**IN THE HIGH COURT OF GUJARAT**

Special Civil Application No. 3592 of 2012 With Special Civil Application Nos. 3897, 3906, 2615, 3894, 3899, 4718, 4120, 2618, 3975, 4031, 4119, 4389, 2782, 2970, 3969, 3982, 4146, 4202, 4309, 4548, 3835 to 3869, 4042, 4213, 2662, 3973, 4007, 4070, 4100, 4121, 4228, 4266, 4390, 4557, 4609, 3976, 4128, 4212, 4231, 4495, 2863, 3974, 3983, 4052, 4248, 4303, 4304, 2474, 3960, 3961 of 2012

Decided On: 08.05.2012

Appellants: **Bharatsigh Lakshmansigh Makwana and Ors.**
**Vs.**
Respondent: **State of Gujarat and Anr.**

**Hon'ble Judges/Coram:**
K.M. Thaker, J.

**JUDGMENT**

**Mr. K.M. Thaker, J.**

1. The petitioners, in this group of petitions, have in substance, brought under challenge :-

(a) The validity of " The Head Teacher, Class III, in the subordinate service of the Directorate of primary or respective District or Municipal Primary Education Committee Recruitment Rules, 2012" (herein after referred to as Rule of 2012)

(b) The qualification criteria prescribed, by Notification for appointment on the post of Head Teacher.

(c) The instruction - directions describing the nature and quality of proof demanded for verifying compliance as to requisite experience.

(d) The provision prescribing upper age limit.

1.1 The fulcrum of the grievance and challenge is the process of promotion/appointment to the post of Head Teacher and the qualification criteria prescribed by respondent State and the method or parameters for verification of compliance prescribed by the Authority. The petitioners are aggrieved by different provisions under the said Rules of 2012.

1.2 The petitioners have, for the said purpose, challenged

(1) Notification dated 18.1.2012 whereby the Rules have been brought in force.

(2) Resolution dated 29.2.2012

(3) Rule 2(a)(iii), Rule 4(a), Rule 4(b)(1) Rule 4(b)(2)(ii) Rule 4(d).

1.3 Those petitioners who are already working as Head Teacher apprehend that the said duty will be taken away after recruitment of Head Teachers pursuant to the impugned process. Hence they have also claimed that it may be declared that the candidates who are appointed as primary teacher on basis of the qualification of SSC/HSC with PTC and are working as Head Teacher being the senior most teacher are eligible to be appointed as Head Teacher.

1.4 The petitioners are primary teachers either in self finance primary schools or primary schools run by local Authorities/District Education Committee or private primary schools receiving grant from the State. Some of them are also working as Head Teacher since last few years.

1.5 Since the grievance and challenge raised in all petitions are intertwined and magnetically drawn to the common issues and contentions and since the respondent State has put forward common defence, the rival contentions are considered under this common order.

In view of the subject matter of this group of petitions and considering the joint requests by learned Advocates for contesting parties for final decision, with consent of learned Advocates for petitioners and learned Government Pleader the captioned petitions are taken up for hearing and final decision.

Factual Background

Until 2009 the matters related to primary education in the State was regulated by the provisions under Bombay Primary Education Act 1947 (hereinafter referred to as the "State Act") and "Bombay Primary Education Rules, 1949" (hereinafter referred to as "State Rules").

1.6 Then parliament enacted the Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as the "Central Act") and in exercise of powers conferred by Section 38 of the Central Act, the Central Government made "The Right Of Children To Free and Compulsory Education Rules, 2010 (hereinafter referred to as the 'Central Rules'). Besides this, in exercise of powers conferred by sub-Section (1) of Section 23 of the Central Act, NCTE issued notification dated 23rd August 2010 laying down eligibility criteria for appointment as teacher in 1st standard to 5th standard and 6th standard to 8th standard. Moreover "National - Council for Teacher Education Act, 1993 (hereinafter referred to as 'NCTE Act") has been enacted and NCTE has framed "National - Council for Teacher Education (Determination of Minimum Qualifications for Recruitment of Teachers in Schools) Regulations, 2001" (NCTE Rules, for short)

1.7. With the enactment of the Central Act substantial and qualitative changes in the system of primary education are introduced and brought in force. Until the enactment of Central Act the division of primary education comprised 1st Standard to 7th Standard while secondary education division comprised Standard VIII, IX and X Standard while standard XI and XII constituted Higher Secondary division (prior to 19731974 Standard VIII to Standard XI formed Secondary Division) however the Central Act altered the set-up of primary school in view of which the State Act came to be amended so as to provide that primary school shall comprise 1st Standard to 8th Standard which shall be divided in two division i.e. 1st Standard to 5th Standard in lower primary school and 6th Standard to 8th Standard in upper primary school. The Central Act also mandates appointment of Head Teacher in lower primary school (if more than 200 students are admitted) as well as in upper primary school (if more than 100 students are admitted). The third change brought on account of Central Act is the provision which prescribes educational qualification.

1.8. So as to carry out and implement the object and provisions of the Central Act the Rules of 2012 are framed and brought in force. The said Rules of 2012, inter alia, prescribe procedure and criteria for recruitment of Head Teacher. In absence of any statutory requirement for the said post and appointment on the post, the primary schools asked the senior most teachers to also perform the functions of Head Teacher.

SUBMISSIONS

2. Mr. Pujara, learned Counsel appearing for some of the petitioners (i.e. in SCA No. 2474 of 2012) submitted, inter alia, that the petitioners have been appointed under and in accordance with the Gujarat Panchayat Service Recruitment of primary teachers Rules 1970 and the said rules prescribe (even now) SSC/HSC and Primary Teachers Certificate (PTC) qualification and did not, and still do not require bachelor's degree as necessary qualification for being appointed as teacher in primary school. The senior most teacher from amongst the teachers in the primary school was and is being appointed, as Head Teacher. The provision which requires bachelor degree as minimum qualification for post of Head Teacher is arbitrary and unjust and not in consonance with State Act and Rules. He also submitted that according to the provision contained under Section 23 of the Central Act, it is only academic Authority who is competent to prescribe qualification. He also invoked the prescribed qualification for the post of Asst. Education Inspector (which is promotional post for primary teacher) and submitted that an anomaly is created inasmuch as the qualification for higher/ promotional post are lower than the qualification for the feeder post. Mr. Pujara also submitted that impugned requirement would exclude all existing teachers from the opportunity of being considered for appointment/promotion to the post of Head Teacher and it would also amount to retrospectively imposing requirement which did not exist at the time of appointment. It is also contended that the requirement cannot be imposed on those who are already working as Head Teacher.

2.1 Mr. Mehta, learned Counsel submitted that the Rules of 2012 are ultra vires Section 63 read with Section23(3) of the State Act. He also submitted that the Rules are framed in exercise of power under Section 23(3) of the State Act but the said provision does not confer power to frame Rules but merely permits the State to issue instructions as to the matters of selection. Thus, the Rules are beyond the power under Section 23. The only provision in the State Act which confers power to make rules is Section 63 thus there is no Authority to frame rules under Section 23(3). He also submitted vested right to the post of Head Teachers has accrued to the petitioners which cannot be taken away except in accordance with law. Mr. Mehta, learned Counsel also submitted that the conditions prescribed under Section 63 viz. previous publication of the draft rules and the requirement to lay the Rules also before the State legislature is not complied and that therefore the rules are invalid. Mr. Mehta, learned Counsel also assailed, the provision imposing upper age limit even for teachers already in service. Mr. Mehta also contended that even if the impugned rules are considered valid it could not have been made retroactive in operation. Mr. Mehta, learned Counsel contended that introduction of the requirement of graduation amounts to excluding the entire class (i.e. persons who are already in employment) from being considered for appointment/ promotion.

2.2 Mr. Yagnik, learned Counsel assailed the provision prescribing the upper age limit and the instruction -directive to mention, in the on -line application, the details of salary account i.e. the name of the bank and the account number in which the salary cheque is deposited by the applicant teacher (the candidate). He submitted that the requirement is suddenly introduced almost at the end of the process. It is submitted that the direction issued vide Resolution dated 29.2.2012 is dehors Rule 106 (4)(xi) inasmuch as the requirement prescribed under said Rule has to be fulfilled by the school and not the teachers. He submitted that the petitioners are dependant on the school for fulfillment of the condition. He also submitted that self finance private primary schools do not pay salary to the teachers by cheque and because of the inaction or lapse or irregularity on part of school the petitioners cannot be rendered ineligible. It is claimed that there are several other valid documents - most of them prescribed and/or recognized by the respondent Authorities - which can demonstrate and establish the facts about experience, however the respondent's decision to accept only bank account number as the proof about experience, is arbitrary unreasonable and without Authority under the Act or the Rules of 2012. He adopted submissions by Mr. Pujara, learned Advocate and Mr. Mehta, learned Advocate.

2.3 Learned Advocates Mr. D.P. Joshi, Mr Goswami, Mr. Sudhanshu Patel and other Advocates have adopted the aforesaid submissions.

2.4 So as to support their submissions learned Advocates appearing for the petitioners have relied on below mentioned decisions :-

(1) Sudip Tripathi and another v. State of Gujarat and others ( : 2007 (1) G.L.H. 590).

(2) Union of India and another v. International Trading Co. and another( : 2003 (5) SCC 437).

(3) Prajapati Paresh Govindbhai and others v. State of Gujarat through Principal Secretary and others ( : 2012 (1) G.L.H. 548).

(4) Barot Vijaykumar Balakrishna v. Modh Vinaykumar Dasrathlal ( : 2011 (7) SCC 308).

(5) Tamil Nadu Computer Science B. Ed. Graduate Teachers Welfare Society (1) v. Higher Secondary School Computer Teachers Association ( : 2009 (14) SCC 517).

(6) State of Mysore v. M.H. Krishna Murthy ( : 1973 (3) SCC 559).

2.5. In case of Sudip Tripathi, PTC has been considered to be the only valid qualification for appointment as primary school teacher. In the case of Union of India v. International Trading Company the Hon'ble Apex Court has addressed the issue as to when would the policy decision by Government be open to judicial review. In the case of Barot Vijay Kumar Balkrishnan the Hon'ble Apex Court examined the relevance that announcement prescribing separate minimum qualifying marks for viva voce was made just a few days before the day on which viva voce was to be held. However the said issue was considered in light of the requirements of the rules i.e. to have separate qualifying marks for viva voce. In the case of Tamil Nadu Computer Science B. Ed. Graduate Teachers Welfare Society the Hon'ble Apex Court held that the change in rules during selection process or afterwards was not justified in view of the fact that the Government had changed the qualifying norms after the examination was held and result was to be announced. (however in case on hand the qualifying norms are not changed). In case of State of Mysore the Hon'ble Apex Court observed that if members of same class are not considered for promotion then Article 14 can be said to have been violated (whereas in present case the facts are different). In case of Prajapati Paresh Govindbhai this Court has held that when NCTE has prescribed minimum qualification State cannot alter the said qualification by adding or limiting any other qualification.

3. The main plank of submissions by Mr. P.K. Jani learned Government pleader is that the said rules and the provision thereunder are policy decisions and therefore outside the scope of judicial review and Court should not interfere with the same and that the petitioners do not have any right in law to challenge the rules because it is the employers prerogative to prescribe qualification and eligibility criteria and other requirement for the post. Mr. Jani, learned Government Pleader submitted that the challenge, in entirety, is misconceived and unsustainable. He submitted that the power to make rules is available under the Act in Section 23(3) of the State Act as well and the Rules have been framed in exercise of power under Section 23(3) of the State Act, hence the requirement to publish the rules and to lay it before the State Legislature is not applicable in present case and in any case the provision is only directory and failure does not invalidate the Rules. In response to the challenge against the provisions under the Rules of 2012, Mr. Jani, learned Government Pleader submitted that the Court would not interfere with such policy decisions and such matters would not come within the purview of judicial review. He also submitted that post of Head Teacher is created for first time and the Rules are also framed for first time. It is claimed that until now only special allowance was being paid to the senior most teacher for working as Head Teacher. He also submitted that the respondent State would be the employer for the persons to be recruited on the said posts and that therefore it has right, as an employer, to prescribe conditions and qualifications which are considered necessary and appropriate. Mr. Jani, learned Government Pleader also claimed that the petitioners have approached the Court at belated stage and that those who did not appear in the said HTAT cannot make any grievance. Mr. Jani also submitted that the teachers who claim that they have been appointed as Head Teacher, are merely holding the post and they get only special allowance and that therefore they do not have and cannot claim any right for being continued as Head Teacher.

3.1 So as to support his submissions Mr. Jani, relied on below mentioned decisions :

(1) Madanlal and others v. State of J & K and others ( : 1995 (3) SCC 486).

(2) Chandra Prakash Tiwari and others v. Shakuntala Shukla and others ( : 2002 (6) SCC 127).

(3) Shri Safal Kelvani Mandal and others v. State of Gujarat and others ( : 1984 (2) G.L.R. 1489).

(4) Andra Kesari Educational Society v. Director of School Education and others ( : 1989 (1) SCC 392).

(5) The State of Mysore and another v. P. Narasinga Rao ( : AIR 1968 SC 349).

(6) M/s. Shri Sitaram Sugar Co. Ltd. v. Union of India ( : AIR 1990 SC 1277).

(7) Government of Andhra Pradesh v. P. Dilip Kumar and another ( : 1993 (2) SCC 310).

(8) State of Gujarat v. Narsinhdas Krishnadas Agravat ( : 2006 (1) G.L.R. 146).

(9) Indian Airlines Officers Association v. Indian Airlines Ltd ( : 2007 (9) SCALE 479).

(10) Amaliyar Jayeshkumar Vichiyabhai v. State of Gujarat (2007 (3) GCD 2433).

(11) Akhil Gujarat Rajya Shala Sanchalak Mandal v. State of Gujarat (Special Civil Application No. 2877 of 2011 and allied matters).

(12) Vadodara Municipal Corporation v. Shital Prakash Harlikar (Letters Patent Appeal No. 639 of 2002 and allied matters).

(13) Karnataka Electricity Board v. The Karnataka Electricity Board ( : ILR 2006 Kar. 3384).

(14) OM Prakash Shukla v. Akhilesh Kumar Shukla and others ( : 1986 (Supp) SCC 285).

3.2 In case of Madanlal and others the Apex Court considered the issue about sufficiency of proof regarding minimum qualification and the service commission's decision to accept particular document offered for verification by the candidate. In case of Chandra Prakash Tiwari the Apex Court examined the challenge against validity of rules on ground of non publication. In case of Shri Safal Kelvani Mandal this Court held that the said provision is directory. In case of State of Mysore the Apex Court held that Article 14 and Article 16 do not forbid reasonable classification for purpose of legislation and do not preclude the Government from laying down qualification for post in question. In case of M/s. Shri Sitaram Sugar the Apex Court considered the issue about the scope of judicial review in the matter of policy decision. In case of Government of A.P. v. P. Dilip Kumar the Apex Court considered the right of recruiting agency i.e. employer to prescribe minimum eligibility qualification. In case of State of Gujarat v. N. K. Agravat this Court examined the challenge that the pension scheme was arbitrary as it excluded teachers on the basis of the cutoff date prescribed in the scheme. In case of Amaliyar Jayeshkumar Vichiyabhai this Court examined the challenge against policy of providing additional 5 marks to diploma holders. In case of Akhil Gujarat Rajya Shala Sanchalak Mandal this Court examined the validity of Section 35 of Gujarat Secondary and Higher Secondary Education Act 1972 and held that the words "procedure for selection" would not mean only the factum of preparation of selection list but will include all facets resulting in the end product of procedure for selection. In case of Vadodara Municipal Corporation and in case of Karnataka Electricity Board this Court considered the issue of employer's right to prescribe qualification. In case of Om Prakash Shukla the Hon'ble Apex Court considered the maintainability of challenge against the examination by the candidates who appeared in examination without protest and after realizing their failure.

4. This Court has taken into consideration the relevant provisions and the decisions referred to and relied on by the learned Advocates for petitioners and by learned Government Pleader.

The Cause, Relevant Events and Cronology.

5. After the enactment of Central Act the respondent State issued notification dated 22nd June 2011 whereby the respondent State resolved to create 5,000 posts of Head Teacher, class III in the pay scale of Rs. 930034800 (grade pay of Rs. 4400/). The said posts are to be filledup by promotion and by direct selection in 1:1 ratio.

5.1 The said notification was followed by another notification dated 18.1.2012 notifying Rules framed for regulating the recruitment on the post of Head Teacher class III and also prescribed that the teachers/candidates aspiring to be appointed to the post of Head Teacher shall have to pass and clear HTAT. On the same date respondent State issued another Notification prescribing format for HTAT and also prescribed eligibility for candidate to appear in HTAT.

5.2 After the result of HTAT was declared the Government came out with resolution dated 29.2.2012 declaring that the candidates will have to submit certificate and affidavit as per schedule-I and schedule II of the said resolution dated 29.2.2012 obliging the candidate to mentioned the details about the salary account in which the candidate deposits the salary cheque.

5.3 The petitioners and other similarly placed persons who are working as teachers or Head Teacher/s (i.e. the teachers who are asked to work as Head Teachers) claim that they are hit by new conditions. Most of them could not mention details of salary account since their salary is paid in cash and some could not demonstrate compliance about age criterion while some failed to show compliance about education qualification. Hence the petitions.

6. It would be apposite to take a look at some of the relevant provisions at this stage. According to Section 18 of the Central Act after commencement of the Act no school, except the schools run by local Authority and Government, can be established without recognition certificate and Section 19 of the Central Act imposes obligation on the schools to fulfill the prescribed standard and norms. The norms which the schools are required to fulfill are mentioned in the schedule to the Act. The schedule divides primary division in two segments viz. 1st to 5th standard and 6th to 8th standard and makes appointment of Head Teacher in lowe primary as well as upper primary school, imperative. According to the provisions in the schedule, lower primary school which admits more than 200 students must appoint a Head Teacher whereas upper primary school is under obligation to appoint a Head Teacher if it admits more than 100 students.

6.1 In view of the provision under Central Act the respondent State introduced amendment in the State Act and by Gujarat Educational Laws (Amendment) Act 2010 the respondent included, in Section (2) of State Act, clause 10(B) clause (15) and clause (20A) defining "lower primary education" (comprising 1st to 5th standard) and "primary education" and "upper primary education" (comprising 6th to 8th standard).

6.2 The posts in question have been created for first time by the resolution dated 22.1.2012. Therefore, until now neither there was any prescribed procedure for selecting and recruiting Head Teacher nor there was any prescribed eligibility criteria for the post in question. Creation of posts of Head Teacher also created need to prescribe procedure as well as eligibility criteria for selecting and recruiting suitable persons for the said posts. Therefore, the respondent State has framed the Rules of 2012 under notification dated 18.1.2012.

6.3 So far as the eligibility criteria for appointment by promotion is concerned, the Rules of 2012 provide, inter alia, that :-

2. Appointment to the post of Head Teacher, Class III, in the subordinate service of the Directorate of Primary Education or respective District or Municipal Primary Education Committee, shall be made either,

(a) by promotion of a person of proved merit and efficiency from amongst the persons who,

(i) have worked for not less than five years in the cadre of Primary Teacher, Class III, in the subordinate service of the Directorate of Primary Education or respective District or Municipal Primary Education Committee;

(ii) have passed the qualifying examination for Computer Knowledge in accordance with the provisions of the Gujarat Civil Services Computer Competency Training and Examination Rules, 2006;

(iii) possess the educational qualifications as prescribed in clause (b) of rule 4 for direct selection; and

(iv) have passed the Head Teachers Aptitude Test as may be prescribed by the Government: Provided that where the appointing Authority is satisfied.....

6.4 So far as the eligibility criteria for appointment by direct selection is concerned, the relevant provisions of, Rules of 2012 inter alia, are :-

4. To be eligible for appointment by direct selection to the post mentioned in rule 2, a candidate shall,

(a) not be more than 35 years of age :-

Provided that the upper age limit may be relaxed in favour of a candidate who belongs to the Scheduled castes, Scheduled Tribes or Socially and Educationally Backward Classes or Women in accordance with the provisions of the Gujarat Civil Services Classification and Recruitment (General) Rules, 1967: Provided further that the upper age limit may be relaxed in favour of a candidate who is in the service of the Government of Gujarat in accordance with the provisions of the Gujarat Civil Services Classification and Recruitment (General) Rules, 1967.

(b) (1) possess a bachelor degree obtained from any of the Universities or Institutions established or incorporated by or under the Central or State Act in India or any other educational institution recognized as such by the Government or declared as deemed University under section 3 of the University Grants Commission Act, 1956; and

(i) have completed two years certificate course of Primary Teachers Course of any of the Educational Institution recognized by the Government; or

(ii) possess one year degree in special education obtained from any of the Universities or Institutions established or incorporated by or under the Central or State Act in India or any other educational institution recognized as such by the Government or declared as deemed University under Section 3 of the University Grants Commission Act, 1956; or

(iii) possess a degree in education obtained from any of the Universities or Institutions established or incorporated by or under the Central or State Act in India or any other educational institution recognized as such by the Government or declared as deemed University under Section 3 of the University Grants Commission Act, 1956; or

(2)...........

(i)...........

(ii)...........

(c) have passed the Head Teachers Aptitude Test as may be prescribed by the Government;

(d) have atleast five years separate or combined experience of teaching as a Teacher or Vidhya Sahayak in Government or Grant in Aid or Non Grant in Aid Private Lower Primary School or Upper Primary School or Secondary Education School or Higher Secondary Education School or Primary Education Adhyapan Mandir or District Institute of Education and Training (DIET);

(e)...........

(f)...........

7. The points of grievance against Rules of 2012 and the resolution dated 29.2.2012 can be broadly categorized and can be put below following captions :-

(i) Upper Age Limit.

(ii) Experience - restriction on considering teaching experience only in specified institutions.

(iii) Evidence as to the length of service/experience.

(iv) Bachelor's Degree

(v) Validity of Rules of 2012.

8. I may now turn to each grievance - caption.

Upper Age Limit.

8.1 Under rule 4(a) of the Rules of 2012 prescribed upper age limit is 35 years. Second proviso to the said rule 4(a) permits relaxation in specified cases. As a result of the said rule 4(a) all those teachers who are employed and working in self financed primary schools or in private primary schools receiving grantinaid and have crossed (as on the relevant date) upper age limit, are automatically excluded and are rendered disqualified. The petitioners would claim that the provision as to upper age limit cannot be applied to the teachers who are already working as Head Teacher. Similar plea is raised by those who are working as teachers and it is claimed that the provision is discriminatory. The provision is challenged also on the ground that it is retroactive in operation. It is also claimed that State Government has no power to frame retroactive Rules.

8.2 The respondent State would contend that it is prerogative of State to prescribe eligibility criteria including age limit which is considered appropriate and necessary. The petitioners have no right or locus to challenge the said condition because actually the State has, extended opportunity to the teachers in private primary schools also. Before proceeding further it is necessary to clear a misbelief and wrong notion on part of the respondent State as to the above submission. It may, probably, be permissible to the respondent State to keep the doors closed and restrict the recruitment process to only those who are in service with Local Authority or District Education or State. However, when the doors are ajar (here they are wide open) and entry to the teachers employed in private primary schools is permitted then the respondent State cannot claim that the said teachers should rest contend with the opportunity which is given and even if any action or provision is bad in law then also they should not and cannot make any grievance. Once entry is permitted then Article 14 will come in picture and the right to oppose any action or provision which appears arbitrary, discriminatory or bad in law, can not be denied. It is another matter that the objection may not be good on merits and may not be accepted.

8.3 It is pertinent that the posts of Head Teacher are to be filled - up by promotion and direct selection from amongst the teachers in primary schools. Thus, the cadre of "primary teacher" is feeder cadre for the post of Head Teacher. When recruitment is to be made by direct selection then it is usual practice to prescribe minimum and upper age limit. Only because upper age limit is prescribed it cannot be said that entire class is excluded inasmuch as the impugned provision merely prescribes limitation in terms of maximum age and the primary teachers in all primary schools (be it self finance/or those receiving grant/run by local Authority or State) who are within prescribed age limit (have not crossed upper age limit) and fulfill other criteria can apply and participate in the recruitment process. The provision does not exclude or discriminate against any particular class of teachers.

8.4 The right to prescribe eligibility criteria including upper age limit, for any post, is employer's prerogative. Employer alone can determine the requirements for the post in question. When employer prescribes particular qualification, then Court would not be justified in imposing its view and would also not claim expertise so as to substitute its view or decision for that of the employer. In present case when the respondent State, in its capacity as employer has, while creating now post and while prescribing eligibility criteria as policy, considered it necessary and appropriate to prescribe upper age limit, then such decision cannot be interfered with and it would not be within the purview of judicial review and Court would not examine the propriety of the decision.

8.5 Furthermore, when the prescribed upper age limit is not lower than upper age limit prescribed for the post of teacher and prescribed experience put together, then the objection from "in service" employees (teacher -candidates) will not have any base to stand on. In present case upper age limit for being eligible for appointment on the post of teacher is 25 years and prescribed experience is 5 years whereas upper age limit for post of Head Teacher (35 Years) which is higher or more than the total of upper age limit for post for teacher (25 years) plus the total prescribed experience (5 years).

8.6 In the case on hand it is also necessary and relevant to keep in focus that it is for the first time that the posts in question are created and eligibility criteria are also fixed for first time, and when recruitment is to be made by promotion as well as direct selection, the provision prescribing upper age limit cannot be termed as retrospective in effect and/or retroactive in operation, more particularly when such qualification is prescribed while creating the post in question (in present case Head Teacher) and when the said condition does not take away any duly accrued or vested right.

Furthermore, until now there was no duly sanctioned post and no appointment on the post and merely because senior most teacher was being assigned the duty of Head Teacher it would not create any vested enforceable right.

A practice, without support and sanction of law or an irregularity (even if continued for long time) will not create any vested enforceable right and Court cannot, for protecting such practice, strike down or read down duly enacted Law or Rules. The "in service teachers" including those working as Head Teacher (on account of the practice) cannot expect, much less insist, that such practice, would continue or should continue forever.

8.7 The contention that the impugned provision discriminates the teachers employed in private primary school is also misconceived. The condition is applicable to all cases where the appointment is to be made by direct selection and competitive exam. According to the advertisement inviting applications, relaxation in age limit is restricted to age of 45 years for "in service" candidates and by restricting relaxation in upper age limit, the provision as to upper age limit is made applicable (in matter of appointment by direct selection) in case of "in service" teachers as well, of course subject to relaxation available under Rules of 1967.

8.8 Likewise, the protest or objection by "in service" teachers against the provision prescribing upper age limit is also not justified or sustainable. In this context it is necessary to note that the post of Head Teacher is created in class III. Thus, "in service" teachers will have the benefit of the provision under subrule (5) of Rule 8 of Gujarat Civil Services Classification and Recruitment (General) Rules 1967 which provides relaxation in, as the case may be, upper age limit. It is clarified in the advertisement that the said relaxation is made available to "in service" teachers. The objection is, thus, not sustainable.

8.9 In the matters related to selection and recruitment, employer is the best judge of his requirements and of the qualification he looks for and desires including the age group of employees. Persons of which age group will be more suitable is for the employer to decide and the Court would be loath and reluctant to interfere with the criterion fixed by an employer, be it State or any private employer. In present case the provision is neither discriminatory nor irrational or arbitrary and is not beyond Government's Authority to prescribe such requirement.

For the foregoing reasons and discussion the aforesaid challenge and objection fails and cannot be accepted. The decision or action to treat petitioners - teachers who do not meet with and fulfill the criterion related to upper age limit prescribed under Rule 4(a) as "not eligible", is not disturbed. The above discussion applies to and covers the writ petitions being S.C.A. Nos. S.C.A. No. 4070 of 2012, S.C.A. No. 3899 of 2012, S.C.A. No. 4557 of 2012, S.C.A. No. 4248 of 2012, S.C.A. No. 4212 of 2012 and S.C.A. No. 4213 of 2012 and the said petitions are decided and they stand disposed of in light of the discussion and decision in present order.

Experience - restriction on considering teaching experience only in specified institutions.

9. Under the said Rules of 2012 i.e. as per Rules 2(a) (i) and 4(d); the respondent State has also prescribed requirement of minimum experience for the post of Head Teacher. So far as the appointment by promotion is concerned, the criteria is prescribed under Rule 2(a)(i). The assault is not on clause 2(a)(i) and/or on requirement of teaching experience for 5 years, but on exclusion of teaching experience in institutes/ colleges other than those mentioned in clause 4(d) particularly B.Ed. college. However serious grievance and challenge are raised against the provision under Rule (4) (d) which, so far as appointment by direct selection is concerned, prescribes, inter alia, that the candidate should have atleast 5 years, separate or combine, experience of teaching as teacher or Vidhya Sahayak in the institutes enlisted in clause (d) of Rule (4).

9.1 It is claimed that though combined experience of teaching in different schools is to be taken into account, by virtue of said provision under Clause (d) of Rule (4) experience earned by teachers while teaching in B.Ed College is, without any rationale, excluded and not mentioned in clause 4(d) and the said provision is arbitrary and discriminatory and there is no justification to exclude the teaching experience, combined or exclusive, in B. Ed. college. Most number of petitioners who have challenged the said provision are those who are teaching or have taught in the colleges imparting education in B.Ed. course. It is claimed that they do possess 5 years' teaching experience but that includes (combined or exclusive) experience of teaching in B.Ed. colleges.

9.2 The respondent State would defend the provision claiming that the provision is made keeping in focus the object and purpose for recruitment in primary school and also the fact that the Head Teacher shall have to supervise, in addition to being a teacher, students in primary schools and that therefore teaching experience in B.Ed. is not considered, as relevant experience.

9.3 On this count it is relevant to note that besides the difference in age of students, there is vast qualitative difference between the students in B.Ed. colleges and in primary schools. The intake and absorbing capacity of the students in primary school and B.Ed. college, their reaction ability and capacity, the method and tools of teaching students in primary schools and B.Ed. colleges, the tolerance and patience required for teaching the said two sets of students etc. are substantially and meaningfully and qualitatively different. Needless to state that teaching the students in primary schools and their supervision demand special skill and training and it is markedly and qualitatively different from the teaching experience in B.Ed. College.

9.4 Therefore if the respondent State has considered it appropriate to not to take into account the teaching experience in institute/colleges imparting post primary/post secondary education e.g. in B.Ed. college and has considered it appropriate to club only such institutes or course which are essentially related to and concerned with students at primary level, then the said decision or such provision cannot be said to be irrational or arbitrary.

9.5 Furthermore this aspect also is in employer's domain and it is employer's prerogative to set the standard and fix the criterion for requisite experience. When the employer is State, the decision may be examined on touchstone of Article 14 of the Constitution and so long as it is not arbitrary Court would not interfere with such decision. In present case, the rationale behind the decision is apparent and does not seem to be arbitrary or irrational or unfair. It also does not appear to be designed to exclude otherwise eligible category, without any justification. It is claimed and clarified by the respondent State that all schools/ institutes which are clubbed and included in clause (d) of Rule 4, for the purpose of determining 5 years combined experience are imparting education in only primary division or are connected with education at primary division.

9.6. For the reasons discussed above the said decision or provision does not warrant any interference in exercise of Judicial Review. The objection on this count cannot be accepted. The decision to treat the petitioner - teachers who do not meet with and fulfill the criterion related to minimum experience as per Rule 4(d) as "not eligible" is not disturbed.

The foregoing discussion applies to and covers the writ petitions being S.C.A. No. 4052 of 2012. S.C.A. No. 4100 of 2012, S.C.A. No. 4231 of 2012, S.C.A. No. 4309 of 2012, S.C.A. No. 3897 of 2012, S.C.A. No. 4303 of 2012, S.C.A. No. 3960 of 2012, and the said petitions are decided and they stand disposed of in light of the discussion and decision in present order.

Evidence as to the length of service/ experience.

10. The grievance and objection is raised against the instructions to the effect that the details of candidate's "salary account" (i.e. the details about the name of Bank and the account number where the candidate deposits the salary cheque) alone will be considered as sufficient and satisfactory evidence about candidate's experience. The said instruction is imposed by way of a resolution dated 29.2.2012. It is also asserted that even the said condition is contrary to the provision contained in rule 106(4)(xi) of the Primary Education Rules 1949. It is also alleged that right from 22.1.2011 to 28.2.2012 the said condition was not imposed and suddenly after declaring the results of HTAT the respondent imposed the said condition. The Counsel for respondent would, contend that after deliberations and due consideration of relevant aspects it is noticed that the said detail alone will prove to be full proof, satisfactory and convincing evidence as to the candidates experience.

10.1 On this count it is necessary to note, at the outset, that the impugned instruction is not part of the Rules of 2012. It is also pertinent to note that the said condition or even any indication of such nature do not flow from the provisions in the Rules of 2012.

10.2 It is only through the reply affidavit that the respondent has come out with the case that the said details are only full proof and satisfactory evidence as to the experience of a candidate. On the other hand the petitioners have emphatically claimed and asserted that there are several other documents, most of them are prescribed by the respondent Authorities, which either individually or in combination would serve as satisfactory evidence. The petitioners have illustratively mentioned the details of such other documents; which are:" (i) Inspection report, (ii) Muster Role, (iii) EPF Statement, (iv) Appointment Letter, (v) Salary Register, (vi) Pay Slip Voucher, (vii) Experience Certificate and (viii) DISE Form (which was earlier known as CRC Form)". It is not in dispute that the said documents/returns/ forms are specified by the respondent Authorities and the school management have to submit, as yearly/half yearly returns in the office of respondent Authority.

10.3 The above details would show that the impugned instruction is issued without considering all relevant aspects and factors. This aspect is all the more evident from the fact that in response to a querry by Court as to why passbook or receipt of Provident Fund Account is not considered as satisfactory evidence, the respondents conceded and submitted that the said document will be taken into account in absence of the details of bank account. It is evident, from the list of documents/forms mentioned by the petitioners and the above mentioned clarification, that before imposing the impugned condition the respondent has not considered all relevant factors and aspects. Although regular submission of returns forms, documents, inspection report etc. is made obligatory by the respondent for ensuring compliance of various provisions under the Act and the rules, somehow the respondent does not want to rely on the said documents and suddenly, at belated stage, the decision to accept only one document as satisfactory proof about requisite qualification is declared and shelter is taken under above mentioned Rule 106(4)(xi). The said Rule reads thus :-

106 (xi) The managing body of the trust of the society maintaining the private primary school shall open an account with the Schedule Bank and the payment of salaries of the staff shall be made from such account by cheque system. Alternatively, for the facility of the private primary school it shall also be open to maintain such account with the Cooperative Bank, and the payment of salaries of the teachers shall be made from such accounts by cheque system.

10.4 The said provision imposes obligation on private primary school, and not on the teacher. The obligation on the school is two fold viz. (i) to open and maintain an account and to make payment of salary from that account; and (ii) to pay salary to the staff by cheque. A plain reading of the said provision makes it clear that until and unless the schools comply the requirement and make payment of salary by cheque, a teacher will not be able to provide the details demanded as per Resolution dated 29.2.2012.

10.5 The teachers in self financed private primary schools claim that the schools do not maintain such account and/or do not pay salary by cheque and their salary is paid in cash and that therefore such teachers - candidates will never be able to mention the details of salary account number, Bank's name etc. It is also alleged that such irregularity is rampant and prevailing in almost all self finance schools and any action against such practice and to stop such irregularity, are not taken. It is submitted that due to default and irregularity on part of school management the affected teachers should not be excluded and they may not be deprived of the opportunity of being considered for appointment on the post in question.

10.6 On this count it is necessary to recall that Rules of 2012 merely prescribe requisite minimum experience. The said rules do not provide and/or contemplate that a particular document alone will be considered as satisfactory proof about requisite experience. The said Rules of 2012 also do not authorize any Authority or officer to prescribe such condition or requirement. When the said rules do not impose such restriction or condition then it is not open to or permissible for the executing Authority to restrict (by issuing a resolution) the option of submitting other documents (e.g. the forms/reports/ returns prescribed under statute or the rules).

10.7 Such decision, in the background of facts and the relevant provisions discussed above, cannot be termed or treated as reasonable or fair not only because the teachers in self finance private primary schools are not able to mention the details but also because (a) the concerned respondent Authority does not want to even take a look at and examine other documents and does not want to examine the veracity of each candidate's documents; and, also because (b) the respondent arbitrarily refuses to rely on and take into account various other documents and details - which the teachers can supply; and also because (c) the rules merely prescribe requisite minimum qualification but do not provide or contemplate such restriction and/or that only specified document alone will be considered satisfactory proof about experience and do not authorize any one to select which document shall be accepted, and also because (d) the Rules do not confer any power of such nature on any Authority - officer, in exercise of which such restriction can be imposed; and also because (e) there is no justification for imposing such restriction and also because (f) the facts establish that the decision is taken without considering all relevant aspects and factors and also' because (g) so far as the petitioners are concerned the fulfillment of said instruction is wholly dependent upon the compliance of the requirement under Rule 106(4)(xi), by the schools.

10.8 It is preposterous that merely because a teacher employed in a school is not able to mention details of the salary account (and that too on account of irregularity by the school management) and although the teacher is ready to submit any other document which would also support the details regarding experience, a presumption that the teacher does not possess requisite experience will be drawn. Merely on the ground that a teacher is not able to mention' the said details it cannot be assumed - and that too even without examining other documents/ details that the teacher does not possess prescribed qualification. The decision to even not accept the application in absence of such details cannot be considered just, fair and reasonable.

10.9 When there are various other documents forms etc. which are prescribed by the respondent State which can, either independently and as a standalone document or in combination, effectively serve the purpose and demonstrate compliance of the prescribed condition the Authorities have not cared to even examine the individual cases/requests on case - to -case basis and only to avoid their own hardships (in examining documents) applications have not been accepted and examined but have been flatly refused.

10.10 The obligation of schools and/ or the effect or consequences of the schools' lapses or failure in discharging the said obligation cannot be transferred to or shifted on the teacher - candidates. The impugned instruction amounts to penalizing the teachers for the wrongs committed by the school management. Such action and conduct of the respondent is ex facie arbitrary, irrational and unreasonable which deprives otherwise eligible candidates of their precious right of being considered for appointment and is hit by Article 14 of the Constitution and it does not pass the litmus test of being "fair and reasonable".

10.11 On this count reference may be made to the observations by the Apex Court in the case between Siemons Public Communication Pvt. Ltd. v. Union of India ( : AIR 2009 SC 1204) the Hon'ble Apex Court has observed that :-

16. In Reliance Airport Developers (P) Ltd. v. Airports Authority of India and Others, : (2006) 10 SCC 1, at paragraphs 56, 57 and 77, it was observed as follows :-

57. The present trend of judicial opinion is to restrict the doctrine of immunity from judicial review to those class of cases which relate to deployment of troupes, entering into international treaties, etc. The distinctive features of some of these recent cases signify the willingness of the Courts to assert their power to scrutinize the factual basis upon which discretionary powers have been exercised. One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is illegality the second irrationality, and the third procedural impropriety. These principles were highlighted by Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service (1984 (3) All. ER. 935), (commonly known as CCSU Case). If the power has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated. (See Commissioner of Incometax v. Mahindra and Mahindra Ltd.( : AIR 1984 SC 1182). The effect of several decisions on the question of jurisdiction have been summed up by Grahame Aldous and John Alder in their book Applications for Judicial Review, Law and Practice thus :-

There is....

77......

In the case between Indian Express Newspaper (Bombay) Pvt. Ltd. v. Union of India ( : AIR 1986 SC 515 (1) the Hon'ble Apex Court has observed that :-

71. We shall assume for purposes of these cases that the power to grant exemption under Section 25 of the Customs Act, 1962 is a legislative power and a notification issued by the Government thereunder amounts to a piece of subordinate legislation. Even then the notification is liable to be questioned On the ground that it is an unreasonable one. The decision of this Court in Municipal Corporation of Delhi v. Birla Cotton, Spinning and Weaving Mills, Delhi & Anr.(1) has laid down the above principle. In that case Wanchoo, C.J. while upholding certain taxes levied by the Corporation of Delhi under Section 150 of the Delhi Municipal Corporation Act, 1957 observed thus :-

Finally there is another check on the power of the Corporation which is inherent in the matter of exercise of power by subordinate public representative bodies such as municipal boards. In such cases if the act of such a body in the exercise of the power conferred on it by the law is unreasonable, the Courts can hold that such exercise is void for the unreasonableness. This principle was laid down as far back as 1898 in Kruse v. Johnson (1898) 2 Q.B.D. 91

73. A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary. In England, the judges would say "Parliament never intended Authority to make such rules. They are unreasonable and ultra vires". The present position of law bearing on the above point is stated by Diplock, L. J. In Mixnam Properties Ltd. v. Chertsey U.D.C.(1) thus :-

The various grounds upon which subordinate legislation has sometimes been said to be void... can, I think, today be properly regarded as being particular applications of the general rule that subordinate legislation, to be valid must be shown to be within the powers conferred by the statute. Thus the kind of unreasonableness which invalid dates a bylaw is not the antonym of 'reasonableness' in the sense of-which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a Court would say :- 'Parliament never intended to give Authority to make such rules :-they are unreasonable and ultra vires.' If the Courts can declare subordinate legislation to be invalid for 'uncertainty,' as distinct from unenforceable this must be because Parliament is to be presumed not to have intended to authorise the subordinate legislative Authority to make changes in the existing law which are uncertain.

76................. A distinction must be made between delegation of a legislative function in the case of which the question of reasonableness cannot be enquired into and the investment by statute to exercise particular discretionary powers. In the latter case the question may be considered on all grounds on which administrative action may be questioned, such as, nonapplication of mind taking irrelevant matters into consideration, failure to take relevant matters into consideration, etc. etc. On the facts and circumstances of a case, a subordinate legislation may be struck down as arbitrary or contrary to statute if it fails to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution. This can only be done on the ground that it does not conform to the statutory or constitutional requirements or that it offends Article 14 or Article 19(1)(a) of the Constitution. It cannot, no doubt be done merely on the ground that it is not reasonable or that it has not taken into account relevant circumstances which the Court considers relevant.

10.12 Since the Court cannot usurp the Authority vested with the respondent to select the method for verifying the petitioner's claims the Court will not direct or suggest which material or detail or document should be taken into account and should be treated as satisfactory proof of evidence. However, when the facts and circumstance of the case are such as discussed above, the Court would be justified and within the jurisdiction to examine the decision on the touchstone of reasonableness.

10.13 Having regard to the facts of the case, the impugned decision and action of the Authority of restricting the option to only one document/detail, cannot be sustained and has to be set aside. Hence, the said Resolution and the condition imposed by Resolution dated 29.2.2012 are declared arbitrary, unjust, unreasonable and irrational and are hereby set aside.

It is, however, clarified that the respondent Authority shall, after considering all relevant factors and aspects, take appropriate decision about the material or the documents which will be considered as sufficient and satisfactory proof for determining the fulfillment of condition as to requisite experience and issue fresh - appropriate instructions for intimation and information to the candidates. However, until such instructions are issued and reasonable time is allowed to the teachers to make application in light of such revised instructions, any final decision and action as to the applications, received earlier shall not be taken and the posts shall not be filled up.

It is further clarified that the Court has not disapproved the decision of considering the details of salary account as evidence about fulfillment of the eligibility criteria viz. experience but what is disapproved is the decision to treat the said details as the only and solitary proof acceptable for ascertaining the compliance as to requisite qualification.

10.14. Before proceeding further it is necessary to mention that when large scale irregularity and breach of the provisions prescribed under statutory rules is placed before the Court and when there is no specific, accurate and emphatic denial by the respondent Authority the Court cannot turn blind eye to such irregularities and Court cannot rest by merely expressing anguish. It is duty of the Court to direct the Authorities to forthwith take steps to immediately put an end to such flagrant violation of Rules. The Court, then, would be justified and within its jurisdiction to examine such issues, be it under the umbrella of administrative action or policy matter in public law domain because such irregularity affects large number of employees in education institutions which includes teaching and nonteaching staff and reflects on the State of affairs in the offices of the respondents. Therefore, the respondent Authorities are hereby directed to forthwith initiate and take all necessary steps and actions, as available and permissible in law - including cancellation of registration and recognition of such school/s so as to immediately arrest and eradicate the said mischief and irregularity and violation of the provision contained under Rule 106(4)(xi). The compliance report shall be filed, by way of separate Civil Application, within 4 months from service of certified copy of present order by the Secretary, Education Department and the Director of Primary Education, who shall be personally responsible for compliance of the direction.

The foregoing discussion applies to and covers the writ petitions being S.C.A. Nos. S.C.A. No. 3592 of 2012, S.C.A. No. 3835 of 2012 to S.C.A. No. 3869 of 2012, S.C.A. No. 4718 of 2012, S.C.A. No. 3961 of 2012, S.C.A. No. 3894 of 2012, S.C.A. No. 4548 of 2012 S.C.A. No. 4031 of 2012, S.C.A. No. 4128 of 2012, S.C.A. No. 4228 of 2012. S.C.A. No. 4146 of 2012, S.C.A. No. 4007 of 2012, S.C.A. No. 4266 of 2012, S.C.A. No. 4609 of 2012, S.C.A. No. 4389 of 2012, S.C.A. No. 4390 of 2012, S.C.A. No. 4495 of 2012, S.C.A. No. 4202 of 2012, S.C.A. No. 4121 of 2012, S.C.A. No. 4119 of 2012, S.C.A. No. 4120 of 2012, S.C.A. No. 3969 of 2012, S.C.A. No. 3973 of 2012, S.C.A. No. 3975 of 2012, S.C.A. No. 3976 of 2012, S.C.A. No. 3982 of 2012, S.C.A. No. 3983 of 2012, S.C.A. No. 3974 of 2012, S.C.A. No. 4042 of 2012 and S.C.A. No. 4304 of 2012 and the said petitions are decided and stand disposed of in light of the above discussion and decision in present order.

Bachelor's degree

11. The respondent State has, by virtue of the rules of 2012 prescribed graduation/bachelor's degree as minimum necessary qualification. The said condition is vehemently opposed and challenged on diverse grounds mentioned earlier. The contention on strength of the provision under "Asst. Educational Inspector class III requirement rules 2004 is not considered further in view of the resolution clarifying that until appropriate modification is brought in effect, any promotion to the post of Asst. Educational Inspector from the post of primary teacher will not be made. The respondent has with equal vehemence and resistance opposed the challenge.

11.1 The objection is required to be considered keeping in focus the settled position that the right to prescribe qualification for any post is employer's prerogative and the said right is in employer's exclusive domain. The Court would, ordinarily, resist from imposing its views as to the sufficiency of qualification on the employer and employer alone is the best judge to decide the minimum qualification he needs.

11.2 It is relevant and necessary to mention, at the outset, that not only the writ petitioners but all teachers in primary schools, be it self finance private primary school or grant receiving primary school and in schools under local Authorities have been, until now, appointed in accordance with the existing and applicable educational qualification viz. SSC/HSC and PTC and they possess the said qualification. Some of them might be possessing bachelor's degree but that would be as an additional qualification, acquired voluntarily, but not as prescribed and necessary qualification.

11.3 The relevant provisions under the Act and applicable rules and the relevant Government resolutions were taken into account by Full Bench in the case of Sudip Tripathi and another v. State of Gujarat (supra) and that therefore those aspects are not discussed in further detail in present judgment. Suffice to note that after elaborate discussion. Full Bench held, inter alia, that :-In the above circumstances, we are of the opinion that the primary teachers' training of two years' duration [as suggested by the Council] shall be the only valid qualification for appointment of teachers in primary schools :- be it an appointment in regular pay scale or be it an appointment as Vidya Sahayak. The State Government may, however, consider appointment of candidates possessing post graduate B.Ed. degree for Standards VI & VII of the primary schools but only if and after the State Government segregates Standards VI & VII from Classes I to V by appropriate legislation and requisite guidelines. We answer the reference accordingly.

11.4 This position as to the minimum qualification for primary teacher remained in force until the Rules of 2012 came into force. After the enactment of the Central Act the Right of Children to Free and Compulsory Education Rules 2010 (RTE Rules) are framed. The provision under Section 23(1) of Central Act and Rule 17 of RTE Rules read thus :-

23. Qualification for appointment and terms and conditions of service of teachers

(1) Any person possessing such minimum qualifications, as laid down by an academic Authority, authorized by the Central Government, by notification, shall be eligible for appointment as a teacher.

17. Minimum qualifications.

(1) The Central Government shall, within one month of the appointed date, notify an academic Authority for laying down the minimum qualifications for a person to be eligible for appointment as a teacher.

(2) The academic Authority notified under subrule (1), shall, within three months of such notification, lay down the minimum qualifications for persons to be eligible for appointment as a teacher in an elementary school.

(3) The minimum qualifications laid down by the academic Authority referred to in subrule (1) shall be applicable for every school referred to in clause (n) of Section 2.

11.5 Thus, the academic Authority (mentioned in Rule 17 of said RTE Rules) is NCTE. Hence, NCTE is the Authority competent to prescribe minimum qualification for a teacher and after NCTE prescribes minimum qualification for any post, then any other body, including State Government, will not be competent to prescribe any other qualification.

11.6 Therefore it is necessary to take into account the qualification prescribed by NCTE. In exercise of powers under Section 23 of the Central Act, NCTE, being the academic Authority, has issued notification dated 23rd August 2010 prescribing minimum qualification for appointment as teacher in class I to VIII in a school referred to in Section 2(a) of Central Act which read thus :-

1. Minimum Qualifications;

(i) Class IV

(a) Senior Secondary (or its equivalent with at least 50% marks and 2 years Diploma In Elementary Education (By whatever name known)

or

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

or

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

or

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

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

(iii) Classes VI-VIII

(a) B.A./B.Sc and 2 - year Diploma in Elementary Education (By whatever name known)

or

B.A./B.Sc with at least 60% marks and 1 year Bachelor in Education (B.Ed.)

or

B.A./B.Sc. With at least 45% marks and 1 year Bachelor in Education (B.Ed.), in accordance with the NCTE (Recognition Norms and Procedure) Regulations issued from time to time in this regard

or

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

or

Senior Secondary (or its equivalent) with at least 50% marks and 4 year

BA/B.Sc. Ed or B.A.

Ed./B.Sc. Ed.

or

B.A./B.Sc. with at least 50% marks and 1 year B.Ed. (special Education)

AND

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

11.7 In light of the above mentioned provisions it is necessary and relevant to note that according to the notification issued by NCTE, the minimum qualification for appointment of primary teacher in lower primary school is still the same i.e. SSC/HSC with PTC. But the prescribed minimum qualification for appointment as teacher in 6th standard to 8th standard has undergone a change inasmuch as bachelor degree in any discipline/faculty is now prescribed as minimum qualification for 6th standard to 8th standard. Thus, so far as the qualification prescribed by NCTE are concerned there is difference between prescribed minimum qualification for post of teacher in lower primary school and in upper primary school.

11.8 However, though the post of teacher in primary school is feeder post for the post of Head Teacher this difference is ignored while making the said Rules of 2012 particularly Rule 2(a)(iii) and Rule 4(b) of Rules of 2012 and by ignoring the said difference (made by NCTE in prescribing minimum qualification for lower and upper primary school) similar or identical provision about minimum qualification for post of Head Teacher is made in Rules of 2012 inasmuch as requirement/ qualification of Bachelor's Degree is prescribed under Rules of 2012, for the said post in both divisions i.e. lower and upper primary schools. Hence, so far as post of Head Teacher in lower primary school is concerned, the minimum qualification prescribed by Rules of 2012 for post of Head Teacher in lower primary school will be at variance with the minimum qualification prescribed for feeder post.

11.9 Therefore, if the requirement as to minimum educational qualification for post of Head Teacher is higher than the minimum qualification prescribed for the feeder post i.e. post of teacher in lower primary school then the resultant situation would be that those teachers who possess only prescribed minimum qualification, and have not, on their own volition or choice, acquired additional qualification over and above the minimum qualification, will be indirectly but automatically excluded from making application and from being considered for appointment on the post of Head Teacher though they belong to feeder cadre - post.

11.10 Now, in present case, so far as the upper primary school i.e. standard 6th to standard 8th is concerned, the academic Authority (NCTE) has, since August, 2010, prescribed minimum qualification of Bachelor Degree for post of teacher. The said rules of 2012, while prescribing bachelor degree as minimum qualification, ignores the two division of primary school made by Central Act and Rules viz. lower primary school and upper primary school and prescribes, without differentiating or without distinction, bachelor degree as minimum qualification for post of Head Teacher.

11.11 Now so far as the Rules of 2012 and the post of Head Teacher under said Rules are concerned, the said Rules prescribe Bachelor Degree as minimum qualification for post of Head Teacher. Thus, the provision under the Rules of 2012, which prescribes bachelor degree for appointment as Head Teacher is in conformity and in consonance with the minimum qualification prescribed by NCTE for feeder post i.e. post of teacher however only in respect of teacher teaching in upper primary level i.e. from 6th standard to 8th standard and is not arbitrary or is not in violation of Central Act/Rules and it cannot be termed as ultra vires the Central Act or the State Act, since the minimum qualification prescribed by NCTE for teaches in upper primary school is bachelor degree. The said provision also does not affect any vested or accrued right as alleged by the petitioners and that therefore it cannot be termed or treated as provision, with retrospective effect or retroactive operation. In this context it may be recalled that the post of Head Teacher is created for first time and the eligibility criteria are also prescribed for first time. Hence in absence of the availability of post and in absence of prescribed eligibility criteria question of any vested or accrued right or any question of retroactive operation of the rules would not arise. So far as the petitioners who have been assigned the functions of Head Teacher are concerned, they have not been appointed on any post and they do not hold any post but are merely discharging certain additional duties for which they are paid special allowance. Such practice without support of law does not create any enforceable right.

11.12 However, the position on this count, so far as 1st standard to 5th standard is concerned, is slightly different. On this count it is appropriate to take into account that so far as lower primary school is concerned the Rules of 2012 have prescribed, without any differentiation or distinction between lower and upper primary school, qualification of bachelor degree for the post of Head Teacher and that therefore the said qualification of bachelor degree is, so far as the lower primary school is concerned, higher than the minimum qualification prescribed by NCTE for feeder post in lower primary school i.e. for teachers teaching in 1st standard to 5th standard.

11.13 Thus, the impugned condition in the said Rules of 2012 would result into automatic elimination of all teachers teaching in standard 1st to 5th standard who have been recruited as per minimum qualification prescribed for lower primary school and possess such minimum qualification required for post as per rules prevailing at relevant time i.e. SSC/HSC with PTC will stand automatically disqualified and excluded and will not be eligible to even make application for the post of Head Teacher.

11.14 Another important aspect is also required to be taken into account at this stage. It is pertinent that by virtue of the State Amendment Act of 2010 [Section 2(10B), Section 2(15) and Section 2(20A)] the Central Act and Central Rules, particularly in view of the schedule to the Central Act, and the RTE Rules there is a clear division of primary division which is brought in effect whereby the primary school comprises two segments viz. lower primary school and upper primary school. Furthermore, the NCTE Rules prescribe different qualification for teachers teaching in lower and upper primary school. Thus, in all respects and for all purpose the primary school is divided in two segments. Besides this the schedule to the Central Act prescribe different parameters for appointment of Head Teacher in lower primary school and upper primary school inasmuch as the obligation to appoint Head Teacher in lower primary school arises when the number of admitted students is more than 200 students whereas the said obligation in respect of upper primary school arises when the number of admitted students is more than 100 students. However, the Rules of 2012, while prescribing qualification for post of Head Teacher do not take into account the said distinction and division.

11.15 It is, relevant and necessary to keep in focus that neither the State Act/ Rules, Central Act/Rules nor NCTE Rules or any other provision (except the Rules of 2012) prescribe qualification for the post of Head Teacher. NCTE, being the academic Authority has prescribed minimum qualification only for the post of teacher, in lower and upper Primary School and Secondary/ Higher Secondary Division but not for the post of Head Teacher in lower or upper primary school.

11.16 At the same time it also cannot be overlooked, and it is necessary to recall that the power to prescribe qualification for appointment in primary schools is conferred on Academic Authority. Thus, the Authority competent to prescribe minimum qualification for the post of Head Teacher would be academic Authority. However, by virtue of the said Rules of 2012 it is the State Government who has prescribed minimum qualification for post of Head Teacher.

11.17 The question which arises is as to whether the respondent is authorized, competent and justified in prescribing such qualification for recruitment on the post of Head Teacher in lower primary school which is higher than the qualification prescribed for the post of teacher in lower primary school though appointment of Head Teacher is to be made from amongst the teachers employed in primary school. So far as the issue about competence of State Government to make such provision is concerned, the said aspect is discussed hereinafter under the captioned validity of Rules of 2012.

11.18 As mentioned hereinabove the qualification/eligibility criteria prescribed by NCTE does not prescribe requirement of bachelor degree for 1st standard to 5th standard and the prescribed minimum qualification for lower primary school is SSC/HSC with PTC however the impugned condition in the notification dated 18.1.2012 imposes the requirement of graduation degree for the post of Head Teacher in lower primary school as well, without taking into account the above mentioned relevant fact and aspect.

11.19 True it is that in its capacity as employer respondent State has the right and prerogative to prescribe eligibility criteria and requirement as it considers necessary and appropriate. However, in view of the Central Act and State Act and the State and Central Rules the said right is subject to the provision under Section 23 of Central Act and Rule 17 of RTE Rules. Furthermore in view of the entire scheme it emerges that the requirement prescribed under the State Act and the Rules thereunder ought to be in consonance and in conformity with and should not run contrary to any other provision under the Central Act and the Rules, the NCTE Act and NCTE/ RTERules or any condition, procedure or requirement prescribed by NCTE.

11.20 It is also true that NCTE has not prescribed any minimum qualification for the post of Head Teacher in lower as well as upper primary school. NCTE has prescribed, for lower and upper primary school, minimum qualification only for the post of teacher. According to Section 23 of Central Act and Rule 17 of RTE Rules, if qualification for any post is not prescribed by NCTE then the State Government may, until NCTE prescribes qualification for such post, can prescribe qualification for such post. Therefore, on face of it the action of State Government of prescribing minimum qualification for Head Teacher in lower primary school may not appear to be contrary to any provision made by NCTE however on considering the Rules of: 2012 in light of the Notification dated 23.8.2010 issued by NCTE in exercise of power under Section 23 of Central Act it emerges that the provision prescribing minimum qualification for; Head Teacher would result into automatic exclusion of all teachers teaching in lower primary school who possess minimum qualification prescribed for the post of teacher in lower primary school.

11.21 The above discussed aspects bring out that the impugned provision is made without considering the relevant and vital difference in the provision made by NCTE for prescribing qualification for primary school. NCTE has for the said purpose taken into account and maintained the two divisions of primary school viz. lower and upper primary school and has prescribed two different set of minimum qualification for said two divisions of primary school inasmuch as Bachelor Degree is not prescribed for lower primary school however in Rules of 2012 such distinction is not kept in focus and it is ignored and for both divisions Bachelor Degree is prescribed as minimum qualification for post of Head Teacher for both divisions viz. lower and upper primary school. Even the drastic consequence of such provision is also not taken into consideration.

11.22 At this stage it is appropriate to refer to the observations by the Apex Court in paragraph No. 14 to 16 of Judgment in case of Union of India v. International Trading Company :-

14. It is, trite law that Art. 14 of the Constitution applies also to matters of Governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional.

15. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Art. 14 is that a change in policy must be made fairly and should not give impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Art. 14 and the requirement of every State action "qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Art. 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heart beat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reasons, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness.

16. Where a particular mode is prescribed for doing an act and there is no impediment in adopting the procedure, the deviation to act in different manner which does not disclose any discernible principle which is reasonable itself shall be labelled as arbitrary. Every State action must be informed by reason and it follows that an act uninformed by reason is per se arbitrary.

11.23 Thus, the exercise of executive power or the discretion to change the policy, when not controlled by any statute, must be made in fair manner and should not give even impression that it is done arbitrarily. As observed by the Apex Court every action of State must be informed by reason and should be fair and reasonable.

11.24 On this count it is also appropriate to note at this stage that in the case of Siemons Public Communication Private Limited (supra) the Apex Court has quoted observations from para 57 of the judgment in case of Reliance Airport Developers (P) Ltd. The relevant observations read thus :-

One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is illegality the second irrationality, and the third procedural impropriety. These principles were highlighted by Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service (1984 (3) All. ER. 935), (commonly known as CCSU Case). If the power has been exercised on a nonconsideration or nonapplication of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated.

11.25 When vital facts and relevant aspects which, by necessary implication or on account of express provision, are required to be taken into consideration but are not taken into account, then on such ground the Court can strike down or read down the condition - if it is severable prescribed by subordinate legislation. In present case the respondents have' not taken into consideration that NCTE has not prescribed Bachelor degree as minimum qualification for teacher in lower primary school which still continues to be SSC/HSC with PTC. Thus, the qualification prescribed under the Rules of 2012 would render the entire class of primary teacher in lower primary school, ineligible and disqualified.

11.26 In this view of the matter, the provision under Rule 4(b)(1) which prescribes requirement of bachelor degree as minimum qualification for the post of Head Teacher will, so far as the lower primary school is concerned, result into drastic consequence of rendering teachers teaching in lower primary school and possessing prescribed minimum qualification ineligible for making application for post of Head: Teacher. The said provision, as the foregoing discussion demonstrates, is made without taking into account relevant aspects and facts, is unsustainable as being arbitrary and unreasonable. Since the said provision under Rule 4(b)(1) can be severed, by maintaining the said provision for upper primary school and since the said provision is, in view of the reasons discussed above, unsustainable, it is hereby set aside however with clarification that it would be open to the respondent State to prescribe appropriate minimum qualification for the post of Head Teacher in lower primary school, i.e. 1st standard to 5th standard by keeping in focus the clear distinction and division of primary school (in lower primary school and upper primary school) made by Central Act and Rules and the schedule under the Central Act and the State Amendment Act and NCTE Rules and also keeping in focus the minimum qualification for the feeder post prescribed by NCTE with reference to lower primary school.

11.27 The requirement of minimum qualification as prescribed by Rules of 2012 shall continue to apply and operate for the post in question in upper primary school i.e. 6th standard to 8th standard and the petitioner's challenge to that extent is not found acceptable.

11.28 Therefore, the respondent competent Authority shall accept and consider the applications of the petitioners teacher's who seek appointment on the post in question in Lower Primary School after complying the directions contained in this order. The applications by the petitioners -teachers for appointment on post in question in Upper Primary School shall be considered and decided in accordance with provision under Rule 4(b)(1).

11.29 The foregoing discussion applies to and covers the writ petitions being S.C.A. No. 2474 of 2012, S.C.A. No. 2615 of 2012, S.C.A. No. 2970 of 2012, S.C.A. No. 2662 of 2012, S.C.A. No. 2782 of 2012 and the said petitions are decided and stand disposed of in light of the discussion and decision in present order.

Validity of Rules of 2012

12. It is claimed that the Rules of 2012 are ultra vires Section 63 and Section 23(3) of the State Act. It is also claimed that the respondent State is not competent to frame the rules under Section 23(3) of the State Act. It is also claimed that for want of previous publication, and since the rules have not been laid before legislature as prescribed under Section 63, the rules are invalid. The said Sections 63 and 23 of the State Act read thus :-

Section 63: Power to make rules :-

(1) The State Government may, by notification in the official gazette, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing provision such rules may be made for all or any of the following matters :-

(3) Rule made under sub-Section

(1) and (2) shall be made after previous publication :-

[Provided that if the State Government is satisfied that circumstances exist which render it necessary to take immediate action, it may dispense with previous publication of any rules to be made under this Section.]

[(4) All rules made under this Act shall be laid for not less than thirty days before the State Legislature as soon as possible after they are made and shall be subject to such modification as the State Legislature may make during the session in which they are so laid or the session immediately following. The modifications so made shall be published in the official gazette and shall thereupon take effect.

Section 23. Staff Selection Committee :-

(i) There shall be a State level staff selection committee constituted by the State Government for all Districts Education Committee and authorized municipalities, consisting of such numbers of members as may be determined by the State Government.

(ii) The Director of Primary Education shall be the Chairmen and the Deputy Director of Primary Education shall be the Secretary of the Committee

(iii) The Committee shall select candidates for appointment on the posts of Assistant Education Inspector, Supervisor, Vidhyasahayak, Primary Teacher, Head Teacher and such other post as the State Government may, by notification in the official Gazette, specify. The selection of candidates shall be made in accordance with the instructions issued by the State Government

12.1 So far as the contentions raised in light of the provision under Section 63 are concerned, it is appropriate to note that the said Section confers Authority on or delegates power to the State Government to make rules for "carrying out purposes of this Act". The Section also postulates that the rules under sub-Section (1) and (2) of Section 63 shall be made after previous publication. The proviso to sub-Section (3) makes room for exemption from requirement of previous publication. Sub-Section (4) provides that the rules made under the Act shall be laid for not less than 30 days, before the State Legislature.

12.2 So far as present case is concerned, it is not in dispute that the Rules of 2012 have not been laid before the legislature as required under sub-: Section (4) and the State Government also did not make previous publication of rules. Therefore, it becomes necessary to ascertain as to whether noncompliance of the said procedure would render the rules invalid.

12.3 It is trite law that if the prescribed procedure is mandatory then the noncompliance of prescribed procedure would render rules invalid, however, if the prescribed procedure is directory then the rules would not be rendered invalid for want of compliance of the prescribed procedure.: Consequently it becomes necessary to determine as to whether the procedure for making rules which is prescribed under Section 63 of State Act is directory or mandatory.

12.4 So far as the "laying clause" is concerned the said provision is what Craies has described as "simple laying" or "laying without further procedure". In Craies on Statute Law (6th Edition, page 304) three kinds of the procedure of "laying" are described, viz.

(i) Laying which does not mandate further procedure;

(ii) Laying coupled with negative procedure;

(iii) Laying coupled with affirmative procedure.

12.5 Whether the direction to lay the rules before legislature is mandatory or merely directory and whether laying is precondition to their operation, can be determined from the circumstances or the language employed by the statute. Depending on the object and language of the Act, usually the below mentioned broad canons help to determine the issue.

(a) If any consequence for default in laying the rules before legislature are not prescribed then, ordinarily, the prescribed procedure would be considered directory and not mandatory and the default in laying the rules before legislature would not render the rules invalid and inoperative.

(b) If the provision does not prescribe that the rules will become effective only after and from the date on which Rules are laid before the legislature i.e. if the procedure is not made condition precedent, then its non-compliance would not render the rules invalid or inoperative.

(c) If the procedure does not require permission or approval of the legislature then also the procedure will be considered directory and noncompliance would not render the Rules ineffective.

(d) When the statute requires rules to be laid before legislature without any condition attached, such provision is, unless the language in that particular statute so demand, would be directory and not mandatory.

12.6 In this light when the said Section 63 is examined it emerges that the said provision does not provide for any consequence for not laying the Rules before legislature. The Section also does not provide that the rules will not take effect until they had sanction of the legislature and the Section does not make the operation of rule subject to affirmation or approval by the legislature. If the legislature had so intended then it would have expressly said so. The said provision also does not prescribe that the rules will acquire validity only from the date on which the rules are placed before the House of Legislature. The said characteristics of the provision lead to the conclusion that the procedure is directory.

12.7 In present case there is one more indication to support and justify the conclusion that the provision is not mandatory, inasmuch as it also does not provide for any penalty and it also does not provide that unless the rules are so laid before legislature, it will not come in operation.

12.8 It would be apposite to take into consideration, at this stage, observations by the Apex Court which provide necessary light and guidance to determine as to whether the provision in question is directory or mandatory.

12.9 In case of Jan Mohammad Noor Mohamad Bagban v. The State of Gujarat ( : AIR 1966 SC 385) the Apex Court while considering the validity of rules framed under Section 26 of Gujarat Agricultural Produce Market Act 1964 which, inter alia, prescribed the requirement of laying the rules before the legislature, observed that:-

18................It was provided by Subs. (5) that the rules made under S. 26 shall be laid before each of the Houses of the Provincial Legislature at the session thereof next following and shall be liable to be modified or rescinded by a resolution in which both Houses concur and such rules shall, after notification in the Official Gazette, be deemed to have been modified or rescinded accordingly. It was urged by the petitioner that the rules framed under the Bombay Act 22 of 1939 were not placed before the Legislative Assembly or the Legislative Council at the first session and therefore they had no legal validity......................The rules are valid from the date on which they are made under S.26(1). It is true that the Legislature has prescribed that the rules shall be placed before the Houses of Legislature, but failure to place the rules before the Houses of Legislature does not affect the validity of the rules, merely because they have not been placed before the Houses of Legislature. Granting that the provisions of Subs. (5) of S. 26 by reason of the failure to place the rules before the Houses of Legislature were violated we are of the view that Subs. (5) of S. 26 having regard to the purposes for which it is made, and in the context in which it occurs, cannot be regarded as mandatory. The rules have been in operation since the year 1941 and by virtue of S. 64 of the Gujarat Act 20 of 1964 they continue to remain in operation

In the case between M/s. Atlas Cycle Industries Ltd and others v. The State of Haryana ( : 1979 (2) SCC 196) the Hon'ble Apex Court has observed that :-

22............ In the instant case, it would be noticed that sub-Section(6) of Section 3 of the Act merely provides that every order made under Section 3 by the Central Government or by any officer or Authority of the Central Government shall be laid before both Houses of Parliament, as soon as may be, after it is made. It does not provide that it shall be subject to the negative or the affirmative resolution by either House of Parliament. It also does not provide that it shall be open to the Parliament to approve or disapprove the order made under Section 3 of the Act. It does not even say that it shall be subject to any modification which either House of Parliament may in its wisdom think it necessary to provide. It does not even specify the period for which the order is to be laid before both Houses of Parliament nor does it provide any penalty for nonobservance of or noncompliance with the direction as to the laying of the order before both Houses of Parliament. It would also be noticed that the requirement as to the laying of the order before both Houses of Parliament is not a condition precedent but subsequent to the making of the order. In other words, there is no prohibition to the making of the orders without the approval of both Houses of Parliament. In these circumstances, we are clearly of the view that the requirement as to laying contained in sub-Section (6) of Section 3 of the Act falls within the first category i.e. "simple laying" and is directory not mandatory. We are fortified in this view by a catena of decisions, both English and Indian.................. it was held overruling the contention that the Rules became effective from the time they were made and it could not be the intention of the Legislature that the laying of the rules before Parliament should be made a condition precedent to their acquiring validity and that they should not take effect until they are laid before and approved by Parliament. If the Legislature had intended the same thing as in Section 4, that the rules should not take effect until they had the sanction of the Parliament, it would have expressly said so by employing negative language.

12.10 When the provision under Section 63 of the State Act are taken into account in light of the position of law explained and clarified by the Apex Court it becomes clear that the procedure prescribed by the said provision i.e. the "laying clause" is directory and not mandatory. Therefore, the default in laying the rules before legislature will not render the rules invalid and inoperative. Hence, the objection raised in light of "laying clause" can not be sustained.

12.11 Now, therefore, the contention raised against validity of the rules of 2012 is required to be examined with reference to the objection that the procedure of previous publication as prescribed under sub-Section (3) of Section 63 is not complied.

12.12 Before considering the explanation and defence of the respondent it would be appropriate to determine as to whether the prescribed procedure viz. previous publication of Rules, is directory or mandatory, and for that purpose it is necessary to take into account proviso of said sub-Section (3) of Section 63.

12.13 So far as the procedure prescribed under sub-Section (3) of Section 63 i.e. previous publication is concerned, the said provision, like sub-Section (4) of Section 63, docs not prescribe any consequence for default in complying the procedure prescribed under sub-Section (3) of Section 63. Furthermore, the sub-Section does not prescribe mode for or manner of publication. Additionally said sub-Section (3) is also coupled with its proviso. The proviso prescribes that if the state Government is satisfied that circumstances exist which require immediate action, then the requirement of previous publication may be dispensed with.

12.14 The said proviso is an indication about the intention of the legislature. From the fact that the sub-Section (3) does not employ any negative language and/or it does not provide for any consequence for not making previous publication of the rules and it also does not prescribe the manner or mode for previous publication and the fact that the sub-Section (3) also contains the above mentioned proviso, it would follow that the legislature did not intend to make the requirement of previous publication a mandatory procedure, otherwise the procedure prescribed by sub-Section (3) would not be coupled with such proviso (which permits the Government to dispense with the procedure) and appropriate consequences for noncompliance would have been prescribed. The conjoint effect of the aforesaid aspects lead to the conclusion that the procedure prescribed under sub-Section (3) is directory and not mandatory. Hence, its noncompliance would not render the Rules of 2012, invalid.

12.15 It is necessary to mention and clarify at this stage that the conclusion as regards the above discussed aspects may not have bearing at this stage in view of the respondents' defence and explanation to the effect that the Rules are not made under Section 63 but are made in exercise of power under Section 23(3) of the State Act and in view of such defence it is not necessary to make any other observation or pass any directions with reference to the said Rules and compliance of procedure.

12.16 So far as said defence (in light of provision under Section 23(3) of the State Act) of the respondent is concerned, a glance at the said Section would make it clear that the said provision authorizes the State Government to "issue instructions" to the Selection Committee. However the respondents would maintain and insist the said Rules of 2012 are made in exercise of powers under Section 23(3) and that in exercise of the Authority to "issue instructions to the selection committee" the State Government can make "Rules" also. The question, therefore, is as to whether the Authority to "issue instruction to the Selection Committee" would include power to make rules prescribing diverse facts of selection and recruitment including eligibility criteria, as well or not.

12.17 Under Section 23(3) the selection committee constituted under sub-Section (1) and sub-Section (2) of Section 23 is authorized to select candidates for "appointment" on the posts specified under sub-Section (3) however the committee does not have Authority to decide, on its own, the criteria or the norms for the purpose of selection. It is only the State Government who is authorized to "issue instructions" for the purpose of selection. Thus, the State Government is authorized to issue only "instructions" to the selection committee who, in turn, shall select the candidates in accordance with the instructions.

12.18 Thus by Government's own admission that the said Rules of 2012 are framed in exercise of power under sub-Section (3) of Section 23, the said Rules will have to be treated as, and they will acquire status of "instructions" issued under Section 23(3) of the Act, (not statutory Rules), and although the nomenclature "Rules" is used, the said Rules of 2012 would, by Government's own admission, not enjoy the status of statutory rules framed under Section 63.

12.19 The respondents claim that the rules are made in exercise of power under Section 23(3) (which permits the respondent Government to issue instructions but does not confer power to make "rules". The term "Rules" has special connotation, more so when the Act delegates the power to make "Rules" on the Government or some other Authority constituted under the Act. In General Clauses Act, 1897, the term Rule is defined thus :-

"rule" shall mean a rule made in exercise of a power conferred by any enactment, and shall include a Regulation made as a rule under any enactment;

12.20 Hence, mere nomenclature would not confer any other status or character to such "instructions" i.e. other than mere "instructions", much less status of statutory rules.

12.21 The said Section 23(3) speaks about selection of candidates for appointment. The term "selection" would, in view of the scheme of the State Act and even ordinarily, include all aspects of selection culminating into recruiting suitable candidates for any or more posts specified in sub-Section (3) of Section 23. Obviously there should be well defined criteria and norms for undertaking the process of "selection" and it is only the State Government who is authorized to "issue instructions", about the criteria and norms in light of which the selection of candidates can be made.

12.22 In this backdrop, if the said rules of 2012 are examined it comes out that the said rules also prescribe minimum qualification for the post of: Head Teacher. As discussed earlier the power to prescribe qualification for teachers teaching in primary school is conferred on NCTE and if NCTE has prescribed minimum qualification for any post then any other Authority including State cannot prescribe any other or different qualification. However, if NCTE has not prescribed qualification for any post then until NCTE prescribes : qualification for such post, the State Government may, if it becomes necessary, prescribe qualification for such post to fill the void.

12.23 At the same time in view of the provision under sub-Section (3) of Section 63 the right of issuing "instructions" as to the criteria or norms for selection process cannot be denied to the respondent State. Issuance of instructions by the State Government is necessary for the selection committee to conduct the selection process. The State Government may "issue" such "instructions" by Notification or Resolution or other mode and in such Notification or Resolution etc. Government may use different nomenclature e.g. "instruction" or "directives" or "guidelines" etc. The selection committee shall be obliged to select the candidates for appointment in accordance with such instructions i.e. in light of the criteria and norms prescribed by the respondent State.

12.24. Now, so far as the criteria and norms, which the committee may require for selecting candidates are concerned, in view of the provisions under the Central Act, Central Rules, NCTE Rules and RTE Rules, it is only "academic Authority" who is authorized to prescribe minimum qualification for the post of teacher and Head Teacher. Therefore, as mentioned above if the academic Authority prescribes or has prescribed minimum qualification for the post in question then the respondent's "instructions" cannot include any other or different criterion related to minimum qualification for such post.

In present case it is noticed that the academic Authority has prescribed minimum qualification for the post of teacher in lower primary school (SSC/HSC with PTC etc.) and for upper primary school (Graduation with B.Ed etc.) however minimum qualification for the post of Head Teacher is not prescribed by the academic Authority, instead the respondent Government has prescribed minimum qualification for the post of Head Teacher. The respondent Government made the said provision probably because the posts in question which have created since June 2011 have to be filled - up.

12.25 So long as the academic Authority does not prescribe minimum qualification for the post of Head Teacher there cannot be a void. It is trite to say that law abhors void.

12.26 At this stage it is apposite to turn to a reference quoted by the Apex Court. The Apex Court has quoted below mentioned passage from "Some Reflection on the Reading of Statute", wherein the concept, object, scope of delegated legislation is lucidly described and explained.

Legislation has an aim, it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of Government. That aim, that policy is not drawn, like nitrogen, out of the air, it is evidenced in the language of the statute, as read in the light of other external manifestations of purpose." (Quoted by the Apex Court in the decision in the case of United; Bank of India, Calcutta v. Abhijit Tea Company Private Limited ( : 2000 (7) SCC 357)

12.27 Under the circumstances if the State Government prescribes minimum qualification, so as to meet with the exigency until the academic Authority prescribes the requisite qualification, then such action should not be rendered invalid otherwise (i.e. if the qualification prescribed by State Government is considered invalid) then, there would be void.

13. For the foregoing reasons the said Rules of 2012 cannot be declared ultra vires Section (63) or Section 23(3)of the State Act and cannot be declared invalid on the ground that the procedure prescribed under Section 63 of the State Act is not followed or on the ground that the State Government is not competent to make "Rules" in exercise of power under Section 23 (3) of the State Act. Thus, the objection against the rules and its validity cannot be accepted. The said objection is, therefore, rejected. However, it is clarified that the said Rules of 2012, by respondents' own admission, do not enjoy the status of statutory rules and they are to be treated and construed as "instructions" issued under Section 23 (3) of the State Act by the State Government to the selection committee for the purpose of selection process.

14. The relief prayed for by the petitioners in the captioned petitions have been categorized and considered under the above mentioned five broad categories/captions, and they stand decided as per the conclusion and decision recorded in respect of each of the said five categories. Accordingly objections against (i) the resolution dated 29.2.2012 i.e. against the directions that the details of salary account alone will be accepted as evidence about candidates' experience; and the objections against (ii) the minimum qualification prescribed for the post of Head Teacher to the extent mentioned below the relevant captioned (i.e. so far as it touches and/or affects the teachers teaching in 1st standard to 5th standard) are accepted and allowed whereas all other objections e.g. objections against the provision under Rule 4(d) which excludes the teaching experience in B.Ed college and/or against the provision regarding upper age limit and/or against the provision prescribing Bachelor degree as minimum qualification for post of Head Teacher in upper primary school (i.e. 6th standard to 8th standard) and/or the objection or challenge against validity of rules are not accepted.

15. The captioned petitions are accordingly disposed of with the foregoing observations, clarifications and directions. It is however clarified that so far as the petitioners in SCA Nos. 2474 of 2012, S.C.A. No. 2615 of 2012, S.C.A. No. 2662 of 2012, S.C.A. No. 2782 of 2012 and S.C.A. No. 2618 of 2012 i.e. the teachers who are already working as Head Teachers (upon being assigned the duty to work as Head Teacher) are concerned, the grievance and: apprehension of the said teachers -petitioners viz. that the said duty will be taken away and discontinued upon the appointment of the Head Teachers recruited pursuant to this process are not addressed at this stage since such grievance and apprehension at this stage are premature. It is further clarified that if and when such action is taken or any steps in that direction are taken, then it would be open to such teachers-petitioners to take out appropriate proceedings against such action, on all grounds and contentions as may be available in law.

The captioned petitions accordingly stand disposed of.