 have been issued by the Governor of Jharkhand in exercise of the power under paragraph 5(1) of the Fifth scheduled of the Constitution of India. This provision in the Constitution of India reads as follows:-

"5. Law applicable to Scheduled Areas.- (1) Notwithstanding anything in this Constitution, the Governor may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and any direction given under this sub-paragraph may be given so as to have retrospective effect."

8. The main contention of the learned counsels for the petitioners, who are led by learned counsel Sri Vigyan Shah, is that in the garb of the non-obstante clause in paragraph 5(1) of the Fifth Schedule of the Constitution of India, such notification altogether depriving the candidates of the non-scheduled districts to apply for Class-III and Class-IV district cadre posts in the scheduled districts could not be issued by the Governor of Jharkhand, as the same amounts to violation of Articles 14 and 16 of the Constitution of India. It is submitted that Article 13(2) of the Constitution of India ordains that the State shall not make any law which takes away or abridges the rights conferred by W.P.(C) No. 1387 of 2017 and analogous matters Part III of the Constitution and any law made in contravention of this provision shall, to the extent of such contravention, be void.

9. Learned counsel for the petitioners has drawn our attention towards Articles 16 (1) to (3) of the Constitution of India, which read as follows:-

"16. Equality of opportunity in matters of public employment.- (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment."

10. It is further submitted that Article 35 (a-i) of the Constitution of India provides that only the Parliament shall have, and the Legislature of a State shall not have, power to make laws with respect to any of the matters, which under clause (3) of Article 16, clause (3) of Article 32, Article 33 and Article 34 may be provided for by law made by Parliament. Learned counsels for the petitioners have, thus, submitted that by prescribing 'residence' as an eligibility criteria for appointment on Class-III and Class-IV posts in the scheduled districts, the Governor has acted in violation of Articles 14, 13(2), 15(2), 16(2), 21 and 35 (a-i) of the Constitution of India, thus, infringing the fundamental rights of the citizens of India guaranteed under Part-III of the Constitution of India.

11. It has further been submitted by the learned counsels for the petitioners that the questions, whether in the garb of non-obstante clause in paragraph 5(1) of the Fifth Schedule of the Constitution, the Governor can override the fundamental rights guaranteed under Part-III of the Constitution and whether there can be 100% reservation based upon residence, so as to make only being resident of a particular area to be the eligibility criteria for appointment to a public post, and whether the power of the Governor in paragraph 5(1) of the Fifth Schedule extends to subordinate legislation, are the questions no more res integra, and have been deliberated upon and answered in negation, in several decisions of the Hon'ble Apex Court.

12. In support of his contention, learned counsel has placed reliance upon the decision of the Hon'ble Apex Court in *Kailash Chand Sharma Vs. State of Rajasthan & Ors.*, reported in (2002) 6 SCC 562, wherein where the Hon'ble Apex Court was considering the question, whether the domiciles of the particular districts of the State of Rajasthan and the residents of the rural area of the district could be given extra bonus marks in the selection process only on the basis of residence, and whether the said exercise was constitutionally valid when tested on the touchstone of Articles 14 and 16 of the Constitution of India. The question has been answered by the Hon'ble Apex Court as follows:-

"13. Before proceeding further we should steer clear of a misconception that surfaced in the course of arguments advanced on behalf of the State and some of the parties. Based on the decisions which countenanced geographical classification for certain weighty reasons such as socio-economic backwardness of the area for the purpose of admissions to professional colleges, it has been suggested that residence within a district or rural areas of that district could be a valid basis for classification for the purpose of public employment as well. We have no doubt that such a sweeping argument which has the overtones of parochialism is liable to be rejected on the plain terms of Article 16(2) and in the light of Article 16(3). An argument of this nature flies in the face of the peremptory language of Article 16(2) and runs counter to our constitutional ethos founded on unity and integrity of the nation. Attempts to prefer candidates of a local area in the State were nipped in the bud by this Court since long past. We would like to reiterate that residence by itself -- be it within a State, region, district or lesser area within a district cannot be a ground to accord preferential treatment or reservation, save as provided in Article 16(3). It is not possible to compartmentalize the State into districts with a view to offer employment to the residents of that district on a preferential basis. At this juncture it is appropriate to undertake a brief analysis of Article 16.

14. Article 16 which under clause (1) guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State reinforces that guarantee by prohibiting under clause (2) discrimination on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. Be it noted that in the allied article -- Article 15 -- the

word "residence" is omitted from the opening clause prohibiting discrimination on specified grounds. Clauses (3) and (4) of Article 16 dilute the rigour of clause (2) by (i) conferring an enabling power on Parliament to make a law W.P.(C) No. 1387 of 2017 and analogous matters prescribing the residential requirement within the State in regard to a class or classes of employment or appointment to an office under the State, and (ii) by enabling the State to make a provision for the reservation of appointments or posts in favour of any backward class of citizens which is not adequately represented in the services under the State. The newly introduced clauses (4-A) and (4-B), apart from clause (5) of Article 16 are the other provisions by which the embargo laid down in Article 16(2) in somewhat absolute terms is lifted to meet certain specific situations with a view to promote the overall objective underlying the article. Here, we should make note of two things: firstly, discrimination only on the ground of residence (or place of birth) insofar as public employment is concerned, is prohibited; secondly, Parliament is empowered to make the law prescribing residential requirement within a State or Union Territory, as the case may be, in relation to a class or classes of employment. That means, in the absence of parliamentary law, even the prescription of requirement as to residence within the State is a taboo. Coming to the first aspect, it must be noticed that the prohibitory mandate under Article 16(2) is not attracted if the alleged discrimination is on grounds not merely related to residence, but the factum of residence is only taken into account in addition to other relevant factors. This, in effect, is the import of the expression "only".

(Emphasis supplied.)

13. In the aforesaid decision, the Hon'ble Apex Court has also taken into consideration its earlier decision in A.V.S Narsimha Rao & Ors. Vs. State of Andhra Pradesh & Anr., reported in (1969) 1 SCC 839, wherein, some special provisions were made for domiciles within the Telangana region of the then unified State of Andhra Pradesh for the purpose of public employment within that region. In the said case the Hon'ble Apex Court has laid down the law as follows:-

"4. The question is one of construction of this article, particularly of the first three clauses, to find out the ambit of the law-making power of Parliament. The first clause emphasises that there shall be in India equality of opportunity for all citizens in matters of employment or appointment to any office under the State. The word "State" here is to be understood in the extended sense given to it by the definition of that word in Article 12. The second clause then specifies a prohibition against discrimination only on the grounds of religion, race, sex, descent place of birth, residence or any of them. The intention here is to make every office of employment open and available to every citizen, and inter alia to W.P.(C) No. 1387 of 2017 and analogous matters make offices or employment in one part of India open to citizens in all other parts of India. The third clause then makes an exception.

This clause was amended by the Constitution (Seventh Amendment) Act, 1956.

For the original words of the clause "under any State specified in the First Schedule or any local or other authority within its territory any requirement as to residence within that State", the present words from "under the Government" to "Union territory" have been substituted. Nothing turns upon the amendment which seeks to apply the exception in the clause to Union territory and to remove ambiguity in language.

5. The clause thus enables Parliament to make a law in a special case prescribing any requirement as to residence within a State or Union territory prior to appointment, as a condition of employment in the State or Union territory. Under Article 35(a) this power is conferred upon Parliament but is denied to the Legislatures of the States, notwithstanding any thing in the Constitution, and under (b) any law in force immediately before the commencement of the Constitution in respect to the matter shall subject to the terms thereof and subject to such adaptations that may be made under Article 372 is to continue in force until altered or repealed or amended by Parliament.

6. The legislative power to create residential qualification for employment is thus exclusively conferred on Parliament. -----.

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9. -----By the first clause equality of opportunity in employment or appointment to an office is guaranteed. By the second clause, there can be no discrimination, among other things, on the ground of residence. Realising, however, that sometimes local sentiments may have to be respected or sometimes an inroad from more advanced States into less developed States may have to be prevented, and a residential qualification may, therefore, have to be prescribed, the exception in clause (3) was made. Even so that clause spoke of residence within the State. The claim of Mr Setalvad that Parliament can make a provision regarding residence in any particular part of a State would render the general prohibition lose all its meaning. The words "any requirement" cannot be read to warrant something which could have been said more specifically. These words bear upon the kind of residence or its duration rather than its location within the State. We accept the argument of Mr Gupte that the Constitution, as it stands, speaks of a whole State as the venue for residential qualification and it is impossible to think that the Constituent Assembly was thinking of residence in districts, talukas, cities, towns or villages. The fact that this clause is an exception and W.P.(C) No. 1387 of 2017 and analogous matters came as an amendment must dictate that a narrow construction upon the exception should be placed as indeed the debates in the Constituent Assembly also seem to indicate. We accordingly reject the contention of Mr Setalvad seeking to put a very wide and liberal construction upon the words "any law" and "any requirement". These words are obviously controlled by the words "residence within the State or Union territory" which words mean what they say, neither more nor less. It follows, therefore, that Section 3 of the Andhra Pradesh Public Employment (Requirement as to Residence) Act, 1957, insofar as it relates to

Telangana (and we say nothing about the other parts) and Rule 3 of the rules under it are ultra vires the Constitution."

(Emphasis supplied.)

14. Learned counsel has also placed reliance upon the decision of the Hon'ble Apex Court in Dr. Pradeep Jain & Ors. Vs. Union of India & Ors., reported in (1984) 3 SCC 654, wherein, it has been held as follows :-

"5. We may point out at this stage that though Article 15 clauses (1) and (2) bars discrimination on grounds not only of religion, race, caste or sex but also a place of birth, Article 16(2) goes further and provides that no citizen shall on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them be ineligible for or discriminated against in State employment. So far as employment under the State or any local or other authority is concerned, no citizen can be given preference nor can any discrimination be practised against him on the ground only of residence. It would thus appear that residential requirement would be unconstitutional as a condition of eligibility for employment or appointment to an office under the State and having regard to the expansive meaning given to the word "State" in Ramana Dayaram Shetty v. International Airport Authority of India it is obvious that this constitutional prohibition would also cover an office under any local or other authority within the State or any corporation, such as, a public sector corporation which is an instrumentality or agency of the State. But Article 16(3) provides an exception to this rule by laying down that Parliament may make a law "prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union Territory, any requirement as to residence within that State or Union Territory prior to such employment or appointment". Parliament alone is given the right to enact an exception to the ban on discrimination based on residence and that too only with respect to positions within the employment of a State Government.-----Yet, in the face of Article 16(2), some of the States are W.P.(C) No. 1387 of 2017 and analogous matters adopting "sons of the soil" policies prescribing reservation or preference based on domicile or residence requirement for employment or appointment to an office under the Government of a State or any local or other authority or public sector corporation or any other corporation which is an instrumentality or agency of the State. Prima facie this would seem to be constitutionally impermissible though we do not wish to express any definite opinion upon it, since it does not directly arise for consideration in these writ petitions and civil appeal.

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20. -----. We agree wholly with these observations made by the learned Judge and we unreservedly condemn wholesale reservation made by some of the State Governments on the basis of "domicile" or residence requirement within the State or on the basis of institutional preference for students who have passed

the qualifying examination held by the university or the State excluding all students not satisfying this requirement, regardless of merit. We declare such wholesale reservation to be unconstitutional and void as being in violation of Article 14 of the Constitution." (Emphasis supplied.)

15. Reliance has also been placed upon the decision of the Apex Court in *Rajesh Kumar Gupta & Ors. Vs. State of U.P & Ors.*, reported in (2005) 5 SCC 172, wherein it has been held as follows :-

" Whether the State Government can prepare merit list at the district level instead of State level and the same is violative of Articles 15 and 16 of the Constitution

16. The Division Bench of the High Court came to the conclusion that the merit list could not be prepared on districtwise basis and that restricting the selection and preparation of merit list at the district level was not justified and amounted to discrimination. -----.

17. -----. For these reasons, we agree with the view taken by the Division Bench on this issue and hold that restriction of the selection and preparation of merit list at the district level was arbitrary and violative of Articles 15(1) and 16(2) of the Constitution."

16. Learned counsel has also placed reliance upon decision of the Hon'ble Apex Court in *State of Orissa & Ors. Vs. Sudhir Kumar Bishwal & Ors*, reported in 1994 Supp (3) SCC 245, wherein where the rule providing direct recruitment to the cadres of Revenue Inspectors, Amins and Collection Moharrirs for the district to be made ordinarily by inviting applications from the candidates W.P.(C) No. 1387 of 2017 and analogous matters of the district concerned only in the State of Orissa, was under challenge before the Hon'ble Apex Court and the Hon'ble Apex Court held that part of the rule to be clearly violative of Article 16(2) of the Constitution and thus, to be ultra vires.

17. Learned counsel has also placed reliance upon a five-Judge Bench decision of this Court in *Prashant Vidyarthi & Anr. Vs. State of Jharkhand & Ors.*, reported in 2005 (1) JLJR, 210, wherein it has been held as follows :-

"17. What, therefore, clearly emerges is that in the face of Clauses (2) and (3) of Article 16 of the Constitution, the State Government by a mere issuance of an executive order cannot prescribe residence "as a condition" for according either preferential treatment or fixing the same as an eligibility criteria by itself, being the "only guiding factor" in the matter of public employment. -----."

18. Learned counsels further submitted that by the impugned notification, 100% reservation has been made in the Class-III and Class-IV posts of the district cadre in the scheduled districts reserving all the posts for the local residents of the concerned districts only, which is again violative of Articles 14 and 16 of the Constitution of India, which is against the law laid down by a nine-Judge Bench of the Hon'ble Apex Court in *Indra Sawhney & Ors. Vs. Union of India & Ors.*,

reported in 1992 Supp (3) SCC 217, wherein it has been held that the outer limit of reservations contemplated in Clause (4) of Article 16 of the Constitution should not normally exceed the limit of 50%.

19. Learned counsels for the petitioners have also pointed out that during the pendency of these writ applications, a Committee was constituted under the Chairmanship of the then Cabinet Minister Shri Amar Bauri, namely, 'Sthaneeya awam Niyojan Samiti', which also made its recommendation for extending the same benefit of 100% reservation to the residents of all the districts in the State of Jharkhand, whether scheduled or non-scheduled. It is thus, submitted that the State Government was heading towards 100% reservation in all the districts of the State, thus, completely depriving the candidates from one district in the State to apply for Class-III and Class-IV posts in the other districts, or the candidates residing outside the State for applying against any post in the district cadre class-III and class IV posts in the entire State. The recommendations dated 17.04.2018 of the aforesaid Committee have been brought on record as Annexure-7 to the lead writ application.

20. At this stage it may be stated that these matters were heard by this Court and Judgment was reserved on 22.1.2020. This Court however, noted that on 13.2.2020, the Hon'ble Apex Court reserved its Judgment in a case involving the same issues in Chebrolu Leela Prasad Rao & Ors. Vs. State of A.P. & Ors, in Civil Appeal No. 3609 of 2002. Accordingly, this Court by order dated 17.3.2020 refrained itself from passing the Judgment in these matters, as the decision in these matters were to be squarely covered by the decision of the Hon'ble Apex Court in Civil Appeal No. 3609 of 2002, and any Judgment passed in the meantime by this Court could have been inconsistent to the Judgment passed by the Hon'ble Apex Court, which situation was always to be avoided. Accordingly, by order dated 17.3.2020, these matters were adjourned and ordered to be listed after the disposal of Civil Appeal No. 3609 of 2002 by the Hon'ble Apex Court. However, we have given the liberty to the parties to hear them afresh on the Judgment passed by the Hon'ble Apex Court. The said case has since been disposed of by the Hon'ble Apex Court by Judgement dated 22.04.2020, as reported in 2020 SCC OnLine SC 383.

21. After the disposal of Civil Appeal No. 3609 of 2002, these matters could not be taken up for a considerable period due the COVID-19 pandemic. With the consent of the parties, again virtual hearings were given to the learned counsels for the parties on 10.7.2020 and 21.8.2020, on which dates, the submissions of the learned counsels were confined only to the law laid down by the Hon'ble Apex Court in Chebrolu Leela Prasad Rao's case (supra). As such, before discussing the other submissions of learned counsels for the parties in detail, which would be more or less of academic purpose only, the law laid down by the Apex Court in Chebrolu Leela Prasad Rao's case (supra), is to be considered and discussed first.

22. In Chebrolu Leela Prasad Rao's case, the validity of the notification issued by

the State of Andhra Pradesh as contained in Government Office M.S. No. 3 dated 10.1.2000 providing 100% reservation to the Scheduled Tribe candidates, out of whom 33.1/3% reserved for women, for the post of Teachers in the schools in the scheduled areas in the State of Andhra Pradesh was under challenge. The questions, which were framed to be considered by the Hon'ble Apex Court were as follows:-

"(1) What is the scope of paragraph 5(1), Schedule V to the Constitution of India?

(a) Does the provision empower the Governor to make a new law?

(b) Does the power extend to subordinate legislation?

(c) Can the exercise of the power conferred therein override fundamental rights guaranteed under Part III?

(d) Does the exercise of such power override any parallel exercise of power by the President under Article 371D? (2) Whether 100% reservation is permissible under the Constitution?

(3) Whether the notification merely contemplates a classification under Article 16(1) and not reservation under Article 16(4)?

(4) Whether the conditions of eligibility (i.e., origin and cut-off date) to avail the benefit of reservation in the notification are reasonable?"

23. Here a few backdrop of the aforesaid case also needs to be taken into consideration. A notification dated 5.11.1986 was issued by the Governor of the State of Andhra Pradesh in exercise of power under paragraph 5(1) of Schedule V of the Constitution of India, directing the posts of Teachers in educational institutions in the scheduled areas to be reserved for Scheduled Tribe candidates only, notwithstanding anything contained in any other order or rule of law in force. The said notification was challenged before the Andhra Pradesh Administrative Tribunal, which by order dated 25.8.1989 quashed the notification. The matter went up to the Hon'ble Apex Court in Civil Appeal Nos. 2305-06 of 1991, which were dismissed as withdrawn on 20.3.1998. Thereafter, another order dated 25.4.1987 was issued amending the order dated 5.11.1986 to allow the appointment of non-tribals to hold the posts of Teachers in the scheduled areas till such time the qualified local tribals were not made available. After that, non-tribals, who were appointed as Teachers in the scheduled area, were terminated from service and they approached the Andhra Pradesh High Court in W.P. No. 5276 of 1993, wherein, by Judgment dated 5.6.1996, Government order dated 25.4.1987 was held to be violative of Article 14 of the Constitution of India. The matter was challenged before the Division Bench of the same High Court and the order of the Single Judge was set aside by the Division Bench by Judgment dated 20.8.1997. The non-tribal appointees preferred Civil Appeal No. 6437 of 1998 before the Apex Court, which was allowed on 18.12.1998. Thereafter, the Government issued fresh notification dated 10.1.2000 effectively providing for 100% reservation in respect W.P.(C) No. 1387

of 2017 and analogous matters of appointment to the posts of Teachers in the scheduled areas. The matter went to the High Court and a three-Judge Bench of Andhra Pradesh High Court by majority view upheld the validity of the Government notification. The minority view was taken by the then Chief Justice, opining that providing 100% reservation for Scheduled Tribes in scheduled areas offended Articles 14 and 16 of the Constitution of India, and the Governor was not empowered to make such law in derogation to Part III or other provisions of the Constitution of India in exercise of his power under paragraph 5(1) Schedule V to the Constitution of India. The majority decision was challenged before the Hon'ble Apex Court in Chebrolu Leela Prasad Rao's case (supra), in which, the aforesaid questions of law were formulated and answered by the Hon'ble Apex Court, taking into consideration and discussing its previous decisions on the issues in detail.

24. For the sake of brevity, without discussing in detail the discussions made by the Apex Court, it would be appropriate to note down the answers given by the Hon'ble Apex Court to the questions referred to above.

25. As regards the Question No.1: What is the scope of paragraph 5(1) Schedule V to the Constitution of India? and Question No.1(a): Does the provision empower the Governor to make a new law?, the Hon'ble Apex Court has laid down the law as follows:-

"39(a). Paragraph 5(1) of Schedule V does not confer upon Governor power to enact a law but to direct that a particular Act of Parliament or the State Legislature shall not apply to a scheduled area or any part thereof or shall apply with exceptions and modifications, as may be specified in the notification. The Governor is not authorised to enact a new Act under the provisions contained in paragraph 5(1) of Schedule V of the Constitution. Area reserved for the Governor under the provisions of paragraph 5(1) is prescribed. He cannot act beyond its purview and has to exercise power within the four corners of the provisions.

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51. We are of the opinion that the Governor's power to make new law is not available in view of the clear language of Paragraph 5(1), Fifth Schedule does not recognise or confer such power, but only power is not to apply the law or to apply it with exceptions or modifications. Thus, notification is ultra vires to Paragraph 5(1) of Schedule V of the Constitution."

26. Regarding Question No. 1(b): Does the power extend to subordinate legislation?, it has been held as follows:-

57. The rules framed under the proviso to Article 309 of the Constitution cannot be said to be the Act of Parliament or State Legislature. Though the rules have the statutory force, they cannot be said to have been framed under any Act of Parliament or State Legislature. The rules remain in force till such time the Legislature exercises power. The power of the Governor under Paragraph 5(1) of

Schedule V of the Constitution is restricted to modifying or not to apply, Acts of the Parliament or Legislature of the State. Thus, the rules could not have been amended in the exercise of the powers conferred under Paragraph 5(1) of Schedule V. The rules made under proviso to Article 309 of the Constitution cannot be said to be an enactment by the State Legislature. Thus, in our opinion, it was not open to the Governor to issue the impugned G.O. No.3/2000."

27. As regards the Question No. 1(c): Can the exercise of the power conferred in Paragraph 5 of the Fifth Schedule override fundamental rights guaranteed under Part III?, the Hon'ble Apex Court has answered the question in the following terms:-

"70. The provision of the Fifth Schedule beginning with the words "notwithstanding anything in this Constitution" cannot be construed as taking away the provision outside the limitations on the amending power and has to be harmoniously construed consistent with the foundational principles and the basic features of the Constitution.

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78. The power is conferred on the Governor to deal with the scheduled areas. It is not meant to prevail over the Constitution. The power of the Governor is *pari passu* with the legislative power of Parliament and the State. The legislative power can be exercised by the Parliament or the State subject to the provisions of Part III of the Constitution. In our considered opinion, the power of the Governor does not supersede the fundamental rights under Part III of the Constitution. It has to be exercised subject to Part III and other provisions of the Constitution. When Paragraph 5 of the Fifth Schedule confers power on the Governor, it is not meant to be conferral of arbitrary power. The Constitution can never aim to confer any arbitrary power on the constitutional authorities. They are to be exercised in a rational manner keeping in view the objectives of the Constitution. The powers are not in derogation but the furtherance of the constitutional aims and objectives."

28. Question No. 1(d) is not relevant for our purpose, as it relates to the special provisions with respect to the State of Andhra Pradesh.

29. As regards the Question No.2: whether 100% reservation is permissible under the Constitution of India?, the Hon'ble Apex Court taking into consideration its earlier decisions, including the one in *Indra Sawhney's* case (*supra*), has laid down the law as follows:-

"127. By providing 100 percent reservation to the scheduled tribes has deprived the scheduled castes and other backward classes also of their due representation. The concept of reservation is not proportionate but adequate, as held in *Indra Sawhney* (*supra*). The action is thus unreasonable and arbitrary and violative of provisions of Articles 14, 15 and 16 of the Constitution of India. It also impinges upon the right of open category and scheduled tribes who have

settled in the area after 26th January 1950.-----

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131. The reason assigned that reservation was to cover impetus in the scheduled areas in the field of education and to strengthen educational infrastructure is also equally bereft of substance. By depriving opportunity to the others, it cannot be said that any impetus could have been given to the cause of students and effective education, and now that could have been strengthened. The provisions of 100 percent reservation are ignoring the merit. Thus, it would weaken the educational infrastructure and the merit and the standard of education imparted in the schools. Educational development of students cannot be made only by a particular class of teachers appointed by providing reservation, ignoring merit in toto. The ideal approach would be that teachers are selected based on merit."

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133. There were no such extraordinary circumstances to provide a 100 percent reservation in Scheduled Areas. It is an obnoxious idea that tribals only should teach the tribals. When there are other local residents, why they cannot teach is not understandable. The action defies logic and is arbitrary. Merit cannot be denied in toto by providing reservations.

134. A reservation that is permissible by protective mode, by making it 100 percent would become discriminatory and impermissible. The opportunity of public employment cannot be denied unjustly to the incumbents, and it is not the prerogative of few. The citizens have equal rights, and the total exclusion of others by creating an opportunity for one class is not contemplated by the founding fathers of the Constitution of India.

Equality of opportunity and pursuit of choice under Article 51?A cannot be deprived of unjustly and arbitrarily. -----."

30. As regards Question No. 3: Whether the notification merely contemplates a classification under Article 16(1) and not reservation under Article 16(4)?, the question has been answered by the Hon'ble Apex Court in the following terms:-

"140. The 100 percent reservation has been provided. It cannot be said to be a case of classification that has been made under Article 16(1). Assuming, for the sake of argument, it is to be a case of classification under Article 16(1), it would have been discriminatory and grossly arbitrary without rationale and violative of constitutional mandate."

141. The incumbents of various categories have the right to stake a claim for the employment of which they have been deprived. Thus, it is not a matter of classification. The reservation under Article 16(4) was made. By way of 100% reservation, the employment to others was illegally deprived -----."

31. As regards Question No. 4: Whether the conditions of eligibility (i.e., origin and cut-off date) to avail the benefit of reservation in the notification are reasonable?, the question has been answered by the Hon'ble Apex Court in the following terms:-

"143. The condition of continuously residing in the district is ex facie arbitrary. Article 15(1) of the Constitution provides that State shall not discriminate inter alia on the ground of place of birth, however, under Article 15(4), it is provided that reservation can be made in favour of citizens of backward classes i.e. Scheduled Castes and Scheduled Tribes and special provision can be carved out for their advancement. It is also open to prescribe for conditions of eligibility on the ground of residence in a particular area as well as on the educational requirements but that cannot be fixed arbitrarily and irrationally."

32. Making the discussions as aforesaid, the Hon'ble Apex Court has summed up as under:-

"154. We answer the questions referred to us thus:

Question No.1: The Governor in the exercise of powers under Paragraph 5(1), Fifth Schedule of the Constitution, can exercise the powers concerning any particular Act of the Parliament or the Legislature of the State. The Governor can direct that such law shall not apply to the Scheduled Areas or any part thereof. The Governor is empowered to apply such law to the Scheduled Area W.P.(C) No. 1387 of 2017 and analogous matters or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and can also issue a notification with retrospective effect. Question No.1(a): The Governor is empowered under Paragraph 5(1), Fifth Schedule of the Constitution, to direct that any particular Act of Parliament or the Legislature of the State, shall not apply to a Scheduled Area or apply the same with exceptions and modifications. The Governor can make a provision within the parameters of amendment / modification of the Act of Parliament or State Legislature. The power to make new laws / regulations, is provided in Paragraph 5(2), Fifth Schedule of the Constitution for the purpose mentioned therein, not under Paragraph 5(1) of the Fifth Schedule to the Constitution of India. Question No.1(b): The power of the Governor under Paragraph 5(1), Fifth Schedule to the Constitution does not extend to subordinate legislation, it is with respect to an Act enacted in the sovereign function by the Parliament or Legislature of the State which can be dealt with.

Question No.1(c): The Governor's power under Paragraph 5(1) of the Fifth Schedule to the Constitution is subject to some (sic - should be same) restrictions, which have to be observed by the Parliament or the Legislature of the State while making law and cannot override the fundamental rights guaranteed under Part III of the Constitution.

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Question No.2: G.O.Ms. No.3/2000 providing for 100 per cent reservation is not permissible under the Constitution, the outer limit is 50 per cent as specified in Indra Sawhney (supra).

Question No.3: The notification in question cannot be treated as classification made under Article 16(1). Once the reservation has been provided to Scheduled Tribes under Article 16(4), no such power can be exercised under Article 16(1). The notification is violative of Articles 14 and 16(4) of the Constitution of India.

Question No.4: The conditions of eligibility in the notification with a cut-off date, i.e., 26.1.1950, to avail the benefits of reservation, is unreasonable and arbitrary one."

33. Apart from earlier decisions referred by the learned counsels for the petitioners, placing reliance on Chebrolu Leela Prasad Rao's case (supra), learned counsels for the petitioners have submitted that all these questions, which are involved in the present writ applications have been fully answered by the Hon'ble Apex Court and in that view of the matter, the impugned notification and order dated 14.7.2016 and all the subsequent actions of making the appointment to the posts of Trained Graduate Teacher in the scheduled districts only from W.P. (C) No. 1387 of 2017 and analogous matters amongst the residents of those districts, ignoring the claim of the residents of the other districts or the claims of the outsiders, even though they have secured more marks than the last candidate appointed in the scheduled districts, cannot be sustained in the eyes of law, being in contravention of Part III of the Constitution of India.

34. Learned counsels for the petitioners have concluded that Paragraph 5(1) of the Schedule V of the Constitution deals with the power of the Governor to issue notification contrary to any particular Act of Parliament or of the Legislature of the State, stating that the same shall not apply to the schedule area, or shall apply with some exceptions and modifications, but in garb of this power, a new law altogether cannot be framed by the Governor of the State. It is also concluded that in exercise of the power conferred upon the Governor in paragraph 5(1) of the Schedule V of the Constitution, the Governor has to act under same restrictions, which have to be observed by the Parliament or the Legislature of the State while making law and cannot override the fundamental rights of the citizen of India under Part III of the Constitution of India, taking it away altogether.

35. Per contra, learned Advocate General appearing for the State, on the other hand, has opposed the prayer and has placed before us the Presidential Notification issued in the year 2007, declaring the scheduled areas in the State of Jharkhand. Learned Advocate General has also placed before us the Notification and Order dated 14.07.2016 issued by the State Government, to submit that the scheduled districts in the State of Jharkhand are characterized by low human development indices, backwardness, remoteness, poverty and since they are in average inferior to the social indicators in the State due to uneven topography,

lack of water resources, loss in canopy average of forest and uncontrolled rapid industrialization, the notification had to be issued by the Governor for protecting the interests of the residents in the scheduled districts.

36. Learned Advocate General has placed Article 162 of the Constitution of India to show the extent of executive power of the State, which extends to the matters with respect to which the Legislature of the State has power to make the laws. He has also placed Article 244 of the Constitution of India which deals with administration of scheduled areas and tribal areas, to which Schedule V of the Constitution applies, as also Articles 29, 38 and 46 of the Constitution of India in support of his contention that the State administration has to take special care to W.P.(C) No. 1387 of 2017 and analogous matters protect the interests of minorities and the people belonging to Scheduled Castes, Scheduled Tribes and the weaker sections of the society, and to protect them from social injustice and all forms of exploitations. Learned Advocate General has also placed reliance upon the decision of the Andhra Pradesh High Court in G. Ramadoss etc. Vs. Union of India & Ors., reported in 1970 SCC OnLine A.P. 277, wherein the Andhra Pradesh High Court had taken the view as follows:-

"15. In construing the provisions of paragraph 5 (1) of the Fifth Schedule, the non obstante clause with which it begins, must be given its full meaning. The use of the words "notwithstanding" anything in this Constitution" makes it abundantly clear that while acting under paragraph 5(1) of the Fifth Schedule, the Governor of a State is invested with overriding powers to make by public notification any law relating to the administration and control of the Scheduled Areas despite the other provisions including those enshrined in Part III of the Constitution. In order to safeguard and protect the interests of Scheduled Tribes residing in Scheduled Areas who are economically, socially, politically, educationally and otherwise backward, the framers of the Constitution deemed fit and proper to invest the Governor of a State, who acts on the advice of his council of Ministers, with overriding powers under the aforesaid clause to make any law or modification in the existing law applicable to Scheduled Areas. Hence, in my considered opinion, any notification or regulation issued by the Governor under paragraph 5(1) of the Fifth Schedule to the Constitution, even if it contravenes the fundamental rights of any citizen, is valid and intra vires of the powers vested in him."

(Emphasis supplied.)

37. Learned Advocate General has again placed reliance upon the decision of the Full Bench of Andhra Pradesh High Court in Pulusam Krishna Murthy Vs. T. Sujan Kumar & Ors., reported in 2001 SCC OnLine A.P. 1044, wherein the Government notification dated 10.01.2000 issued by the State of Andhra Pradesh, reserving the post of teachers in the school in the scheduled areas to be filled up by the local scheduled tribe candidates only, was under challenge before the Andhra Pradesh High Court.

The majority view of the Andhra Pradesh High Court was as follows :-

"227. In view of the judgment of Jagannatha Rao, J., in W.P. No.16918 of 1998 as well as the judgment of the Supreme Court in Samatha, we hold that whether or not fundamental rights can be ignored in enforcing the provisions of Paragraph 5(1) of V Schedule, reservation of all the posts of teachers in the schools W.P.(C) No. 1387 of 2017 and analogous matters intended for citizens belonging to Scheduled Tribes in Scheduled Area, in favour of local Scheduled Tribes candidates is valid even under Articles 14 and 16(1) of the Constitution of India, and the same does not suffer from any vice of arbitrariness and / or unreasonableness."

38. As stated earlier, the minority view in aforesaid decision was of the Chief Justice of Andhra Pradesh High Court, opining that providing 100% reservation for Scheduled Tribes in scheduled areas offended Articles 14 and 16 of the Constitution of India, and the Governor was not empowered to make such law in derogation to Part III or other provisions of the Constitution of India in exercise of his power under paragraph 5(1) Schedule V to the Constitution of India.

39. It may be stated at this place itself, that it is the same Judgment of Andhra Pradesh High Court, which was under challenge before the Hon'ble Apex Court in Chebrolu Leela Prasad Rao's case (supra), wherein the majority view taken by the Andhra Pradesh High Court has been annulled and the law has been laid down as detailed above, thus, confirming the minority view of the Chief Justice of that High Court.

40. After the Judgment in Chebrolu Leela Prasad Rao's case (supra) came, learned Advocate General tried to differentiate the Judgment, submitting that the said Judgment shall not be applicable to the facts of this case, inasmuch as, the question before the Hon'ble Apex Court was 100% reservation in favour of the Scheduled Tribes in the scheduled areas, whereas that is not the case in the State of Jharkhand. In the State of Jharkhand, what has been sought to be done is to make reservation on the ground of residence in favour of the residents of the scheduled districts, which include the persons belonging to unreserved category and all the reserved categories, to which, the benefit of reservation is applicable.

41. Learned Advocate General further submitted that Article 16(2) of the Constitution of India prohibits discrimination on the grounds "only" of religion, race, caste, sex, descent, place of birth, residence, and these expressions are preceded by the word "only" and followed by the expression "or any of them", which play a very important role. It is submitted by the learned Advocate General that the discrimination is prohibited, only on any of the grounds mentioned above, but if any protective action is required to be taken under Articles 29, 38 and 46 of the Constitution of India, and the action is taken on any or more of those grounds, in combination with other factors, Article 16(2) of the Constitution of India W.P.(C) No. 1387 of 2017 and analogous matters shall not

be attracted, even if it results in some discrimination to the other set of citizens. Learned Advocate General pointed out that in the present case, the cumulative factors of low human development indices, backwardness, remoteness, poverty, inferiority in the social indicators in the State due to uneven topography, lack of water resources, loss in canopy average of forest and uncontrolled rapid industrialization have been taken into consideration, while issuing the Notification and Order dated 14.07.2016 by the Governor of the State, in combination with one of the grounds of 'residence', and as such, Article 16(2) of the Constitution of India shall not be attracted in the present case. In support of his contention, learned Advocate General has also placed reliance upon that portion of Hon'ble Apex Court's decision in Kailash Chand Sharma's case (supra), wherein it is clarified as follows:-

"14. ----- . Coming to the first aspect, it must be noticed that the prohibitory mandate under Article 16(2) is not attracted if the alleged discrimination is on grounds not merely related to residence, but the factum of residence is only taken into account in addition to other relevant factors. This, in effect, is the import of the expression "only"."

42. Learned Advocate General, however, very fairly conceded that in view of the Hon'ble Apex Court's decision in Chebrolu Leela Prasad Rao's case (supra), the rules framed under Article 309 of the Constitution of India cannot be said to be an Act of Parliament or of the State Legislature, and by the impugned Notification and Order dated 14.07.2016 none of the Act of the Parliament or the State Legislature is sought to be affected. Accordingly, the said notification and order may not stand the test laid down by the Hon'ble Apex Court in Chebrolu Leela Prasad Rao's case (supra).

43. The respondents and the intervener respondents, who have been selected and who have also been appointed in the scheduled districts, or the intervener respondents to whom the appointment letters could not be issued due to the interim order passed by this Court on 18.09.2019, are represented by learned senior counsels Sri Anil Kumar Sinha, Smt. Indrani Sen Choudhary, learned counsels M/S Rajiv Kumar Sinha, Rajiv Kumar, and other learned advocates. Learned senior counsel Sri Anil Kumar Sinha submitted that the petitioners do not have any case for consideration, as they took part in the selection process, knowing full well about the reservation made in favour of the residents of the scheduled districts, and having taken part in the selection process W.P.(C) No. 1387 of 2017 and analogous matters and having failed in getting selected, they now cannot turn back and challenge the conditions laid down in the advertisement. In this connection, learned senior counsel has placed reliance upon the decision of the Apex Court in Union of India & Ors. Vs. S. Vinodh Kumar & Ors., reported in (2007) 8 SCC 100. Learned senior counsel has submitted that the Governor of the State is fully competent under paragraph 5(1) of Scheduled V of the Constitution of India to issue the notification making reservation in favour of the residents of the scheduled districts in order to secure justice -

social, economic and political, to the residents suffering variously in the backdrop of the conditions mentioned in the notification. Learned senior counsel in this connection has also relied upon Article 46 of the Constitution of India. It is submitted that under Article 15(4) of the Constitution of India, the State is empowered to make special provisions for the advancement of any socially and educationally backward classes of citizens or for Scheduled Castes and Scheduled Tribes, and as such, there is no violation of Articles 14 and 16 in the present case. It is submitted by the learned senior counsel that the scheduled area cannot be equated with the non-scheduled area. Learned senior counsel has pointed out that such action had also taken place in the State of Jharkhand previously and has been upheld up to the Hon'ble Apex Court. In this connection, learned senior counsel has placed reliance upon the decision of the Hon'ble Apex Court in Union of India & Ors, Vs. Rakesh Kumar & Ors., reported in (2010) 4 SCC 50, wherein where, by Act 14 of 1874, Santhal Paragraphganas Division and Chutia Nagpur Division (now known as Chhota Nagpur Division) were created and in these scheduled districts, tribal communities were created and accorded a certain degree of autonomy to regulate their affairs on the basis of their own conventions and traditions. Many of these communities chose their leaders through an informal consensus and it was held by the Hon'ble Apex Court that in the Panchayats located in those scheduled areas, the exclusive representation of the Scheduled Tribes in the Chairperson positions of the same bodies is constitutionally permissible, as they warranted exceptional treatment with regard to the reservation. It was further held that rationale behind imposing an upper ceiling of 50% in reservations for higher education and public employment cannot be readily extended to the domain of political representation at the panchayat level in scheduled areas.

44. Learned senior counsel has also placed reliance upon the decision of the Hon'ble Apex Court in K.G. Ashok & Ors. Vs. Kerala Public Service W.P.(C) No. 1387 of 2017 and analogous matters Commission & Ors., reported in (2001) 5 SCC 419, wherein where, the candidates were prohibited from making application for appointment for the same post of Jr. Health Inspector Gr.-II in all the 14 districts in the State of Kerala, by putting a restriction to the effect that applications should not be sent for more than one district, it was held by the Hon'ble Apex Court that though a candidate was prohibited from applying in more than one district, he was free to choose any district of his choice and thus, the only thing was that the candidate was not entitled to apply for the same post in more than one district at a time. In such a case, the right of the candidate was not curtailed as he / she was not prevented from choosing the district of his or her choice. It is submitted that this decision has also been followed by this High Court in the case of appointments made in the Police Department in the State of Jharkhand, in The State of Jharkhand & Ors. Vs. Sri Anil Kumar Mehta & Ors., reported in 2014 (3) JLJR 346. Learned senior counsel concluded that even in the present case, the candidates were not deprived from applying in their own district or in the non-scheduled districts of the State, and their rights cannot be

said to be curtailed in any manner whatsoever.

45. The other learned counsels, appearing for the similarly situated intervener respondents have also adopted the submission of the learned senior counsel and they have also argued that there is no illegality in the Notification and Order dated 14.07.2016 or in the subsequent advertisements contained in Annexures-4 and 4/1 to the lead writ application, providing reservation in favour of the local residents of the scheduled districts. Learned counsels have submitted that taking into consideration the various factors, it was found necessary to protect the interests of the residents in the scheduled districts. Learned counsels have also submitted that even otherwise it would be of immense benefit to the school going children in the scheduled districts, if they are taught in their own tribal language by the local teachers, than the outsiders, who may not be well conversant with the local language. It is lastly submitted that in view of the decision of the Hon'ble Apex Court in Chebrolu Leela Prasad Rao's case (supra), as has been done in the said case, appointments already made should not be disturbed. It is pointed out by the learned Advocate General that by now, about 80% persons have already been appointed and as such, the appointments already made should not be disturbed.

46. Learned counsels for the JSSC have only clarified the stand of JSSC that it has followed the dictates of the State Government.

47. An interlocutory application has also been filed relating to Panchayat Service, which is not related with these writ applications. The anxiety of these intervener respondents is that due to the order dated 18.09.2019 passed by this Court, their selection process has also been stalled by the State Government. They only need a clarification that by virtue of the said interim order, their selection process may not be affected.

48. Having heard learned counsels for the parties, it would be appropriate to take a look at the Presidential Notification and the impugned Notification and Order dated 14.07.2016. The Presidential Notification which is in force, declaring scheduled areas in the State of Jharkhand, was issued on 11th April, 2007, which reads as follows:-

MINISTRY OF LAW AND JUSTICE

(Legislative Department)

NOTIFICATION

New Delhi, the 11th April, 2007

G.S.R. 285 (E)- The following Order made by the President is published for general information:-

"C.O.229"

The Scheduled Areas (State of Jharkhand) Order, 2007 In exercise at the powers

conferred by sub-paragraph (2) of paragraph 6 of the Fifth Schedule to the Constitution of India, the President hereby rescinds the Scheduled Areas (States of Chhatisgarh, Jharkhand and Madhya Pradesh) Order, 2003 in so far as it relates to the areas now comprised in the State of Jharkhand and in consultation with the Governor of that State, is pleased to make the following Order, namely:-

1. (1) Thus Order may be called the Scheduled Areas (State of Jharkhand) Order, 2007.

(2) It shall come into force at once.

2. The areas specified below are hereby redefined to be the Scheduled Areas within the State of Jharkhand:-

JHARKHAND

- 1) Ranchi District
- 2) Lohardagga District
- 3) Gumla District
- 4) Simdega District
- 5) Latehar District
- 6) East-Singhbhum District
- 7) West Singhbhum District
- 8) Saraikela-Kharsawan District
- 9) Sahebganj District
- 10) Dumka District
- 11) Pakur District
- 12) Jamtara District
- 13) Palamu District-Rabda and Bokariya Panchayats of Satbarwa Block.
- 14) Godda District-Sunderpahari and Boarijor Blocks. Explanation - For the removal of doubts, it is hereby declared that the said areas are the same, by whatever name called, as were notified as Scheduled Areas as part of the erstwhile State of Bihar vide C.O.109 [the Scheduled Area (States of Bihar, Gujrat, Madhya Pradesh and Orissa) Order, 1977.

3. Any reference in the preceding paragraph to the territorial division by whatever name indicated shall be construed as a reference to the territorial division of that name as existing at the commencement of this Order.

A.P.J. ABDUL KALAM,

President

[F.No 19(8)/2006-1]

K.N. CHATURVEDI, Secy.

49. A plain reading of paragraph 5(1) of the Fifth Schedule of the Constitution of India (quoted in paragraph 7 above), shows that it starts with non-obstante clause "notwithstanding anything in this Constitution" and empowers the Governor to issue public notification directing that any particular Act of the Parliament or of the State Legislature shall not apply to a scheduled area or any in part thereof in the State, or shall apply with such exceptions and modifications as may be specified in the notification. The Order No.5939 dated 14.7.2016 issued by the Governor of the State in exercise of the aforesaid power, reads as follows:-

Government of Jharkhand Deptt. of Personnel, Administrative Reforms & Rajbhasha Order Ranchi, Dated 14.07.2016 No. 5939 / Whereas, under sub-paragraph (1) of paragraph 5 of the Fifth Schedule to the Constitution of India, the Governor may, by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Schedule Area or any part thereof in the State subject to such exceptions and modifications as specified in the notification.

And whereas, the Scheduled Area in the State are characterized by low Human Development Indices, backwardness, W.P.(C) No. 1387 of 2017 and analogous matters remoteness poverty and whereas the social indicators of the Scheduled Areas are on an average, inferior to the average of social indicators in the State due to uneven topography, lack of water resources, loss in canopy coverage of forest and uncontrolled rapid industrialization;

And whereas, recognizing the factors identified above, the Tribal Advisory Council of Jharkhand has recommended issuing of a notification by the Governor for suspension of eligibility conditions as enshrined in various appointment rules for the appointment of class 3 and class 4 posts at district level for a period of 10 years in the 13 districts namely- Sahebganj, Pakur, Dumka, Jamtara, Latehar, Ranchi, Khunti, Gumla, Lohardagga, Simdega, East Singhbhum, West Singhbhum and Sraikela-Kharsawan for appointment of cent-percent District level class-3 and class-4 posts by the local residents of the district concerned;

And whereas, the Governor of Jharkhand in order to improve the quality of people in the Scheduled Areas, by providing additional opportunities of employment, in favour of the local residents of Scheduled Areas;

The following notification shall come into effect from the date of its publications in the official Gazette.

50. The Notification No.5938 dated 14.7.2016 issued by the Governor of the State in exercise of the power under paragraph 5(1) of the Fifth Schedule of the Constitution of India, reads as follows:-

Government of Jharkhand Department of Personnel, Administrative Reforms and Rajbhasha Notification Ranchi, Dated 14.07.2016 No.14 / Sthaneeyata Neeti-14-01/2015/5938 In exercise of powers conferred by the provisions by sub-paragraph (1) of paragraph 5 of the Fifth Schedule to the Constitution of India, the Governor of Jharkhand, hereby, directs that the provisions regarding "eligibility of the appointment" mentioned in the various appointment rules as per list enclosed, Government may amend from time to time, framed by the State Government under article 309 of the Constitution for the appointment to the district cadre posts, shall be deemed to the modified and enforced up to the extent as specified, hereinafter, namely:-

"Notwithstanding anything contained in these rules or any other Act, Order, Direction, Rules or Law for the time being in force, only local residents of the districts namely - Sahebganj, Pakur, Dumka, Jamtara, Latehar, Ranchi, Khunti, Gumla, Lohardagga, Simdega, East Singhbhum, West Singhbhum and W.P.(C) No. 1387 of 2017 and analogous matters Sraikela-Kharsawan, shall be eligible for recruitment to the vacancies arising in class-3 and class-4 posts of the district cadre in various department of the concerned districts, for a period of 10 years from the date of issue of this notification."

By order in the name of the Governor of Jharkhand Sd/- Nidhi Khare Principal Secretary to the Government

51. A plain reading of these notification and order show that the Governor of Jharkhand has directed that the provisions regarding "eligibility of the appointment" mentioned in the various appointment rules, as per the list enclosed, and as framed by the State Government under Article 309 of the Constitution of India, for the appointment to district cadre posts shall be deemed to be modified to the extent that cent-percent Class-III and Class-IV posts in various department in the 13 scheduled districts have been reserved for the residents of the concerned districts only. By the notification only the service rules framed under Article 309 of the Constitution of India have been sought to be modified, and even the list attached to the notification does not contain any Act of the Parliament or of the State Legislature. It is held by the Hon'ble Apex Court in Chebrolu Leela Prasad Rao's case (supra), that the rules framed under Article 309 of the Constitution of India are neither the law enacted by the Parliament nor by the State Legislature. This apart, though in the cases of G. Ramadoss (supra) and Pulusam Krishna Murty (supra), it has been held by the Andhra Pradesh High Court that the use of word "notwithstanding anything in this Constitution" makes it absolutely clear that while acting under paragraph 5(1) of the Fifth Schedule, the Governor of the State is vested with overriding powers to make by public notification any law relating to the administration and control of the scheduled areas, despite the other provisions including those enshrined in Part-III of the Constitution of India, but, these decisions have been annulled by the Hon'ble Apex Court in Chebrolu Leela Prasad Rao's case (supra), clearly and specifically holding that in garb of the non-obstante clause as aforesaid, such

power cannot be exercised by the Governor of the State overriding the fundamental rights of the citizens guaranteed under Part-III of the Constitution.

52. We are also bound by the conclusion of the Hon'ble Apex Court in Chebrolu Leela Prasad Rao's case (supra), that the Governor in exercise of powers under Paragraph 5(1) Schedule V of the Constitution, can exercise the W.P.(C) No. 1387 of 2017 and analogous matters powers concerning any particular Act of the Parliament or the Legislature of the State, directing that such law shall not apply to the scheduled areas or any part thereof, or shall apply subject to any exceptions and modifications, but by that, a new law cannot be framed by the Governor of the State. It has been made clear by the Hon'ble Apex Court that the area reserved for the Governor under the provisions of paragraph 5(1) Schedule V of the Constitution is prescribed. He cannot act beyond its purview and has to exercise his power within the four corners of the provision.

53. We also find that by the impugned notification issued by the Governor of the State, 100% reservation has been provided in favour of the residents of the scheduled districts, totally ignoring the fundamental rights of the citizens residing out of the scheduled districts, and as held by the Hon'ble Apex Court, such reservation is not permissible under the Constitution, as the outer limit is 50%, as specified in Indra Sawhney's case (supra).

54. The submissions of the learned Advocate General and learned counsels for the respondents that in order to overcome the factors of low human development indices, backwardness, poverty etc., in the scheduled districts and to secure justice - social, economic and political, the notification had to be issued by the Governor of the State for protecting the interests of the residents in the scheduled districts, and even otherwise it would be of immense benefit to the school going children in the scheduled districts, if they are taught in their own tribal language by the local teachers, than the outsiders, who may not be well conversant with the local language, are only fit to be rejected. This "sons of the soil" policies prescribing reservation or preference based on domicile or residence has already been decried by the Apex Court in Dr. Pradeep Jain's case (supra), holding that Parliament alone has been given the right to enact an exception to the ban on discrimination based on residence. We find no logic in the submission that it would be of immense benefit to the school going children in the scheduled districts, if they are taught in their own tribal language by the local teachers, as the education of the school going children cannot be compromised with merit, giving 100% reservation in favour of the teachers of the same district and prohibiting the appointment of more meritorious teachers, even if available.

55. We also do not find any merit in the submission of learned Advocate General that the decision in Chebrolu Leela Prasad Rao's case (supra), shall not be applicable to the facts of this case, inasmuch as, the question before the W.P.(C) No. 1387 of 2017 and analogous matters Hon'ble Apex Court was 100% reservation in favour of the Scheduled Tribes in the scheduled areas, which was not the basis of "residence", as in the State of Jharkhand. In Kailash Chand

Sharma's case (supra), A.V.S Narsimha Rao's case (supra) and Dr. Pradeep Jain's case (supra), the Hon'ble Apex Court has held that "residence" by itself cannot be a ground to accord any preferential treatment for reservation, and it is not possible to compartmentalize the State into districts with a view to offer employment to the residents of that district on a preferential basis. In Dr. Pradeep Jain's case (supra), the Apex Court has even condemned the wholesome reservation made by some of the State Governments on the basis of "domicile" or "residence". It is also held in these cases that only the Parliament is empowered under Articles 16(3) and 35(a) of the Constitution of India to enact any such law and this power is not available to the State Legislatures, and consequently, this power is not available to the Governor of the State as well.

56. We accordingly find, hold and conclude that the Notification No. 5938 and Order No, 5939 dated 14.7.2016, issued by the respondent State as contained in Annexures-6 and 6/1 of the lead writ application, cannot be sustained in the eyes of law and must be held ultra vires Articles 14, 13(2), 15 and 16 of the Constitution of India. The impugned notification and order also violate Articles 16(3) and 35(a-i) of the Constitution of India, as such power is vested only in the Parliament and not in the State Legislatures. Consequently, the Governor of the State also cannot exercise such power. The same is ultra vires paragraph 5(1) of Schedule V of the Constitution of India as well, as the Governor has transgressed the limitations, in the garb of non-obstante clause therein.

57. For the reasons detailed above, both these Notification No. 5938 and Order No. 5939 dated 14.7.2016, as contained in Annexures-6 and 6/1 of the lead writ application are accordingly, quashed.

58. Consequently, paragraph 5(iii) of the Advertisement No. 21/2016 published on 28th December, 2016 as modified by Advertisement dated 4.2.2017, as contained in Annexures-4 and 4/1 of the lead writ application, containing the stipulation that as against the vacant posts of Trained Graduate Teacher in the scheduled districts, only the local residents of those scheduled districts can apply, also cannot be sustained in the eyes of law for the same reasons, and this paragraph of the advertisement, is hereby, also quashed.

59. This brings us to the question about the appointments already made of the candidates belonging to the scheduled districts. It is submitted by learned counsel for the respondents and the intervener respondents that similar was the situation in Chebrolu Leela Prasad Rao's case (supra), decided by the Hon'ble Apex Court, wherein the appointments already made in the scheduled areas with respect to the Scheduled Tribe candidates of those areas have been saved by the Hon'ble Apex Court, irrespective of the fact that the Government's notification dated 10.1.2000 was held ultra vires and not sustainable in the eyes of law.

60. The facts of Chebrolu Leela Prasad Rao's case (supra) were quite different, as have already been discussed in paragraph 23 of our Judgment. In the said case, the candidates were working for about 30 years, inasmuch as, they were

appointed pursuant to the Govt. notification issued on 5.11.1986 itself. Though the Andhra Pradesh Administrative Tribunal quashed the notification and the challenge to that order before the Hon'ble Apex Court was dismissed as withdrawn on 20.3.1998, the Government of Andhra Pradesh came out with yet another illegal notification dated 25.4.1987, which was also finally quashed by the Hon'ble Supreme Court in Civil Appeal No. 6437 of 1998 allowing the appeal by Judgment dated 18.12.1998. Thereafter, the State of Andhra Pradesh came out with yet another illegal notification dated 10.1.2000, which was held ultra vires by the Hon'ble Apex Court in Chebrolu Leela Prasad Rao's case (supra). Thus, the candidates already appointed in the year 1987 or afterwards had already worked for more than 30 years and it was in that peculiar circumstance, their appointments were saved with the condition that the States of Andhra Pradesh and Telangana shall not attempt similar exercise in future.

61. Such is not the case in the present writ applications in hand. The local residents of the scheduled districts have been appointed only in the month of July, 2019 and they are working since then. Their appointments are fresh appointments and indeed, in teeth of Articles 14 and 16 of the Constitution of India. Such appointments cannot be protected in law. Indeed, it has been pointed out through Annexure-7 to the lead writ application that the State Government had been contemplating to impose such unreasonable and unconstitutional restrictions for all the districts in the State. We cannot be a mute spectator to such illegal actions of the State Government and any such attempt by the State Government has to be stalled at its very inception. Such appointments, ignoring the rights of more meritorious candidates, only on the basis of residence, were W.P.(C) No. 1387 of 2017 and analogous matters absolutely illegal and unconstitutional from its very inception and have to be quashed.

62. In the result, the appointments of the Trained Graduate Teachers made pursuant to the Advertisement No. 21/2016 published on 28.12.2016 as modified by Advertisement dated 4.2.2017, as contained in Annexures-4 and 4/1 of the lead writ application, in the scheduled districts relating to the local residents of those districts only, are hereby, quashed. Even those appointees, if any, who may not be a party in these writ applications, shall be treated to be represented in representative capacity by the respondents and the intervener respondents, in view of orders dated 21.02.2019, 24.04.2019 and 18.09.2019 passed by this Court.

63. So far as the appointments made in the non-scheduled districts are concerned, these are not under challenge in these writ applications. Though vide paragraph 5(i) of the advertisements as contained in Annexures-4 and 4/1 to the lead writ application the candidates were given the choice to apply against the vacancies of only one district of their choice, and were prohibited from applying in more than one district, but they were free to choose the district of their choice, as held by the Hon'ble Apex Court in K.G. Ashok's case (supra), and

followed in the State of Jharkhand in Anil Kumar Mehta's case (supra). In that case the Hon'ble Apex Court has laid down the law as follows:-

"13. Though a candidate is prohibited from applying in more than one district, he is free to choose any district of his choice and thus the only thing is that the candidate is not entitled to apply for the same post in more than one district at a time. Here, the right of the candidate is not curtailed as he/she is not prevented from choosing the district of his/her choice. At the same time, if every person is permitted to apply for all districts the number of applications received by the Commission will be 14 times the number of applications now being received with the result that the Commission will be doing a futile exercise of selection work in the other 13 districts, as a candidate can after all accept appointment in only one district. Considering all these aspects the Commission has imposed the restriction on candidates from applying in more than one district in response to one and the same notification. The restriction does not tantamount to the denial of opportunity to a candidate for applying to any post." (Emphasis supplied.)

64. Accordingly, we hereby, direct that all the 8423 posts of Trained Graduate Teacher in the Government Secondary Schools in the scheduled districts W.P.(C) No. 1387 of 2017 and analogous matters of the State of Jharkhand, as detailed in the Notification No. 5938 and Order No. 5939 dated 14.7.2016, as contained in Annexures-6 and 6/1 of the lead writ application, be advertised afresh and fresh selection process be undertaken in accordance with law.

65. We hereby, clarify that all those candidates who were eligible to apply in response to the Advertisement No. 21/2016, as contained in Annexures-4 and 4/1 of the lead writ application, shall be entitled to apply in the fresh selection process, irrespective of any barrier, if any, as to their age.

66. We also propose to make it abundantly clear that by the ad-interim order dated 18.9.2019 passed by this Court in these writ applications, the selection process was never stayed by the Court in the non-scheduled districts, though, as informed to us, it had erroneously been taken by the State Government like that. There was no stay for appointments on any post in the non-scheduled districts, or for that matter there was no stay for the appointments even in the scheduled districts, rather, only the operation of the Notification No. 5938 dated 14.7.2016 was stayed by this Court. In other words, the appointments could be continued to be made even in the scheduled districts, ignoring the aforesaid notification.

67. In the result, all these writ applications succeed and are accordingly, allowed with the directions and observations as above. The pending interlocutory applications also stand disposed of.