

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

Interlocutory Application Nos.6 of 2018
and
Interlocutory Application Nos.2 and 3 of 2018
and
Interlocutory Applications Nos.4, 5 and 8 of 2019
in / and
Writ Petition No.3019 of 2018

COMMON ORDER :

In this Writ Petition, petitioners challenged initially notification No.16/2017 dt.14.04.2017 issued by the Telangana State Public Service Commission (3rd respondent) (for short 'TSPSC') for filling up posts of Physical Education Teachers (P.E.T.) in Telangana Social Welfare Residential Educational Institutions Society (2nd respondent), as being violative of the A.P. Tribal Welfare Residential Education Institutions Society Recruitment Rules, 1999, and also violative of Articles 14, 16 and 21 of the Constitution of India, and to set aside the same or in the alternative to continue the recruitment process with such of those persons who are eligible as per the said Rules which were amended in VIII Board of Governors meeting held on 17.08.2004.

2. Subsequently, I.A.Nos.5 to 10 of 2018 and I.A.No.1 to 3 and 6 of 2019 were filed to implead Telangana Residential Educational Institutions Society, Telangana Tribal Welfare Residential Educational Institutions Society, Mahatma Jyothibai Phule Telangana

Backward Classes Welfare Residential Educational Institutions Societies and Telangana Minorities Residential Educational Institutions Societies, and several private respondents.

3. I.A. No.4 of 2018 was filed seeking amendment of the pleadings in the Writ Petition. In the said application, amendment of pleading in the Writ Petition was sought by reading '3rd respondent' in place of '2nd respondent' in paragraph 4 and "various residential educational institutions societies" in place of '2nd respondent society' and '2nd respondent' in paragraph 6 and grounds thereunder in the Writ Petition.

4. On 19.03.2019, I.A.Nos.5 to 10 of 2018, I.A. No.1 of 2019 and I.A. No.4 of 2018 were ordered. I.A. Nos.2, 3 and 6 of 2019 were ordered on 01.07.2019.

5. I.A. No.6 of 2018 is hereby ordered since it seeks to amend the prayer by substituting "respondents residential educational institutions societies" in place of "2nd respondent society" in the Writ Petition and since such amendment is necessary and has not been opposed by the respondents.

6. The Telangana State Public Service Commission, Hyderabad (TSPSC) had issued initially notification No.8/2017 for recruitment to the post of PETs in Residential Educational Institutions Societies (respondent Nos.2 and 4 to 7) to fill up 616 vacancies.

7. Thereafter the State of Telangana received representations from individuals to follow National Council for Technical Education

(for short 'NCTE') guidelines for recruitment to all the posts including PET.

8. The State Government then issued a memo No.1181/SCD.RS/2017-2, dt.23.03.2017 directing the Secretary of the 2nd respondent society to examine the same and furnish revised proposals.

9. Revised proposals were then submitted to the Government by the Secretary of the 2nd respondent society.

10. The Government then constituted a Committee consisting of Commissioner and Director of School Education, Director, SCERT, JD (Services) and Secretary, Telangana State Residential Educational Institutions Society (4th respondent) to examine and advise it.

11. The Committee, after studying the applicable NCTE Regulations, gave recommendations to the Government to modify some of the terms of the advertisement dealing with the qualifications of the eligible candidates.

12. The recommendations of the Education Department specifically stated that qualifications prescribed by NCTE for those PETs in residential schools are as under:

For classes I to VIII:

- (i). *“Intermediate (or its equivalent) recognized by the Board of Intermediate Education, Telangana with atleast 50% of marks **or***

(ii).Intermediate (or its equivalent) recognized by the Board of Intermediate Education, Telangana and have participated in Sports/Games atleast at School/College/District level as per NCTE Regulations, 2007 or

(iii). Intermediate (or its equivalent) recognized by the Board of Intermediate Education, Telangana with atleast 45% as per NCTE Regulations, 2002 (Regarding the minimum aggregate marks for SC/ST candidates there is no such stipulation in NCTE Regulations and the Tribal Welfare Department, Social Welfare Department, BC Welfare Department, Minority Welfare Department may take a view at their level accordingly)

and

A certificate/Under Graduate Diploma/Diploma in Physical Education (or its equivalent) from an institution recognized by the NCTE.

For classes IX and X

A Bachelor's degree with Physical Education as an elective from a University recognized by UGC with atleast 50% marks or

A Bachelor's degree from a University recognised by UGC with atleast 45% marks and participation in National or State or Inter-University competitions in sports or games or athletics recognized by Association of Indian University or Indian Olympic Association.

Or

A Graduate in Physical Education with 40% marks or Graduate in Physical Education i.e. B.P.Ed. course (or its equivalent) of three years duration course.

Or

Graduate who participated in School or Inter collegiate Sports, Games/passed NCC – C Certificate (As per NCTE Regulations 2007)/Graduate represented State University in Sports, Games, Athletics/secured 1st, 2nd or 3rd position in Inter Collegiate Sports, Games, Tournaments/ passed basic course in Adventure Sports/Graduate with one year training programme in Sports Science, Sports Management, Sports Coaching, Yoga, Olympic Education, Sports Journalism, etc. (As per NCTE Regulations 2002)

(Regarding the minimum aggregate marks for SC/ST candidates there is no such stipulation in NCTE Regulations and the Tribal Welfare Department, Social Welfare Department, BC Welfare Department, Minority Welfare Department may take a view at their level accordingly.)

AND

Bachelor of Physical Education (B.P.Ed.) of atleast one year duration (or its equivalent) from any institution recognized by NCTE.

13. It is not in dispute that the NCTE (Determination of Minimum Qualifications for Persons to be recruited as Education Teachers and Physical Education Teachers in Pre-primary, Primary, Upper Primary,

Secondary, Senior Secondary or Intermediate Schools or Colleges) Regulations, 2014 notified on 12.11.2014 in exercise of the powers conferred on the Central Government under Section 32(2) (dd) read with Section 12A of the National Council for Teacher Education Act, 1993 prescribed the above qualifications for filling up the posts of Physical Education Teachers too and the Committee of the School Education Department had recommended to the State Government that they be followed.

14. In turn, the Government addressed a letter No.1181/SCD.RS/2017-4, dt.30.03.2017 to the TSPSC proposing certain amendments as per recommendations made by the said Committee.

15. In view of the letter No.1181/ SCD.RS/2017-4, dt.30.03.2017 to the TSPSC, the impugned notification No.16 of 2017 was issued by the TSPSC.

16. Clause 4 of the said notification prescribes educational qualifications for the post of PET in respondent Nos.2, 4 to 7 institutions as under:

Sl. No.	Name of the Post	Educational Qualifications
1.	Physical Education Teachers in Telangana Tribal Welfare Residential Educational Institutions Societies.	Intermediate (or its equivalent) recognized by the Board of Intermediate Education, Telangana with atleast 50% marks. In case of SC/ST/BC candidates, the minimum marks shall be 45% OR Intermediate (or its equivalent) recognized by the Board of Intermediate Education, Telangana/A.P. and have participated in

		Sports/Games at least at School/College/District level as per NCTE Regulations, 2007. OR Intermediate (or its equivalent) recognized by the Board of Intermediate Education, Telangana/A.P. with atleast 45% as per NCTE Regulations, 2002 in case of SC/ST/BC candidates, the minimum marks shall be 40%. AND A certificate/Under graduate Diploma/Diploma in Physical Education (or its equivalent) from an institution recognized by the NCTE.
2.	Physical Education Teachers in Telangana Social Welfare Residential Educational Institutions Societies.	
3.		OR 1. A Bachelor's Degree with Physical Education as an elective from a University recognized by UGC with atleast 50% marks.
4.	Physical Education Teachers in Mahatma Jothiba Phule Telangana Backward classes Welfare Residential Educational Institutions Societies.	In case of SC/ST/BC candidates, the minimum marks shall be 45%. OR A Bachelor's degree from a University recognized by UGC with atleast 45% marks and 40% marks for SC/ST/BC candidates and participation in National or State or Inter University competitions in sports or Games or Athletics recognized by Association of Indian University or Indian Olympic Association.
5.	Physical Education Teachers in Telangana Minorities Welfare Residential Educational Institutions.	OR A graduate in Physical Education with 40% marks or Graduate in Physical Education in i.e., B.P.Ed course (or its equivalent) of three years duration course. OR Graduate who participated in School or Inter Collegiate Sports, Games/passed NCC-C Certificate (As per NCTE Regulations 2007)/Graduate represented State University in Sports, Games, Athletics/Secured 1st, 2nd or 3rd position in Inter Collegiate Sports, Games,

	Physical Education Teachers in Telangana Residential Educational Institutions Societies.	Tournaments/ passed basic course in Adventure Sports/Graduate with one year training programme in Sports Science, Sports Management, Sport Coaching, Yoga Olympic Education, Sports Journalism, etc. (As per NCTE Regulations 2002). AND Bachelor of Physical Education (B.P.Ed) of atleast one year duration (or its equivalent) from any institution recognized by NCTE.
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17. In the impugned notification, however, it was proposed that a single examination (objective type) would be held for the post of PETs in respondent No.s 2 and 4 to 7 institutions. In other words there was to be a single examination for (i) PETs who would be taking classes I to VIII (for whom Intermediate or its equivalent plus certificate, under-graduate Diploma/Diploma in Physical Education (or its equivalent) from an institution recognized by the NCTE), *and* also (ii) classes IX and X (for whom the qualification would be Bachelors Degree/Graduation in Physical Education).

18. The petitioners had filed I.A.No.1 of 2018 to stay all further proceedings pursuant to the impugned notification No.16/2017 dt.14-04-2017 issued by the 3rd respondent for the post of Physical Education Teacher under the 2nd respondent Society pending disposal of the Writ Petition.

19. On 01-02-2018, in I.A.No.1 of 2018, this Court granted the following interim order:

“Prima facie, the 3rd respondent has no jurisdiction to change the qualification to the post of Physical Education Teachers vide Notification No.16 of 2017 dt.14-04-2017 differently from those prescribed under Telangana Tribunal Welfare Residential Educational Institutions Society Recruitment Rules, 1999.

Therefore, there shall be interim direction as prayed for.”

20. I.A.Nos.2, 3 of 2018 and I.A.Nos.4, 5 and 8 of 2019 are filed by the respondents to vacate the said order.

21. On the basis of the pleadings and contentions of the parties, the following questions arise for consideration:

(a) Whether there can be a single entrance exam/test for non-graduates and graduates for all the vacant posts of PET in respondent No.2 and 4 to 7 institutions, whether for classes I to VIII or for classes IX and X?

(b) Whether the TSPSC has prescribed qualifications in tune with the applicable NCTE Regulations?

(c) Whether the petitioners and some of the respondents supporting the petitioners who have appeared for the entrance examination held pursuant to the above notification in May, 2017, can question the said notification?

(d) Whether there is a necessity to amend the bylaws of respondents 2 and 4 to 7 first to be in tune with the above NCTE Regulations before the said institutions can place an indent with the TSPSC to fill up the said vacancies, since it is the admitted contention that the bylaws prescribe only Intermediate exam with Under-graduate Diploma in Physical Education and do not contemplate consideration of Graduates for appointment to the said posts?

(e) To what relief?”

22. Before I deal with these contentions, I will also consider one other contention also advanced by the Additional Advocate General that it is the State Government which has got the power to prescribe qualifications for filling up any vacant post and that judicial review in these matters is restricted. According to him, there is no bar for the State Government to prescribe a higher qualification like Graduation for recruitment to post of PETs even if the byelaws of the institutions like respondent No.s 2 and 4 to 7 prescribe a lesser qualification like a pass in Intermediate Examination / Diploma.

23. This issue is academic for the reasons that in the impugned notification both graduates and non-graduates were shown to be eligible for consideration for the said post of PET in respondent Nos.2, 4 to 7 institutions. Had the State Government or the TSPSC totally excluded non-graduates from applying for the post of PET, it was probably necessary to then deal with this contention and now it is unnecessary to deal with it.

Point (a):

24. On the first question i.e., Whether there can be a single entrance exam/test for non-graduates and graduates for all the vacant posts of PET in respondent No.2 and 4 to 7 institutions (be it for classes I to VIII *or* for classes IX and X), the existence of an inherent distinction between a person with a Degree and one who is merely a Diploma

Holder is too obvious (as held in **Roopchand v. Delhi Development Authority**¹).

25. It is common knowledge that the subject is taught to a Degree Holder in more depth than to a Diploma Holder.

26. The Additional Advocate General attempted to refer to the National Council for Teacher Education (Recognition Norms and Procedure) Regulations, 2009 which deal with the syllabus taught for the Course of Diploma in Physical Education Programme *and* the Course of Bachelor of Physical Education Programme, and sought to contend that both a Diploma Holder in Physical Education and a Graduate would have the same extent of knowledge. If both Diploma Holders in Physical Education and persons holding Graduate Degree in Physical Education have the same depth of knowledge, there would be no necessity to have two separate nomenclatures. This argument flies in the face of common sense and I reject the same.

27. There is also logic in the NCTE Regulations which prescribe that *for classes I to VIII*, the qualification should be only Intermediate or its equivalent with a certificate/Under-graduate Diploma/Diploma in Physical Education (or its equivalent) *while for classes IX and X*, the qualification of a Bachelors Degree with Physical Education as an elective from University recognized by UGC with atleast 50% marks or Graduate in Physical Education with 40% marks or a Bachelors Degree from the University recognized by the UGC with atleast 45%

¹ AIR 1989 SC 307 para 7

marks coupled with participation in National or State or Inter-University Competitions in Sports or Games or Athletics recognized by Association of Indian Universities or Indian Olympic Association etc is laid down.

28. May be it was felt by NCTE that more mature persons with wider knowledge are more suited for higher classes of IX and X and such type of persons are not necessary to take classes I to VIII.

29. The Additional Advocate General does not dispute that in the impugned notification there is no segregation of the PET posts in respondent Nos.2 and 4 to 7 institutions of (a) who teach classes I to VIII and (b) who teach classes IX and X. According to him, in fact, only classes V to VIII and above are existing the above institutions and they do not have students in classes I to IV.

30. He also does not dispute that separate cut-off marks were not prescribed for non-graduates and graduates who appeared for the entrance examination held by the TSPSC in May, 2017.

31. So the further question arises :

“When Graduates and Non-graduates cannot be treated as equals, can the same cut-off marks be prescribed for both? and whether such action on the part of the TSPSC is valid in law, or violates Article 14 of the Constitution of India?”

32. Article 14 states:

“ Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

33. It thus prohibits unequals to be treated equally.

34. In **Bennet Coleman & Co. Ltd. and others v. Union of India**², a Constitution Bench of the Supreme Court by majority held that restricting news print to ten pages by the Government of India to all news papers irrespective of their circulation (large/medium/small) violates Article 14 of the Constitution of India. It observed that the news print policy of the Government of India of fixing the page level at 10 is seeking to make unequals equal and also to benefit one type of daily at the expense of another. It observed that such policy is arbitrary and it tends to treat unequals as equals and discriminates against those who by virtue of their efficiency, standard and service and because of their All India Stature acquired a higher page level in 1957. Thus the News Print policy of the Union of India was held to be arbitrary and violative of Art.14 to that extent.

35. In **All India Sainik Schools Employees Association v. The Defence Minister-cum-Chairman, Board of Governors, Sainik School Society**³, the Supreme Court reiterated that it is against the objective of Article 14 of the Constitution of India to put unequals as equals. It rejected the plea of the petitioners that being employees of Sainik School Society they ought to be treated on par with employees of Kendriya Vidyalayas. It held that the latter is a creation of Government of India and is wholly financed out of the Central exchequer, but the former is not and is funded with contributions from

² AIR 1973 SC 106

³ AIR 1989 SC 88

the State where the school is located. It thus held that employees of Sainik School cannot be treated as Central Government Employees nor can they be treated on par with employees of Kendriya Vidyalayas.

36. In Direct Recruit Class II Engineering Officers Association and others v. State of Maharashtra⁴, the Constitution Bench of the Supreme Court held that if an appointment is made by way of stopgap arrangement, without considering the claims of all the eligible available persons and without following the Rules of appointment, the experience on such appointment cannot be equated with the experience of a regular appointee, because of the qualitative difference in the appointment. It held that to equate the two would be to treat two unequals as equal, which would violate the equality clause.

37. The above concept was explained in Prem Chand Somchand Shah v. Union of India⁵, in the following terms:

“8. As regards the right to equality guaranteed under Article 14 the position is well settled that the said right ensures equality amongst equals and its aim is to protect persons similarly placed against discriminatory treatment. It means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Conversely discrimination may result if persons dissimilarly situate are treated equally. Even amongst persons similarly situate differential treatment would be permissible between one class and the other. In that event it is necessary that the differential treatment should be founded on an intelligible differentia which distinguishes persons or things that are grouped together from

⁴ AIR 1990 SC 1607

⁵ (1991) 2 SCC 48

others left out of the group and that differentia must have a rational relation to the object sought to be achieved by the statute in question.”(emphasis supplied)

38. Another illustration of this principle is found in the decision of the Supreme Court in **Shree Bhagwati Steel Rolling Mills v. CCE**⁶, in the context of Rules framed by the Central Excise Act levying same amount of penalties on delayed payment of duty irrespective of the period of delay. The Supreme Court held:

“33. On the facts before the Gujarat High Court, there were three civil applications each of which challenged the constitutional validity of the aforesaid Rules insofar as they prescribed the imposition of a penalty equal to the amount of duty outstanding without any discretion to reduce the same depending upon the time taken to deposit the duty. The Gujarat High Court struck down the aforesaid Rules on the basis that not only were they ultra vires the Act, but they were arbitrary and unreasonable and therefore violative of Articles 14 and 19(1)(g) of the Constitution.

34. Shri Radhakrishnan, learned Senior Advocate appearing on behalf of the Revenue found it extremely difficult to argue that the aforesaid judgment was wrong. He therefore asked us to limit the effect of the judgment when it further held that after omission of the aforesaid Rules with effect from 1-3-2001 no proceedings could have been initiated thereunder. In this submission he is correct for the simple reason that the Gujarat High Court followed Rayala Corpn.³ in holding that “omissions” would not amount to “repeals”, which this Court has now clarified is not the correct legal position.

35. However, insofar as the reasoning of the High Court is concerned on the aspects stated hereinabove, we find that on all three counts it is unexceptionable. First and foremost, a delay of even one day would straightaway, without more, attract a penalty of an equivalent amount of duty, which may be in crores of rupees. It is clear that as has been held by this Court, penalty imposable under the aforesaid three Rules is inflexible and mandatory in nature. The High

⁶ (2016) 3 SCC 643

Court is, therefore, correct in saying that an assessee who pays the delayed amount of duty after 100 days is to be on the same footing as an assessee who pays the duty only after one day's delay and that therefore such rule treats unequals as equals and would, therefore, violate Article 14 of the Constitution of India. It is also correct in saying that there may be circumstances of force majeure which may prevent a bona fide assessee from paying the duty in time, and on certain given factual circumstances, despite there being no fault on the part of the assessee in making the deposit of duty in time, a mandatory penalty of an equivalent amount of duty would be compulsorily leviable and recoverable from such assessee. This would be extremely arbitrary and violative of Article 14 for this reason as well."

39. In the light of the above settled legal position that unequals (non-graduates/Diploma holders *and* Graduates) cannot be treated as equals, the same cut-off marks cannot be prescribed for both classes and such action on the part of the TSPSC violates Article 14 of the Constitution of India.

40. Therefore Point (a) is answered in favor of the petitioners and against the respondents 1-7.

Point (b) :

41. I will now consider the following question:

"Whether the TSPSC has prescribed qualifications in tune with the applicable NCTE Regulations?"

42. It is the plea of TSPSC in para 16 of its counter (I.A. No.2 of 2018) that it has only incorporated in its notification, qualifications recommended by the Government to it and that it is the prerogative of the Government to prescribe qualification to a post. This plea is incorrect for the following reasons.

43. Admittedly, the Committee of the School Education Department prescribed, in accordance with the 2014 NCTE Regulations, (a) qualifications of Intermediate plus Diploma in Physical Education for PETs who handle classes I to VIII *and* (b) qualification of Graduation in/ with Physical Education subject etc for PETs who handle classes IX and X. The State Government then forwarded it to the 2nd respondent on 23.03.2017 vide memo No.1181/SCD.RS/2017-2.

44. The 2nd respondent Society in its counter, which is adopted by respondents 4 to 7, accepts the NCTE Regulations, and claims to have acted in accordance with the recommendations of the Committee of the Education Department and wrote back to the State Government on 27.03.2017 reiterating the same. The State Government then wrote to the TSPSC vide letter No.1181/SCD.RS/2017-4 about the revision made pursuant to recommendations of the Committee of Education Department with reference to NCTE Regulations, enclosing as Annexure to the said letter the criteria to be followed for filling up various posts including PETs mentioning in accordance with the recommendations of the Committee of Education Department.

45. But the TSPSC in the impugned notification proposed to conduct a single written examination for filling up all the posts of PETs (irrespective of what class students they would be teaching) by prescribing both Graduation *and* pass in Intermediate examination plus Diploma. It did not ask respondents 1, 2 and 4 to 7 how many are

the posts of PETs who handle classes V to VIII *and* how many are the posts of PETs who handle classes IX and X and conduct different examinations for them or prescribe different cut off marks for them.

46. Respondents 1, 2 and 4 to 7 also did not bother to disclose the break up of such PETs to the State Government or to the TSPSC, which they ought to have done.

47. So the TSPSC cannot claim to have acted in accordance with the NCTE Regulations of 2014 when it did not conduct different exams for PETs who handle classes I to VIII *and* for those who handle classes IX and X or atleast prescribe a different cut-off marks in the examination conducted by it for non-graduate and graduates.

48. Point (b) is thus answered accordingly.

Point (b):

49. It is strongly urged by the Additional Advocate General and Sri L. Ravichander, Senior Counsel appearing for the respondents that the petitioners in the Writ Petition who were non-graduates had applied pursuant to the impugned notification to the post of PET teachers in respondent No.2 and 4 to 7 institutions; they had even appeared for the written examination conducted by the TSPSC and they cannot now question the action of the TSPSC in holding a common examination for both graduates and non-graduates or for fixing the same cut-off marks for both graduates and non-graduates.

50. Strong reliance was placed by the Additional Advocate General on the decision of the Supreme Court in **Pradeep Kumari Rai v. Dinesh Kumar Pandey**⁷, **Ranjan Kumar v. State of Bihar**⁸ and the Division Bench judgment of this Court in **P. Divya and others v. M.D., APPGCL and others**⁹.

51. In **Pradeep Kumar Rai** (7 supra), the Supreme Court held that persons who participated in the process of interview and had not challenged it till the results were declared, cannot file a Writ Petition after they became unsuccessful on declaration of results. It held that the candidates cannot approbate and reprobate at the same time; that either they should not have participated in the interview and challenged the procedure *or* they should have challenged immediately after the interviews were conducted.

52. In **Ranjan Kumar** (8 supra) also, the Court reiterated the same principle and declared that persons who appeared in the interview knowing fully well the process, cannot resile later on or take a somersault saying that the procedure adopted by the Department was vitiated. In that case also the challenge was after the results of the interview were declared.

53. However, in the instant case, it is to be noted that the notification was issued by the TSPSC on 14.04.2017 and the examination was held in May, 2017. The Writ Petition was filed by

⁷ (2015) 11SCC 493

⁸ (2014) 16 SCC 187

⁹ 2019 (1) ALT 536

the petitioners on 31.01.2018 and interim order was granted on 01.02.2018 in I.A. No.1 of 2018 in W.P. No.3019 of 2018 staying all further proceedings pursuant to the impugned notification dt.14.04.2017 issued by the TSPSC. Though this order was not vacated, the TSPSC went ahead and declared results in May, 2018 ignoring the interim order passed by this Court and blatantly violating it.

54. Thus the respondents cannot raise the plea that the petitioners had challenged the notification issued by the TSPSC after they discovered that they were unsuccessful in the examination conducted by it because the W.P. had been filed *before* the declaration of results.

55. Also, the petitioners have established that non-graduates like them were treated by the respondents 1, 2 and 4 to 7 on par with graduates and made to undergo the same examination, and same cut-off marks were applied to them as were applied to the graduates, and that this amounts to treating unequals as equals violating Article 14 of the Constitution of India.

56. In **Olga Tellis v. Bombay Municipal Corpn**¹⁰, the Supreme Court declared that there can be no estoppel against the Constitution nor can there be any waiver of a fundamental right guaranteed by the Constitution of India. It declared:

“28. It is not possible to accept the contention that the petitioners are estopped from setting up their fundamental rights as a defence to the demolition of the huts put up by them on pavements or parts of

¹⁰ (1985) 3 SCC 545

public roads. There can be no estoppel against the Constitution. The Constitution is not only the paramount law of the land but, it is the source and sustenance of all laws. Its provisions are conceived in public interest and are intended to serve a public purpose. The doctrine of estoppel is based on the principle that consistency in word and action imparts certainty and honesty to human affairs. If a person makes a representation to another, on the faith of which the latter acts to his prejudice, the former cannot resile from the representation made by him. He must make it good. This principle can have no application to representations made regarding the assertion or enforcement of fundamental rights. For example, the concession made by a person that he does not possess and would not exercise his right to free speech and expression or the right to move freely throughout the territory of India cannot deprive him of those constitutional rights, any more than a concession that a person has no right of personal liberty can justify his detention contrary to the terms of Article 22 of the Constitution. Fundamental rights are undoubtedly conferred by the Constitution upon individuals which have to be asserted and enforced by them, if those rights are violated. But, the high purpose which the Constitution seeks to achieve by conferment of fundamental rights is not only to benefit individuals but to secure the larger interests of the community. The Preamble of the Constitution says that India is a democratic Republic. It is in order to fulfil the promise of the Preamble that fundamental rights are conferred by the Constitution, some on citizens like those guaranteed by Articles 15, 16, 19, 21 and 29 and, some on citizens and non-citizens alike, like those guaranteed by Articles 14, 21, 22 and 25 of the Constitution. No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding, whether under a mistake of law or otherwise, that he does not possess or will not enforce any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceeding. Such a concession, if enforced, would defeat the purpose of the Constitution. Were the argument of estoppel valid, an all-powerful State could easily tempt an individual to forego his precious personal freedoms on promise of transitory, immediate benefits. Therefore, notwithstanding the fact that the petitioners had conceded in the Bombay High Court that they have no fundamental right to construct hutments on pavements and that they

will not object to their demolition after October 15, 1981, they are entitled to assert that any such action on the part of public authorities will be in violation of their fundamental rights. How far the argument regarding the existence and scope of the right claimed by the petitioners is well-founded is another matter. But, the argument has to be examined despite the concession.

*29. The plea of estoppel is closely connected with the plea of waiver, the object of both being to ensure bona fides in day-to-day transactions. In **Basheshar Nath v. CIT**¹¹ a Constitution Bench of this Court considered the question whether the fundamental rights conferred by the Constitution can be waived. Two members of the Bench (Das, C.J. and Kapoor, J.) held that there can be no waiver of the fundamental right founded on Article 14 of the Constitution. Two others (N.H. Bhagwati and Subba Rao, JJ.) held that not only could there be no waiver of the right conferred by Article 14, but there could be no waiver of any other fundamental right guaranteed by Part III of the Constitution. The Constitution makes no distinction, according to the learned Judges, between fundamental rights enacted for the benefit of an individual and those enacted in public interest or on grounds of public policy."(emphasis supplied)*

57. Therefore, this plea of the Additional Advocate General and Sri L. Ravichander, Senior Counsel appearing for some of the respondents that the petitioners are estopped from filing the Writ Petition after participating in the selection process conducted by the TSPSC is rejected. Point (c) is answered accordingly in favour of the petitioners and against the respondents.

Point (d)

58. Next I shall consider the question :

¹¹ AIR 1959 SC 149

“Whether there is a necessity to amend the bylaws of respondents 2 and 4 to 7 first to be in tune with the above NCTE Regulations before the said institutions can place an indent with the TSPSC to fill up the said vacancies, since it is the admitted contention that the bylaws prescribe only Intermediate exam with Under-graduate Diploma in Physical Education and do not contemplate consideration of Graduates for appointment to the said posts?”

59. It is the contention of the petitioners that the Telangana Tribal Welfare Residential Educational Institutions Society (5th respondent) Recruitment Rules, 1999 in Annexure-III provide for recruitment of Physical Education Teachers (PETs) in Residential Schools at Sl.No.22 thereof and they prescribe a pass in Intermediate Examination or its equivalent apart from possessing an Undergraduate Diploma in Physical Education as the qualification to be possessed by a candidate for consideration for the said post; that similar Rules exist even for respondent Nos.2, 4, 6 and 7 Institutions also; and any relaxation of qualification can only be done by approval of the Board of Governors of the said Institutions and without such approval, the respondent Nos.1 to 7 cannot prescribe Graduation as the qualification for filling up the post of PETs in the said Institutions.

60. This argument is countered by the learned Additional Advocate General and Sri L.Ravichander, learned counsel by contending that it is the NCTE prescribe qualifications which prevail and ought to be applied by the respondent Nos.1 to 7 even if the bylaws or Service Rules of respondent Nos.2 and 4 to 7 have not been amended to be in tune with the NCTE (Determination of minimum qualifications for persons to be recruiting as Education Teachers and Physical

Education Teachers in Pre-Primary, Upper Primary, Secondary, Senior Secondary or Intermediate Schools or Colleges) Regulations, 2014. They contended that the NCTE Regulations have over riding effect over the bylaws of the Institutions such as respondent Nos.2 and 4 to 7

61. It is settled legal position that the above Regulations of the NCTE have been framed by the Central Government in exercise of powers conferred on it under the NCTE Act, 1993 which is a Central enactment and the Supreme Court in **Maa Vaishno Devi Mahila Vidyalaya Vs. State of U.P.**¹² has held that the Departments of State concerned or the affiliating Universities have a limited role and they cannot lay down any guideline of policy which would be in conflict with the Central Statute or the standards laid down by the Central body. It declared that the State can frame its policy for admission to professional courses but such policy again has to be conformity with the directives issued by the Central body. This legal position is not disputed by the counsel for the petitioners.

62. In this view of the matter, I hold on this point that notwithstanding what the bylaws or service rules framed by the respondents 2 and 4 to 7, in the event they are in conflict with what is prescribed by the NCTE, the NCTE Regulations would prevail and the respondent Nos.1 to 7 have rightly taken note of the NCTE Regulations and applied them to the instant recruitment.

¹² (2013) 2 SCC 617

Point (e)

63. In the light of the findings recorded by me on the above points, the question arises what is the appropriate order to be passed in the matter.

64. It is to be noted that in the impugned notification No.16/2017 dt.14-04-2017, 616 posts of PETs in respondent Nos.2, 4 to 7 have been notified for filling up by the TSPSC. Already 2½ years have elapsed since then. Several persons including the petitioners and the private respondents have appeared for the examination conducted in May, 2017 by the TSPSC pursuant to the above notification.

65. In the light of these facts, I am of the opinion that if the entire process initiated by the TSPSC is set at nought on the basis of the above findings, it would cause untold hardship not only to the candidates who participated in the examination, but also to the Institutions themselves if the posts are not filled up.

66. In **M. Sudakar v. V. Manoharan**¹³, the Supreme Court has held that High Courts exercising jurisdiction under Art.226 of the Constitution of India have the power to mould relief. It held:

“ The power to mould relief is always available to the court possessed with the power to issue high prerogative writs. In order to do complete justice it can mould the relief, depending upon the facts and circumstances of the case. In the facts of a given case a writ petitioner may not be entitled to the specific relief claimed by him but this itself will not preclude the writ court to grant such other relief which he is otherwise entitled.”

¹³ (2011) 1 SCC 484

67. I therefore propose to mould the relief sought by the petitioners in the interest of justice in the following manner:

- (a) the respondent NOs.1 to 7 are directed to identify the PET posts which would be required for (i) Classes I to VIII or Classes V to VIII *and* (ii) Classes IX and X in respondent Nos.2, 4 to 7 institutions;
- (b) respondent Nos.1 to 7 shall prescribe a higher cut off mark for Graduates who are eligible as per the NCTE Regulations referred to above only for the posts of PETs earmarked for Classes IX and X;
- (c) respondent Nos.1 to 7 shall prescribe a lower cut off mark for non-Graduates like the petitioners who are also eligible as per the NCTE Regulations referred to above for the posts of PETs earmarked for Classes I to VIII or Classes V to VIII;
- (d) respondent Nos.1 to 7 shall consider on the basis of the cut off marks so fixed, qualified Graduate candidates only for the posts of PETs earmarked for Classes IX and X;
- (e) respondent Nos.1 to 7 shall consider on the basis of the cut off marks so fixed, qualified non-Graduate candidates like the petitioners only for the posts of PETs earmarked for Classes I to VIII or Classes V to VIII;

- (f) the TSPSC shall publish a fresh list of selected candidates as per the above norms within eight weeks from the date of receipt of a copy of this order; and
- (g) respondent Nos.1 to 7 shall then take further steps to fill up the said posts with such qualified candidates.

68. Till the said exercise is completed, *status quo* prevailing as on date shall be maintained in all respects.

69. W.P.No.3019 of 2018 is allowed as above. I.A.Nos.6 of 2019 is allowed; and I.A.Nos.2 and 3 of 2018 and I.A.Nos.4, 5 and 8 of 2019 are disposed of accordingly.

70. The respondent Nos.1 to 7 shall also pay costs of Rs.5,000/- to each of the petitioners in this Writ Petition.

71. As a sequel, miscellaneous petitions pending if any in this Writ Petition, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 16.09.2019

Ndr/Vsv