

2022 SCC OnLine SC 954

In the Supreme Court of India

(BEFORE M.R. SHAH AND B.V. NAGARATHNA, JJ.)

Civil Appeal No. 4038 of 2022

Satyajit Kumar and Others ... Appellant(s);

Versus

State of Jharkhand and Others ... Respondent(s).

With

Civil Appeal No. 4039 of 2022

Civil Appeal No. 4040 of 2022

Civil Appeal No. 4041 of 2022

Civil Appeal No. 4042 of 2022

Civil Appeal No. 4043 of 2022

Civil Appeal No. 4044 of 2022

Civil Appeal No. 4045 of 2022

Civil Appeal No. 4046 of 2022

Civil Appeal No. 4047 of 2022

Civil Appeal No. 4048 of 2022

Civil Appeal No. 4049 of 2022

Civil Appeal No. 4050 of 2022

Civil Appeal No. 4079 of 2022

Civil Appeal No. 4038 of 2022, Civil Appeal No. 4040 of 2022, Civil Appeal No. 4041 of 2022, Civil Appeal No. 4042 of 2022, Civil Appeal No. 4043 of 2022, Civil Appeal No. 4044 of 2022, Civil Appeal No. 4045 of 2022, Civil Appeal No. 4046 of 2022, Civil Appeal No. 4047 of 2022, Civil Appeal No. 4048 of 2022, Civil Appeal No. 4049 of 2022, Civil Appeal No. 4050 of 2022 and Civil Appeal No. 4079 of 2022

Decided on August 2, 2022

The Judgment of the Court was delivered by

M.R. SHAH, J.:— Feeling aggrieved and dissatisfied with the impugned common judgment and order dated 21.09.2020 passed in Writ Petition No. 1387 of 2017 and other allied writ petitions and connected applications, by which, the High Court has allowed said writ petitions and has observed, held and declared that the Notification No. 5938 and the Order No. 5939 dated 14.07.2016 issued by the State of Jharkhand and Advertisement No. 21 of 2016 dated 28.12.2016 modified by the Advertisement No. 21 of 2016 published on 04.12.2017, by the State Government through Department of Personnel, Administrative Reforms and Rajbhasha inviting application for appointment to the posts of Trained Graduate Teacher in the Government Secondary Schools to the extent of making 100% reservation for the local candidates/residents of Thirteen Scheduled Areas in the State of Jharkhand as illegal, ultra vires and unconstitutional and consequently has quashed the appointments of the Trained Graduate Teachers made pursuant to the aforesaid advertisement, in the Scheduled Districts relating to the local residents of those Districts, the original respondents - candidates belonging to the Thirteen Scheduled Districts have preferred present appeals.

2. Civil Appeal No. 4043 of 2022 has been preferred by the petitioners who were

not party before the High Court challenging the action of the State Government in not appointing them. It is the case on behalf of the petitioners that the State Government has misinterpreted the judgment and order passed by the High Court passed in Writ Petition No. 1387 of 2017. It is their case that the dispute before the High Court was with regard to the appointment of the Trained Graduate Teachers and advertisement Notification No. 21 of 2016. However, so far as petitioners are concerned, according to them, they are eligible applicants of the advertisement nos. 1 of 2017 and 2 of 2017 for the post of Lower Divisional Clerks (Collectorate cadre) - District Level Post Panchayat Secretary-District Level Posts and Lower Divisional Clerks-State Level Post, State Stenographer - State Level Post and in no manner concerned with the issue agitated before the High Court. It is the case on behalf of the petitioners that they are awaiting the final results with respect to the aforesaid posts and have also undergone document verification procedure carried out by the Jharkhand Staff Selection Committee in the year 2019.

3. Civil Appeal No. 4048 of 2022 has been preferred by the State of Jharkhand challenging the order passed by the High Court dated 4.3.2022 passed in Contempt Case No. 109 of 2021. It is to be noted that Civil Appeal No. 4048 of 2022 is with respect to the candidates belonging to the Non-Scheduled Districts who earlier filed writ petitions before the High Court and the High Court directed to issue appointments orders to the candidates belonging to the Non-Scheduled Districts. It is required to be noted that by the interim order passed by the High Court further contempt proceedings before the High Court have been stayed.

4. Civil Appeal No. 4050 of 2022 has been preferred by the candidates belonging to the Scheduled Districts and who applied as a Trained Teacher pursuant to the aforesaid advertisement and who are not appointed after interim order passed by the High Court dated 18.09.2019.

5. Facts leading to the present appeals in a nutshell are as under:

6. Pursuant to the Presidential Notification dated 11.04.2007 13 Districts in the State of Jharkhand had been declared as **Scheduled Areas**. That the said Notification had been issued in exercise of powers conferred by the sub-paragraph (2) of paragraph 6 of the Fifth Schedule to the Constitution of India. Pursuant to the said Notification, following Districts in the State of Jharkhand had been declared as Scheduled Areas/Districts.

1. Ranchi District.
2. Lohardagga District.
3. Gumla District.
4. Simdega District.
5. Latehar District.
6. East-Singhbhum District.
7. West-Singhbhum District.
8. Saraikela-Kharsawan District.
9. Sahebganj District.
10. Dumka District.
11. Pakur District.
12. Jamtara District.
13. Palamu District-Rabda and Bakoriya Panchayats of Satbarwa Block.
14. Godda District-Sunderpahari and Boarjor Blocks. (hereinafter referred to as the "Scheduled Areas").

7. That the State Government issued "Jharkhand Government (Recruitment of Teachers and Non-Teaching Staff in Secondary Schools & their Service and Condition) Rules, 2015 by means of which the conditions/qualifications for appointment of

teachers had been prescribed, vide Notification dated 1.3.2016.

8. That pursuant to the order passed by the High Court in Writ Petition (PIL) No. 4806 of 2016, vide Circular dated 18.04.2016 the State Government prescribed definition of "Local Resident of Jharkhand". As per the said Circular, the Local Resident of Jharkhand would be deemed such Indian Citizens who would fulfill any one condition out of the following

- "(i).he would have been residing within the geographical limits of the State of Jharkhand and either his own name or name of his forefather would have been lying recorded in Survey Khata. In the cases of landless, he would be identified by the concerning Gram Sabha which would be based on language, culture & traditions prevailing in the State of Jharkhand.*
- (ii) would have been residing within the geographical limits of the State of Jharkhand for the past 30 years or more due to any trade, employment and other reasons and would have earned immovable property or such person has wife/husband/child and affirm commitment to stay in Jharkhand State.*
- (iii) would have been appointed & working officer/employee under the Government of State of Jharkhand/institutions being run/recognized by the State Government, Corporation etc. Or has wife/husband/child and affirm commitment to stay in Jharkhand state.*
- (iv) Officer/employee of the Government of India, working in the State of Jharkhand or have 188 wife/husband/child and affirm commitment to stay in Jharkhand state.*
- (v) Person appointed at any constitutional or statutory posts in the State of Jharkhand or have wife/husband/child and affirm commitment to stay in Jharkhand state.*
- (vi) Such person who would have born in the State of Jharkhand and completed his whole education upto Matriculation or its equivalent level from the recognized institutions established in the state of Jharkhand & affirm commitment to stay in Jharkhand state."*

9. That thereafter, the State Government came out with Notification No. 5938 and Order No. 5939 dated 14.7.2016 directing that in Thirteen Scheduled Districts of the State, the local residents of the concerned Districts (Thirteen Scheduled Districts) only shall be eligible to be appointed on the District Cadre Class III and Class IV posts, for a period of ten (10) years from the date of publication of the Notification. It appears that said order had been issued by the Governor of Jharkhand in exercise of powers conferred under sub-paragraph(1) of paragraph 5 of the Fifth Schedule of the Constitution of India. In the order dated 14.07.2016 it is observed as under:

"And whereas, the scheduled Area in the State are characterised by low Human Development Indices, backwardness, remoteness poverty and whereas the social indicators of the Scheduled Areas are on an average, inferior to the average of social indicators in the State due to uneven topography, lack of water resources, loss in canopy coverage of forest and uncontrolled rapid industrialization;

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

And Whereas, the Governor of Jharkhand in order to improve the quality of

people in the Scheduled Areas, by providing additional opportunities of employment, in favour of the local residents of Scheduled Areas.”

10. That thereafter, further order came to be published on 11.11.2016 specifically making it clear that in compliance of Notification No. 5938 dated 14.07.2016, local residents of concerned Districts only are deemed eligible for appointment in the vacant post of District-Level Class III and Class IV in 13 notified Districts out of 24 Districts of the State and appointment of people from other Districts/other States is not permissible in these Districts. Meaning thereby, it was made clear that the candidate belonging to the Non-Scheduled Districts cannot participate in the process of selection in the Scheduled Districts.

11. That pursuant to the advertisement no. 21 of 2016 published on 28.12.2016 as modified by advertisement dated 4.2.2017 which was issued in pursuance of the Notification No. 5938 dated 14.07.2016, applications were invited for filling up 17,784 Trained Graduate Teachers out of which 13,398 posts (75% posts of total advertised posts) were to be filled up by direct recruitment and remaining 25% posts i.e., 4386 posts were reserved for primary teachers. The said advertisement was issued through Jharkhand State Staff Selection Commission (hereinafter referred to as the “JSSC”). In the advertisement in para 5(iii), it was stated that so far as vacancies in the Scheduled Districts and State are concerned, only the local residents of those Scheduled Districts shall be entitled to apply. As per the para 5(i) of the advertisement, a candidate could apply against the vacancy in only one District of his/her choice. At this stage, it is required to be noted that in all 8423 posts were advertised for filling up the vacancies in the Thirteen Scheduled Districts in the State, whereas 9149 posts were advertised for the remaining non-scheduled districts in the State.

12. Several candidates applied for the posts and undergone the selection process. The results were published and process of appointments were initiated by the State Government. Candidates belonging to the Non-Scheduled Districts who were prevented making application for the vacancy in the Scheduled Districts, preferred writ petition before the High Court by way of present writ petition challenging the constitutional validity of the Notification and order issued by the State Government bearing Notification No. 5938 and Order No. 5939 dated 14.07.2016, by which, only the local residents of the concerned Scheduled Districts were made eligible for appointment on the District Cadre Class III and Class IV posts for a period of 10 years. The original writ petitioners-candidates belonging to the Non-Scheduled Candidates also challenged the subsequent Advertisement No. 21 of 2016, as modified by the Advertisement No. 21 of 2016, inviting applications for appointment to the posts of Trained Graduate Teacher in the Government Secondary Schools more particularly, para 5(iii) of the said advertisement by which, it was stated that the so far as vacancies in the Scheduled Districts of the State are concerned, only the **local residents** of those Scheduled Districts shall be eligible to apply.

13. By order dated 21.2.2019 the Division Bench of the High Court directed that the notices be published in the Daily Newspaper having wide circulation about institutions of writ petitions so that the person interested may intervene in the writ petitions. Pursuant to such notices, several interlocutory applications/intervener applications came to be filed, which came to be allowed by the High Court.

14. Taking into consideration the question of Constitutional importance involved in these matters, by order dated 18.09.2019 the Division Bench of the High Court referred the matter to be decided by the Larger Bench. By the same order dated 18.09.2019, the High Court stayed further implementation and operation of the impugned Notification No. 5938 and Order No. 5939 dated 14.7.2016, subject to the appointments already made, if any.

15. It was the case on behalf of the original writ petitioners - candidates belonging to the Non-Scheduled Districts that the aforesaid Notification issued in exercise of powers conferred in para 5(i) of the Fifth Schedule of the Constitution of India is violative of Articles 14 & 16 of the Constitution of India. Article 13(2) of the Constitution of India was also pressed into service. Heavy reliance was placed on Article 16(2) of the Constitution of India. It was submitted on behalf of the original writ petitioners that in the garb of the nonobstante clause in para 5(i) of the Fifth Scheduled of the Constitution, the Governor cannot infringe and/or affect fundamental rights guaranteed under Part III of the Constitution and that there cannot be any 100% reservation, so as to make only residents of a particular area to be eligible for appointment to a public post. Heavy reliance was placed on the decisions of this Court in the case of *Kailash Chand Sharma v. State of Rajasthan* reported in (2002) 6 SCC 562; *A.V.S Narsimha Rao v. State of Andhra Pradesh* reported in (1969) 1 SCC 839; *Dr. Pradeep Jain v. Union of India* reported in (1984) 3 SCC 654; *Rajesh Kumar Gupta v. State of UP* reported in (2005) 5 SCC 172; *State of Orissa v. Sudhir Kumar Bishwal* reported in 1994 Supp (3) SCC 245 and *Indra Sawhney v. Union of India* reported in 1992 Supp (3) SCC 217, in support of their submissions that there cannot be 100% reservation for the local residents and such 100% reservation for the local residents and/or reservations on the basis of residence shall be hit by Article 16(3) of the Constitution of India. On the constitutional validity of the Notification making 100% reservation for the local residents in exercise of powers under para 5 of the Fifth Schedule of the Constitution of India, heavy reliance was placed on recent Constitutional Bench decision of this Court in the case of *Chebrolu Leela Prasad Rao v. State of A.P.* reported in (2021) 11 SCC 401.

16. On the other hand, it was the case on behalf of the State as well as successful candidates belonging to the Scheduled Districts that the Notification making 100% reservation for local residents of the Scheduled Areas was/is absolutely within the scope, ambit and powers of the Governor in exercise of para 5 of the Fifth Schedule to the Constitution of India.

17. It was submitted that for the upliftment of local residents belonging to the Scheduled Areas/Districts such a reservation is permissible. It was submitted that the object and purpose of declaring Scheduled Districts/Areas under Fifth Schedule is to uplift and for the betterment of local residents of the Scheduled Areas. It was also contended on behalf of the State and successful candidates belonging to the Scheduled Areas/Districts that special powers under the Fifth Schedule are not subject to restriction under Article 16 of the Constitution of India. Heavy reliance was placed on the non-obstante clause. It was submitted that para 5(i) of the Fifth Schedule of the Constitution of India begins with the words "notwithstanding contained anything in this Constitution". It was further submitted that even the Governor may by public notification direct that any particular Act of Parliament shall not apply to a Scheduled Area; powers conferred on the Governor with respect to Scheduled Areas are special powers and therefore, such powers are not subject to any of the restrictions contained in Article 16 and/or any other provisions of the Constitution of India.

18. By the impugned common judgment and order and following the decision of the Constitutional Bench of this Court in the case of *Chebrolu Leela Prasad Rao* (supra), the High Court has declared the aforesaid Notification and the aforesaid Advertisement unconstitutional and/or ultra vires, to the extent making 100% reservation for the local residents of the Scheduled Areas. By the impugned judgment and order, the High Court has also held that the Notification and the Order are violative of Article 16 (3) and 35(a) of the Constitution of India, as such powers are vested only in the Parliament and not with the State Legislature. By the impugned common judgment and order, the High Court has also quashed para 5(iii) of the Advertisement No. 21 of 2016 published on 28.12.2016 as modified by the advertisement dated 4.2.2017 to

the extent it provided that as against the vacant posts of Trained Graduate Teacher in the Scheduled Districts, only the local residents of those Scheduled District can apply. In the result, the High Court has quashed all the appointments of the Trained Graduate Teachers made pursuant to the aforesaid advertisement, in the Scheduled Districts relating to the local residents of those Districts only. That the High Court has further directed that all the 8423 posts of Trained Graduate Teacher in the Government Secondary Schools in the Scheduled Districts of the State of Jharkhand, be advertised afresh and fresh selection process be undertaken in accordance with law. The High Court also further clarified that all those candidates who were eligible to apply in response to the Advertisement No. 21 of 2016, shall be entitled to apply in the fresh selection process, irrespective of any barrier, if any, as to their age.

19. The High Court has also made it abundantly clear that by the ad-interim order dated 18.09.2019, selection process was never stayed by the Court in the Non-Scheduled Districts and there was no stay for appointments on any post in the Non-Scheduled Districts. According to the High Court by impugned common judgment and order has allowed all the writ petitions accordingly.

20. Feeling aggrieved and dissatisfied with the impugned common judgment and order passed by the High Court of Jharkhand declaring Notification No. 5938 and Order No. 5939 dated 14.07.2016 as unconstitutional and ultra vires to Articles 14, 16(2), 16(3) and 35(a-i) of the Constitution of India and consequently quashing para 5(iii) of the Advertisement No. 21 of 2016 published on 28.12.2016 as modified by the Advertisement dated 4.2.2017 to the extent of providing 100% reservation for the local residents of the Thirteen Scheduled Districts only, selected candidates belonging to the Scheduled Areas - local residents of Scheduled Areas/Districts have preferred the present Appeals.

21. Dr. Rajeev Dhavan, Shri Vikas Singh, Shri R. Venkataramani, Ms. Vibha Datta Makhija, learned Senior Advocates have appeared on behalf of the successful candidates belonging to the Scheduled Areas. We have heard Shri Kapil Sibal and Shri Sunil Kumar learned Senior Advocates appearing on behalf of the State of Jharkhand. We have heard Shri Ranjit Kumar and Shri Gopal Sankaranarayanan, learned Senior Advocates appearing on behalf of the contesting respondents - original petitioners - candidates belonging to the Non-Scheduled Areas/Districts. We have also heard Shri Ajit Kumar Sinha, Shri Colin Gonsalves and Shri Pallav Shishodia, learned Senior Advocates appearing on behalf of the other respective parties/interveners.

22. Shri R. Venkataramani, learned Senior Advocate appearing on behalf of some of the successful candidates belonging to the Scheduled Districts/Areas has vehemently submitted that while passing the impugned common judgment and order the High Court has not properly appreciated and considered the object and purpose of declaration of the Scheduled Areas in exercise of powers conferred under Fifth Schedule and the object and purpose conferring special powers to the Governor under para 5 of the Fifth Schedule to the Constitution of India.

23. It is further submitted that the High Court has also not properly appreciated and considered the reasons for which the Notification and the order dated 14.07.2016 was issued by the Governor of State.

24. It is further submitted that the Notification and the order dated 14.07.2016 shows that the Scheduled Districts in the State of Jharkhand are characterized by low human development indices, backwardness, remoteness, poverty and they are on an average inferior to the social indicators in the State due to uneven topography, lack of water resources, loss in canopy average of forest and uncontrolled rapid industrialization. That due to the aforesaid grounds and the reasons, the Notification had to be issued by the Governor for protecting the interest of the residents of the Scheduled Districts.

25. Taking us to the Article 29, 38 and 46 of the Constitution of India and reliance being placed on Article 244 of the Constitution of India which deals with the administration of Scheduled Areas and Tribal Areas to which Fifth Schedule of the Constitution applies, it is vehemently submitted that the said administration has to take special care of the interests of minorities and the people belonging to the Scheduled Castes, Scheduled Tribes and the weaker sections of the society, and to protect them from social injustice and all forms of exploitation. It is submitted that therefore, Notification/order dated 14.07.2016 issued by the Governor in exercise of powers conferred under para 5(i) of the Fifth Schedule of the Constitution of India which was issued to protect the interest of local residents of the Scheduled Areas and for their upliftment, ought not to have been held to be ultra vires and/or unconstitutional by the High Court. It is submitted that the impugned judgment and order passed by the High Court has the effect of taking away special rights conferred on the Governor, conferred under para 5 of the of the Fifth Schedule of the Constitution of India.

26. It is further submitted that Article 16(2) of the Constitution of India prohibits discrimination on the grounds "only" of religion, race, caste, sex, descent, place of birth, residence and these expressions are preceded by the word "only" and followed by the expression "or any of them" which play a very important role. It is submitted by Shri R. Venkataramani, learned Senior Advocate appearing on behalf of petitioners that successful candidates belonged to the Scheduled Area, though it was the contention on behalf of the original petitioners that discrimination is prohibited on the ground mentioned in Article 16(2) and 16(3) and if any protective action is required to be taken under Articles 29, 38 and 46 of the Constitution of India the same is taken on any or more of those grounds, in combination with other factors and Article 16(2) of the Constitution of India shall not be attracted, even if it results in some discrimination to the other set of citizens.

27. Shri R. Venkataramani, learned Senior Advocate appearing on behalf of petitioners has further submitted that Governor of the State is fully competent under para 5(i) of the Fifth Schedule of the Constitution of India to issue notification making reservation in favour of the residents of the Scheduled Districts in order to secure justice, social, economic and political to the residents suffering variously in the backdrop of the conditions mentioned in the Notification. It is urged that under Article 15(4) of the Constitution of India, the State is empowered to make special provisions for the advancement of any socially and educationally backward classes of citizens or for Scheduled Castes and Scheduled Tribes, as such there is no violation of Articles 14 & 16 of the Constitution of India. It is further submitted by Shri R. Venkataramani, learned Senior Advocate that the Scheduled Area cannot be equated with the non-scheduled areas. It is submitted that taking into consideration various factors, it was found necessary to protect the interests of the residents of the Scheduled Districts.

28. It is submitted that it would be of immense benefit to the school going children in the Scheduled Districts, if they are taught in their own tribal language by the local teachers, rather than by outsiders, who may not be well conversant with the local language. It is urged that orders under challenge before the High Court as such did not suffer from any denial of equality of opportunity and/or discriminatory. Further the order under challenge before the High Court only distributes equality of opportunity in terms of felt needs of the Scheduled Areas of the State. Hence, there can be no objection to reasonable provisions being made as regards Scheduled Areas. It is submitted that the Constitution permits discrimination, albeit on reasonable grounds.

29. It is further submitted that the scope of Article 16(3) is confined to inter State borders and that it has no application to areas within a State. In this context, reliance is placed on the decision of this Court in the case of *AVS Narasimha Rao v. The State of A.P.* reported in (1969) 1 SCC 839 : (1970) 1 SCR 115.

30. It is submitted that the Governor has the power under para 1 of the Fifth Schedule to enact any measure in the interests of the Scheduled Areas. No dichotomy between the powers under paras 1 and 2 of the Fifth Schedule can be suggested. That they are only different facets of the plenary powers of the Governor. It is submitted that the powers conferred on the Governor under para 5(1) and (2) of the Fifth Schedule are plenary and exclusive powers. It is submitted that therefore the Governor can also stay the law made by the Parliament and hence the said powers are not subject to restrictions under Article 16 of the Constitution of India.

31. Shri R. Venkataramani, learned Senior Advocate appearing on behalf of petitioners has further submitted that as such the decision of this Court in the case of *Chebrolu Leela Prasad Rao* (supra) is not applicable at all to the facts of the case on hand. That in the case of *Chebrolu Leela Prasad Rao* (supra) there was 100% preference/reservation in favour of only of Scheduled Tribes of the respective local areas of Andhra Pradesh, where schools are located. It is submitted that in the instant case there is no such reservation only in favour of the Scheduled Tribes of the Scheduled Areas. He has pointed out the following distinguishing features in support of his submissions that the decision of this Court in the case of *Chebrolu Leela Prasad Rao* (supra) shall not be made applicable to the present cases.

- I. All candidates whether in Scheduled or non-Scheduled Areas can apply only in the District.
- II. Only Class III and IV posts at the District Level included. In the context of fitness of transfers of employees, generally this Court has observed that Class III and Class IV posts stand on a separate footing.
- III. All candidates within the districts, whether SC/ST/BC or OBC, General can apply.
- IV. The provisions were experimental i.e., to last only for 10 years. (legislative experiments in Socioeconomic matters will receive judicial deference).

32. Relying upon the decisions of this Court in the case of *Ram Kripal Bhagat v. State of Bihar* reported in (1969) 3 SCC 471 : (1970) 3 SCR 233 and in the case of *Puranlal Lakhanpal v. President of India* reported in AIR 1961 SC 1519, it is prayed that there is need for reconsideration of the decision in the case of *Chebrolu Leela Prasad Rao* (supra).

33. It is further submitted that in the present case, the Notification issued by the Governor, impugned before the High Court are not hit by Articles 14 and 16 of the Constitution of India and as such do not fall within the scope of the judgment of this Court in the case of *Chebrolu Leela Prasad Rao* (supra). It is submitted that the notifications can be traced both to Article 16(3) and the Fifth Schedule of the Constitution. It is further submitted that under the Fifth Schedule the Governor is placed at par with the parliament and the State legislature, and the power exercisable thereunder is plenary legislative power, and not subordinate to any other legislative power. The power of the Governor not to apply a parliamentary law to a Scheduled Area would place her/him at par with the power of the Parliament available under Article 16(3) of the Constitution.

34. It is further submitted that that the Governor can do what the Parliament can do under Article 16(3) of the Constitution, and thus enact in respect of requirement of residence, as a measure of taking care of the interests of schools in scheduled areas. It is further submitted that since Article 16(3) is an exception to Article 16(1) any reasonable provision as regards residence requirement will be saved. It does not matter that the law is made either by Parliament or the Governor. The power of the Governor not to apply a parliamentary law includes the power to do what the parliament can otherwise do.

35. It is further submitted that it is open to treat the notifications not as the

amending instruments of the Rules made by the State of Jharkhand under Article 309 relating to appointment of teaching staff. It is submitted that in the case of *Chebrolu Leela Prasad Rao* (supra) answering question 2(b) raised therein it was opined that since Rules made under Article 309 are not Parliamentary or State law they cannot be amended under para 5 of the Fifth Schedule.

36. It is further submitted that Fifth Schedule is a Constitution within the constitution, (See *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225) which suggests that the paramount interest of the scheduled areas and their development in ways that would suit the areas (for instance lands, forests, mineral wealth, etc. and the need to ensure against exploitation) will always inform the Governor in the exercise of powers under the Fifth Schedule.

37. It is further submitted that the rules relating to appointment themselves provide that no candidate can apply to posts in more than one district, and that the cadres are district level and not State level cadres. The Notification only extends the same restriction of one district application to Scheduled Areas, keeping in view the interests of all Scheduled Areas. There is no inter se discrimination amongst eligible candidates residing within the Scheduled Areas. All principles of reservation to other categories of candidates are also applicable.

38. It is submitted that this court has saved domicile as a reasonable principle as regards access to education and public employment. The safeguards enacted in Article 371 D, for example, are one proximate illustration.

39. It is submitted that the impugned Notifications are not discriminatory. They do not look only at the place of residence as the factor, relevant for appointment to schools in Scheduled Areas. They treat residence as one among other factors, namely the best way of promoting the interests of schools in Scheduled Areas as a prominent or dominant aspect. In the balancing of the interests of schools in Scheduled Areas and the right of all in all districts to be considered for appointment as teachers, if the factor of residence within the scheduled district will tip in favour of the schools' interest, then the emphasis in Article 16(2) on non-discrimination "'only' on grounds of residence will yield to Article 16(3).

40. It is submitted that Article 16(2) of the Constitution of India prohibits discrimination on the grounds "only" of religion, race, caste, sex, descent, place of birth, residence, and these expressions are preceded by the word "only" and followed by the expression "or any of them", which are significant. In the present case, the cumulative factors of low human development indices, backwardness, remoteness, poverty, inferiority in the social indicators in the State due to uneven topography, lack of water resources, loss in canopy average of forest and uncontrolled rapid industrialization have been taken into consideration.

41. It is further submitted that the Governor of the State is fully competent under paragraph 5(1) of Fifth Schedule of the Constitution of India to issue the notification making reservation in favour of the residents of the scheduled districts in order to secure justice-social, economic and political, to the residents suffering variously in the backdrop of the conditions mentioned in the notification.

42. In the alternative, it is prayed that even if the Notification/Order impugned before the High Court are held to be unconstitutional and/or ultra vires, in that case, as done by this Court in the case of *Chebrolu Leela Prasad Rao* (supra) the appointments already made in the Scheduled Areas be saved even by exercising power under Article 142 of the Constitution of India. It is submitted that in many cases those candidates who have been appointed in the Scheduled Areas, were either working in the non-Scheduled Areas or for getting appointment in the Non-Scheduled Areas they had left their jobs as they were getting appointment in their own Districts. It is submitted that equities are also in their favour. It is further submitted that even

appointment of the petitioners may not be disturbed when large number of posts are still lying vacant in the State of Jharkhand and under the provision of Right to Education Act, fundamental rights are available to the residents of the area to have access to education and further it is duty cast upon the State to provide education.

43. It is submitted that the High Court has erred in not protecting the appointments already made by narrowly applying the decision in the case of *Chebrolu Leela Prasad Rao* (supra). One of the factors for protecting appointments made to public services in pursuance of open competition and fair opportunity, even though falling foul of any other legal factor, will be whether the appointments are vitiated by the candidature's fraud or benefit, and whether the appointees will lose on various counts. It is a matter of record that a large number of appointees have left their previous jobs. Even in the case of *Chebrolu Leela Prasad Rao* (supra), persons appointed as recently as in 2020 have been protected. Reliance is also placed on the judgment in *Dr. Jaishri Laxmanrao Patil v. Chief Minister*, 2021 SCC OnLine SC 362 for protection granted by Court to the appointments already made.

44. Dr. Rajeev Dhavan, learned Senior Advocate appearing on behalf of some of the petitioners - candidates belonging to the Scheduled Districts/Areas has elaborately made submission on the use of the word "only" under Article 15(1) and 16(2) of the Constitution of India.

45. It is submitted by Dr. Rajeev Dhavan, learned Senior Advocate appearing for the some of the petitioners that use of the word "only" in Article 15(1) and 16(2) of the Constitution of India would suggest that any of the prohibited classification "including caste" cannot be taken as the basis of the classification unless there is some wider constitutional or public purpose and the classification has a nexus to and subserves that purpose. Reliance is placed on the decision of this Court in the case of *Kailash Chandra Sharma* (supra) (para 14) on the prohibitions in Article 16(2). That it is observed in the said decision that prohibitory mandate under Article 16(2) is not attracted if the alleged discrimination is on grounds not merely related to residence but the factum of residence is only taken into account in addition to other relevant factors.

46. Reliance is also placed on the decision of this Court in the case of *P. Rajendran v. State of Madras* reported in (1968) 2 SCR 786. It is submitted that as held by this Court in the aforesaid decision if the reservation in question, had been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15(1) but it must not be forgotten that a caste can also refer to a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that such a caste is socially and educationally backward class within the meaning of Article 15(4).

47. Dr. Rajeev Dhavan, learned Senior Advocate has also relied upon the decisions of this Court in the case of *N. Vasundhara v. State of Mysore* reported in (1971) 2 SCC 22 and in the case of *Jayshree v. State of Kerala* reported in (1976) 3 SCC 730 in support of his submission that for upliftment of local residents belonging to the Schedules Areas, the Governor can in exercise of powers conferred under para 5 of the Fifth Schedule stay any of the Act made by the Parliament and/or State and the same cannot be said to be affecting rights of the individual under Articles 16(2) and 16(3) of the Constitution of India.

48. Shri Vikas Singh, learned Senior Advocate appearing on behalf of some of the original petitioners has made further submission in support of the prayer to mould the relief to protect the services of the already appointed candidates as they participated in a fair process of selection in which no malpractice was involved. It is submitted that even today, there are more than 4000 posts available in the Scheduled Districts which

are lying vacant. In support of his above prayer, it is urged that this Court, in the case of *Chebrolu Leela Prasad Rao* (supra) had saved the appointments already made. It is submitted that this was because at least 50% of the seats had been reserved for Scheduled Tribes only which was struck down by this Court. It is submitted that applying the said observations in the present case also this Court while exercising its extraordinary powers conferred under Article 142 of the Constitution of India may protect the appointments made in the State of Jharkhand as about 50% appointments of total advertised vacancies have been made till now. It is submitted that if the appointments already made are set aside pursuant to the impugned common judgment and order passed by the High Court, in that case, lakhs of children who go to the school would be without teachers which would be contrary to the constitutional mandate of Right to Education as provided under Article 21A of the Constitution of India.

49. It is submitted that thousands of innocent petitioners/teachers will be rendered unemployed as against 219 contesting respondents/interveners. That the paramount public interest demands that the appointments already made are not disturbed and the impugned judgment is made to apply only prospectively.

50. It is submitted that as such the original petitioners took part in the selection process, knowing fully well about the reservation made in favour of the local residents of the Scheduled Districts and thereafter having taken part in the selection process and having failed in getting selected, they cannot now turn around and challenge the conditions laid down in the advertisement.

51. It is further submitted that it is not true that less meritorious candidates were given appointment and the rights of meritorious candidates has been hampered. That as a matter of fact, in all most every subject most of the appellants herein were much more meritorious than that of last selected/non selected/less meritorious candidates of Non-Scheduled Districts.

52. Making above submissions, it is prayed to mould the relief and to direct to apply the impugned common judgment and order passed by the High Court prospectively and/or at least to save appointments already made.

53. Similar prayer to mould the relief and save the appointments already made and to direct to apply impugned judgment and order passed by the High Court prospectively has been made by Shri P.S. Patwalia, learned Senior Advocate appearing on behalf of some of the appellants/teachers already appointed.

54. In the alternative, it is prayed that only those writ petitioners i.e., about 219 candidates may be given opportunity to submit an option of the Districts where they would like to be appointed, which would be done with reference to their merit against the vacant posts and with respect to rest of the vacant posts, the State may issue a fresh advertisement in accordance with law, with the age relaxation to the candidate who had already participated in the 2016 selection. In support of his above submission, reliance is placed on the decision of this Court in the case of *Hanuman Dutt Shukla v. State of Uttar Pradesh* reported in (2018) 16 SCC 447.

55. Shri Patwalia, learned Senior Advocate has also reiterated what has been submitted on behalf of the other counsel on merits by assailing the impugned common judgment and order passed by the High Court and on the constitutional validity of the Notification/Orders issued by the Governor/State Government providing reservation for candidates belonging to the local residents of the Scheduled Areas/Districts.

56. Ms. Vibha Datta Makhija, learned Senior Advocate appearing on behalf of some of the appellants herein - candidates already appointed has made following submissions in support of her prayer to mould the relief in favour of already appointed candidates.

I. That the appointments were made before the decision of this Court in the case of

Chebrolu Leela Prasad Rao (supra). Thus, at the time of appointment of the petitioners herein, law in the State of Jharkhand was not clear and was in a state of flux;

- II. Even this Court has vide final order in the case of *Chebrolu Leela Prasad Rao* (supra) has saved the appointments;
- III. That all the appointed candidates-petitioners are appointed by a fair process of selection and they are all meritorious candidates;
- IV. The Schools would be without teachers in case the petitioners are ousted from service. In SLP (C) No. 12490 of 2020 about 1108 schools would be having no teachers and therefore, it may affect the education of the pupils. That the residents of the Scheduled Areas are also having right to education which is a fundamental right as provided under the Constitution of India. Therefore, if the petitioners and other already appointed teachers are removed, in that case, the schools would be without teachers and therefore, it may affect/hamper the education in the State of Jharkhand.

57. Ms. Makhija, learned Senior Advocate has also relied upon the decisions of this Court in the case of *Chebrolu Leela Prasad Rao* (supra), *Kailash Chand Sharma v. State of Rajasthan* reported in (2002) 6 SCC 562, *K Madhav Reddy v. State of A.P* reported in (2014) 6 SCC 537, *R.K. Sabharwal v. State of Punjab* reported in (1995) 2 SCC 745 and *Baburam v. CC Jacob* reported in (1999) 3 SCC 362, in support of her prayer to direct to apply the impugned judgment and order passed by the High Court only prospectively.

58. While assailing the impugned judgment and order passed by the High Court Shri Kapil Sibal, learned Senior Advocate and Shri Sunil Kumar, learned Senior Advocate appearing on behalf of the State of Jharkhand have vehemently submitted that in the present case and in the facts and circumstances of the case, High Court has committed a grave error in declaring the Notification/Order issued by the Governor/State Government and the advertisement providing reservation for the local residents of Scheduled Area/Districts as unconstitutional and ultra vires Articles 14, 16 and 35 of the Constitution of India.

59. It is submitted on behalf of the State that there is a basic fallacy in the contention of the original petitioners that the impugned Notification makes the District as the basis of classification. It is submitted that as such a classification is made by the Constitution itself and the basis is "Scheduled Area" as contemplated under Article 244 r/w Fifth Schedule of the Constitution of India. That the Scheduled Areas are such of those areas comprised of mostly tribal population within the different States constituting the Union of India which the Constitution of India treats as special in the matter of its governance. That the President may, by an order declare any such area as Scheduled Area under para 6 of Fifth Schedule of the Constitution of India. Under sub-para 2 of para 5 of Fifth Schedule, the President may direct that the whole or any specified part of a Scheduled Area shall cease to be a Scheduled Area or a part of such an area, or even increase the area of a Scheduled Area in the State. Thus the President may declare an entire District as a Scheduled Area or a part of the District as a Scheduled Area or even the combination of two Districts as a Scheduled Area. It is submitted that in the instant case on a consideration of the demography of the different Districts in the State of Jharkhand, the President of India formed an opinion to declare the areas comprised in 13 Districts as a Scheduled Area and made the Scheduled Areas (State of Jharkhand) Order, 2007. That as time passes the President may declare that a portion of any of the 13 Districts may cease to be a Scheduled Area or even increase the area of any of the declared Scheduled Areas by combining portions of two Districts. Therefore the impugned Notification and order makes the District as the basis of classification. It is submitted that as such there is no challenge

to the Scheduled Area (State of Jharkhand) Order, 2007 in these cases.

60. So far as the contention on behalf of the original writ petitioners that impugned Notification and Order purport to modify Rules framed under the proviso to Article 309 which are neither an Act of Parliament nor an Act of State Legislature, it is submitted that as such impugned Notification carves out an exception by stating "Notwithstanding anything contained in these rules or any other Act, Order, Direction, Rules or Law for the time being in force" and hence would include an Act of Parliament like the "Right of Children to Free and Compulsory Education Act, 2009" which was enacted pursuant to Article 21-A of the Constitution of India and is applicable to Elementary Schools. It is submitted that Section 23 of the said 2009 Act makes provision for eligibility for appointment of teachers in Elementary Schools. Hence the impugned Notification would have to be read as carving out an exception/modification to an Act of the Parliament i.e., Section 23 of the said 2009 Act and same cannot be faulted with.

61. It is submitted that the impugned Notification and the Rules appended thereto which are being excepted/modified, are both expressed to have been made by "The Order of the Governor" and authenticated in the manner prescribed under Article 166 (2) of the Constitution of India. That the source of power to issue the impugned Notification can be traced to para 5(1) of Schedule V as also proviso to Article 309 of the Constitution of India. It is submitted that the omission to mention "read with proviso to Article 309 of the Constitution" after "in exercise of powers conferred by the provision of sub-para (1) of para 5 of the Fifth Schedule ..." in the impugned Notification shall not affect/invalidate the amendment to the Rules framed under the proviso to Article 309 of the Constitution of India. That in the case of *Union of India v. Tulsiram Patel* reported in (1985) 3 SCC 398 (para 126) it is observed that the source of power exists by reading together two provisions, whether statutory or constitutional and the order refers to only one of them but the validity of the order should be upheld by construing it as an order passed under both the provisions.

62. Now so far as submission on behalf of the original writ petitioners whether the impugned Notification/Order are violative of Article 16 of the Constitution of India is concerned, it is vehemently submitted that the impugned Notification and Order are not "only" on the ground of residence. It is submitted that social indicators in the scheduled areas being lesser as compared to the other areas of the State as also the other factors mentioned in the impugned Notification/Order which indicate that those residing therein are not equally circumstanced as those residing in the Non-Scheduled Areas, there is no equality of opportunity. Hence, a duty is cast upon the State to minimize the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst group of people residing in different areas or engaged in different vocations. It is submitted that the Directive Principle of State policy contained in Articles 38, 39, 39-A, 43 and 46 part IV of the Constitution of India would apply in this case. It is submitted that the impugned order No. 5939 dated 14.07.2016 was issued after noticing the Report of Tribal Advisory Council and various factors of inequality between the Scheduled Areas and Non-Scheduled Area, it is stated therein that, inter alia, that additional opportunities of employment had to be provided to those residing in Scheduled Areas. That in the case of *Kailash Chand Sharma* (supra) (para 48) it is observed that "equalising unequals by taking note of their handicaps and limitation is not impermissible under the Constitution provided that it seeks to achieve the goals of promoting overall equality". It is urged that in the present case it was expected that overall equality would be achieved by expression/modification of the Rules made by impugned Notification and Order for a period of ten years. Therefore, as such, the impugned Notification and order cannot be said to be violative Article 16 of the Constitution of India.

63. Now so far as submission on behalf of the original writ petitioners that the impugned Notification is violative of Article 14 of the Constitution of India is concerned, it is vehemently submitted by learned Senior Advocate on behalf of the State that such argument based on infringement of Article 14 is fallacious. It is contended that while Article 14 guarantees that the State shall not deny to any person equality before law or the equal protection of laws, para 5(1) of Fifth Schedule starts with a non obstante clause which empowers the Governor to direct that any Central Law or State Law shall not apply to a Scheduled Area or part thereof or may apply with such exceptions or modifications as he may direct. It is submitted that if the submission on behalf of the original petitioners that the impugned notification/order is in violation of Article 14 is accepted, in that case, it would lead to an apparent conflict between two constitutional provisions, viz. Article 14 and para 5(1) of Fifth Schedule. It is submitted that this conflict can only be resolved by following the well settled principle of harmonious construction that the special law shall prevail over the general. Reliance is placed on the decision of this Court in the case of *J K Spinning and Weaving Mills Co. Ltd v. State of UP* reported in AIR 1961 SC 1170 (para 9). It is submitted that said provision for the Governance and development of the Scheduled Areas and the Tribals residing therein would never be subject to the general provisions of the fundamental rights guaranteed under Article 16.

64. In the alternative, it is prayed by the learned Senior Advocate appearing on behalf of the State not to disturb the appointments already made earlier and to apply the impugned common judgment and order passed by the High Court prospectively so that it may not affect the education of the local residents of the Scheduled Areas. It is submitted that if the impugned judgment and order passed by the High Court is implemented and the appointments already made are also set aside as observed and held by the High Court, in that case, the teachers will have to be relieved and many schools in the Scheduled Areas would be without teachers and it may ultimately hamper education in the State and which may violate the fundamental rights which would be available to the local residents of the Scheduled Area guaranteed under Article 21 A of the Constitution of India.

65. Present Appeals are vehemently opposed by Shri Ranjit Kumar and Shri Gopal Sankaranarayanan, learned Senior Advocates appearing on behalf of the contesting respondents - original petitioners - candidates belonging to the Non-Scheduled Areas/Districts.

66. Shri Ranjit Kumar, learned Senior Advocate appearing on behalf of the original writ petitioners appearing in Civil Appeal No. 4044 of 2022 on behalf of Soni Kumari has submitted that the original writ petitioners (W.P No. 1387 of 2017 before the High Court) approached the High Court challenging the State Government Notification No. 5938 and Order No. 5939 dated 14.07.2016 whereby in Thirteen Scheduled Districts in Jharkhand (out of total 24 Districts) only local residents of Thirteen Scheduled Districts were made eligible for appointment to Class III and IV posts for a period of 10 years as well as advertisement dated 28.12.2016 as modified on 4.12.2017 and clause V (iii) which restricted only local residents/domicile of notified/Scheduled Districts alone being entitled to submit application against vacancies earmarked for the said Districts. It is submitted that due to the impugned Notification/order and the advertisement she was constrained to submit the application Form for District Palamu - a Non-Scheduled District, though after her marriage she is residing at Ranchi, a Scheduled District. It is submitted that she had secured more marks than the cut off marks obtained by the last selected candidate in her category and subject in the Scheduled Districts and yet she was not selected. It is submitted that in this factual background the challenge to the impugned notification/order and the advancement are required to be appreciated.

67. It is submitted by Shri Ranjit Kumar, learned Senior Advocate that the issues

which arises for consideration in the instant case are:

- I. Whether the exercise of Governor's power under Paragraph 5 of the Fifth Schedule is a "plenary power" or an "enabling power" which must meet the test of basic feature/foundational principles and fundamental rights guaranteed under Part III of the Constitution?
- II. Whether the Governor is vested with the power to determine eligibility based on residence (specifying 100% reservation for domiciles in Schedule Districts) under Paragraph 5(1) of the Fifth Schedule?
- III. Whether GOs No. 5938 & 5939 dated 14.07.2016 whereby in the 13 Scheduled Districts in Jharkhand, Only local residents of the said districts were declared eligible for appointment to Class III and IV posts for a period of 10 years are ultra vires Articles 14, 16(2)&(3) and 35(a-i) of the Constitution?

68. In support of the submissions on behalf of the original petitioners - candidates belonging to the Non-Scheduled Areas that the impugned Notification/Order and the advertisement restricting the local residents of the Scheduled Area only to apply for the post in the Scheduled Area are ultra vires to Articles 14 & 16 of the Constitution of India and it affects candidates belonging to the non-Scheduled Area guaranteed under Part III of the Constitution of India, following submissions are made:

- I. The power vested with the Governor under Article 244(1) read with the Fifth Schedule of the Constitution is not a plenary power but is an enabling power to meet the object specified therein i.e., "Administration of the Scheduled Areas". Paragraph 5(1) of the Fifth Schedule is one facet of this enabling power vested with the Governor. In terms of this paragraph, he may determine which Parliament or State legislation shall apply to the Scheduled Area, specify the exceptions/modifications to the legislations so specified and also determine retrospective applicability of such legislation;
- II. The power of the Governor under Para 5(1) of Fifth Schedule does not extend to subordinate legislation; it is with respect to an Act enacted in the sovereign function by the Parliament or legislature of the State which can only be dealt with;
- III. The Non obstante clause in Paragraph 5 of Fifth Schedule cannot be construed as taking away the provision outside the limitations on the amending power and has to be harmoniously construed consistent with the foundational principles and the basic features of the Constitution;
- IV. The Governor's power under Para 5(1) of the Fifth Schedule to the Constitution is subject to some restrictions, which have to be observed by the Parliament or the legislature of the State while making law and shall not affect fundamental rights guaranteed under Part III of the Constitution;

69. In support of above submissions, heavy reliance is placed on the decision of this Court in the case of *Chebrolu Leela Prasad Rao* (supra) (Paras 102-104, 154(1) (c)).

70. It is further submitted by Shri Ranjit Kumar, learned Senior Advocate that residence local by itself cannot be a ground to accord any preferential treatment for reservation in public employment by the State Government since the same stands specifically barred by Article 16(1) and (2) of the Constitution. Reliance is placed on the decision of this Court in the case of *State of Orissa v. Sudhir Kumar Bishwal* reported in 1994 Supp (3) SCC 245 para 6 and 8.

71. It is further submitted that the Governor lacks subject matter jurisdiction to prescribe any requirement as to residence within the State in light of Article 16(3) r/w Article 35(a-i) of the Constitution which mandate that power to create residential qualification for employment is exclusively conferred on Parliament and not the State Legislature which, by necessary corollary, shall exclude the State Executive (Governor)

whose power is co-terminus with the State Legislature. It is submitted that the Parliament alone is empowered to make the law prescribing residential requirement within a State or Union Territory, as the case may be, in relation to a class or classes of employment. It is submitted that therefore, in the absence of parliamentary law, even the prescription of requirement as to residence within the State is impossible. In support of above submission, reliance is placed on the decision of this Court in the case of *AVS Narasimha Rao v. State of Andhra Pradesh* reported in (1969) 1 SCC 839, *Kailash Chand Sharma v. State of Rajasthan* reported in (2002) 6 SCC 562 (para 13-14) and *Rajesh Kumar Gupta v. State of UP* reported in (2005) 5 SCC 172 (para 16 & b 17).

72. It is further submitted that even otherwise impugned orders/notification as sought to introduce 100% reservation in the Thirteen Scheduled District in the State of Jharkhand whereby only local residents of said Districts were declared eligible for appointment to Class III and IV posts for the period of 10 years, are contrary to the law laid down by this Court in the case of *Indra Sawhney* (supra) (para 788) as well as recent decision of the Constitutional Bench of this Court in the case of *Chebrolu Leela Prasad Rao* (supra) (para 104) wherein it has been held that the outer limit of the reservations contemplated in Clause (4) of Article 16 of the Constitution of India should not normally exceed the limit of 50%.

73. Now so far as justification by the State in invoking "sons of the soil" policy prescribing reservation or preference based on domicile or residence as already been decreed by this Court in the case of *Dr. Pradeep Jain v. UOI* reported in (1984) 3 SCC 654 (para 5), it is submitted that in the said decision it is observed and held that the Parliament alone has been given the right to enact an exception to the ban on discrimination based on residence. The impugned Government Notifications No. 5938 & 5939 dated 14.07.2016 are ex facie violative of Article 14 of the Constitution in as much as the same is not based on any intelligible differentia and does not have any rational nexus with the object and purpose it has set out to achieve i.e., selection of the most competent teachers to impart quality education in secondary and high schools run by State Government and improvement of educational standard of the residents within the State. It is submitted that many districts notified as Scheduled Districts like East Singhbhum (Jamshedpur) and Ranchi are at the top half of the Human Development Index (HDI) in Jharkhand whereas the Petitioner's District Palamau has the lowest HDI in the State, yet has been classified as a Non-Scheduled District which smacks of arbitrariness adopted by the State in determination of Schedule and Non-Scheduled Districts.

74. It is further submitted that even the contention raised by the State Government and some of the learned counsel appearing on behalf of the candidates belonging to the Scheduled Areas that the impugned Notification/Order were premised on the basis that candidates who knew the local tribal language spoken in the concerned district would be in a better position to teach the students, is absolutely fallacious. It is submitted that as such said contention has not been approved and/or accepted by this Court in the case of *Chebrolu Leela Prasad Rao* (supra). That even otherwise TGT Recruitment Process is conducted for selection of Trained Graduate Teachers to teach various subjects in Secondary Schools. It is submitted that thus excepting for the local tribal language subject, all other subjects (viz. English, Hindi, Mathematics, Science, Social Studies) which are general in nature must be taught by the most meritorious teachers so as to bring about an all-round development of the students as opposed to a substandard teacher whose contribution is negligible in academics.

75. It is submitted that Hindi is the official language in Jharkhand and is also the common medium of interaction among the various regions in the State since over 21

languages are spoken in the State. That therefore, it stands to no reason that persons who do not know all 21 regional languages spoken in the State would be unable to impart education to the students in those regions. It is submitted that any person who is well versed in Hindi (Devnagari script) is more than competent to effectively impart education to the students in all districts in the State without any hindrance.

76. It is further submitted by Shri Ranjit Kumar, learned Senior Advocate that once impugned Notification/Order are held to be unconstitutional and ultra vires to Articles 14, 16 and 35 of the Constitution of India, in that case, any appointment made violating the fundamental rights of the original writ petitioners and appointment made pursuant to such unconstitutional provisions, the same have to be set aside. It is submitted that therefore, the High Court has not committed any error in quashing the appointment of the original writ petitioner. In support of his above submission, following recent decisions are relied upon:

- I. *Anupal Singh v. State of UP* reported in (2020) 2 SCC 173.
- II. *State of UP v. Anand Kumar Yadav* reported in (2018) 13 SCC 560.
- III. *Renu v. District & Sessions Judge* reported in (2014) 15 SCC 731.
- IV. *State of MP v. Dharam Bir* reported in (1998) 6 SCC 165.
- V. *Syed Khalid Rizvi v. Union of India* reported in 1993 Supp (3) SCC 575.
- VI. *Surajprakash Gupta v. State of J & K* reported in (2000) 7 SCC 561.
- VII. *R.S. Garg v. State of UP* reported in (2006) 6 SCC 430.
- VIII. *Secretary, State of Karnataka v. Umadevi* (3) reported in (2006) 4 SCC 1.

77. It is further submitted by Shri Ranjit Kumar, learned Senior Advocate appearing on behalf of the respective original writ petitioners - candidates belonging to the Non-Scheduled Districts has also requested to mould the relief under Article 142 of the Constitution of India by directing to prepare a revised merit list based on the already published cut off obtained by the last selected candidate in each TGT subject against respective categories. It is submitted that this would entail that no fresh or de novo recruitment process is initiated qua the advertised posts on the one hand, while on the other hand candidates from the present pool itself including the original writ petition - Soni Kumar and 218 similarly situated candidates as well as even the present selected candidates will get an opportunity to be considered for appointment as TGT teachers. Reliance is placed on the decision of this Court in the case of *Rajesh Kumar v. State of Bihar* reported in (2013) 4 SCC 690 and *Ran Vijay Singh v. State of UP* reported in (2018) 2 SCC 357, in support of his request and prayer to mould the relief as prayed for.

78. Shri Gopal Sankaranarayanan, the learned Senior Advocate has also made elaborate submissions in support of the impugned common judgment and order.

79. In the State of Jharkhand 13 Districts were declared as Scheduled Districts/Areas in exercise of powers conferred by sub-paragraph (2) of Paragraph 6 of the Fifth Schedule to the Constitution of India. That the State Government has framed the Recruitment Rules, 2015 prescribing conditions/qualifications for appointment of teachers. The said Rules are in exercise of powers under Article 309 of the Constitution of India. That vide Circular dated 18.04.2016 and pursuant to the order passed by the High Court, the State Government has prescribed definition of "Local Resident of Jharkhand". As per the said circular, Local Resident of Jharkhand would be deemed to be Indian Citizens who are fulfilling any one condition out of the following criteria:—

- "(i). he would have been residing within the geographical limits of the State of Jharkhand and either his own name or name of his forefather would have been lying recorded in Survey Khata. In the cases of landless, he would be identified by the concerning Gram Sabha which would be based on language, culture & traditions prevailing in the State of Jharkhand.

- (ii) would have been residing within the geographical limits of the State of Jharkhand for the past 30 years or more due to any trade, employment and other reasons and would have earned immovable property or such person has wife/husband/child and affirm commitment to stay in Jharkhand State.
- (iii) would have been appointed & working officer/employee under the Government of State of Jharkhand/institutions being run/recognized by the State Government, Corporation etc. Or has wife/husband/child and affirm commitment to stay in Jharkhand state.
- (iv) Officer/employee of the Government of India, working in the State of Jharkhand or have 188 wife/husband/child and affirm commitment to stay in Jharkhand state.
- (v) Person appointed at any constitutional or statutory posts in the State of Jharkhand or have wife/husband/child and affirm commitment to stay in Jharkhand state.
- (vi) Such person who would have born in the State of Jharkhand and completed his whole education upto Matriculation or its equivalent level from the recognized institutions established in the state of Jharkhand & affirm commitment to stay in Jharkhand state."

80. That thereafter, Governor of Jharkhand/State Government in exercise of powers under Paragraph 2(1) of the Fifth Schedule to the Constitution of India has issued the order/Notification dated 14.07.2016, inter alia, providing that notwithstanding anything contained in any Appointment/Recruitment Rules or any other Act, Order, Direction, Rules or Law for the time being in force only local residents of the Scheduled Areas/Districts in the State shall be eligible for recruitment to the vacancy arising in Class III and IV posts of the District Cadre in various departments of the concerned Districts, for a period of 10 years from the date of issue of the said Notification. The Order and Notification, validity of which have been questioned, are extracted hereinunder:

**"Government of Jharkhand
Deptt. of Personnel, Administrative Reforms &
Rajbhasha
Order
Ranchi, Dated 14.07.2016**

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

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

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

4 posts by the local residents of the district concerned;

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

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

**"Government of Jharkhand
Deptt. of Personnel, Administrative Reforms &
Rajbhasha
Notification
Ranchi, Dated 14.07.2016**

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

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

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

81. Thus, by the aforesaid impugned Order/Notification the Governor of Jharkhand has directed that the provisions regarding "eligibility of the appointment" mentioned in the various Appointment Rules, and as framed by the State Government under Article 309 of the Constitution of India for the appointment to the District Cadre posts, shall be deemed to the modified and enforced up to the extent that cent-percent Class -III and Class-IV posts in various department in the 13 Scheduled districts shall be reserved for the local residents of the concerned districts only. At this stage, it is required to be noted that by the said Notification only the service Rules framed under Article 309 of the Constitution of India came to be modified and even the list attached to the notification does not contain any Act of the Parliament or of the State Legislature. By the impugned judgment and order, the High Court, following and relying upon the decision of the Constitutional Bench of this Court in the case of *Chebrolu Leela Prasad Rao* (supra) has declared the aforesaid Order/Notification dated 14.07.2016 as unconstitutional and consequently has quashed appointments of the trained graduate teachers made pursuant to the Advertisement No. 21/2016 published on 28th December, 2016 as modified by Advertisement dated 4.2.2017, in the Scheduled Districts relating to the local resident of those Districts only. That thereafter, the High Court has directed that all the 8423 posts of Trained Graduate Teacher in the Government Secondary Schools in the scheduled districts of the State

of Jharkhand shall be advertised afresh and a fresh selection process be undertaken in accordance with law. The impugned judgment and order passed by the High Court and the aforesaid directions is the subject matter of the present appeals.

82. Having heard the learned counsel for the respective parties and considering the impugned common judgment and order passed by the High Court, the questions which are posed for consideration of this Court are as under:

- I. Whether in exercise of powers conferred under paragraph 5(1) of the Fifth Schedule to the Constitution of India, whether, the Governor can provide for 100% reservation contrary to Part III of the Constitution of India, more particularly, guaranteed under Article 16(1) and (2)?
- II. Whether in exercise of powers under paragraph 5(1) of the Fifth Schedule to the Constitution of India the Governor has the power to modify the relevant Recruitment Rules framed under Article 309 of the Constitution of India?
- III. What order?

83. While considering the aforesaid questions/issues the relevant Constitutional provisions which would have a direct bearing are required to be referred to, which are as under:—

"Article 13. Laws inconsistent with or in derogation of the fundamental rights- (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,— (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.

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

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

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office 1[under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory] prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4A) Nothing in this article shall prevent the State from making any provision for reservation 3[in matters of promotion, with consequential seniority, to any class] or

classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent. reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

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Article 46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections -*The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.*

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Article 244. Administration of Scheduled Areas and Tribal Areas - *(1) The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State 1*** other than 2[the States of Assam 3[, 4[Meghalaya, Tripura and Mizoram].*

(2) The provisions of the Sixth Schedule shall apply to the administration of the tribal areas in 2[the States of Assam 3[, 5[Meghalaya, Tripura and Mizoram]

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Article 246. Subject-matter of laws made by Parliament and by the Legislatures of States -*(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").*

*(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State 1*** also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").*

*(3) Subject to clauses (1) and (2), the Legislature of any State 1*** has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").*

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included 2[in a State] notwithstanding that such matter is a matter enumerated in the State List.

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Article 254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States - *(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or*

after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State 1*** with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

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309. Recruitment and conditions of service of persons serving the Union or a State - Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act

Para 5 of the Fifth Schedule of the Constitution

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

(2) The Governor may make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area. In particular and without prejudice to the generality of the foregoing power, such regulations may—

- (a) prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area;
- (b) regulate the allotment of land to members of the Scheduled Tribes in such area;
- (c) regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such area.

(3) In making any such regulation as is referred to in sub-paragraph (2) of this paragraph, the Governor1*** may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to the area in question.

(4) All regulations made under this paragraph shall be submitted forthwith to the President and, until assented to by him, shall have no effect.

(5) No regulation shall be made under this paragraph unless the Governor making the regulation has, in the case where there is a Tribes Advisory Council for

the State, consulted such Council.

84. As per Article 246(1), notwithstanding anything contained in clauses (2) and (3), Parliament shall have exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (Union List). As per Article 246 (2), notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also shall have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (Concurrent List). As per Article 254 of the Constitution of India, if any provision of law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void. Thus, as per the aforesaid Constitutional provisions, law made by the Parliament is supreme and shall prevail and every State/State Legislature is bound by the law made by the Parliament. However, paragraph 5 of the Fifth Schedule to the Constitution of India is an exception. Notwithstanding the aforesaid provisions, giving supremacy to the law made by the Parliament, the Governor may direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification. Thus, the expression “notwithstanding anything in this Constitution” is related to the Constitutional provisions regarding the supremacy of the law made by the Parliament or State Legislature. This aspect shall be discussed herein below while considering the submissions made on behalf of the appellants herein regarding paragraph 5(1) of the Fifth Schedule to the Constitution of India.

85. Therefore, the short question which is posed for the consideration of this Court is, whether, in exercise of powers conferred under paragraph 5(1) of the Fifth Schedule to the Constitution, the Governor can make provisions for 100% reservation in the scheduled Areas/Districts which may affect the rights of the citizens guaranteed under Part III, more particularly, under Article 16(2) of the Constitution of India? Whether such reservation would not be hit by Article 13 of the Constitution of India?

86. Identical question came to be considered by the Constitutional Bench of this Court in the case of *Chebrolu Leela Prasad Rao* (supra). Before this Court the Governor of State of Andhra Pradesh issued GO in exercise of powers under paragraph 5(1) of the Schedule 5 of the Constitution of India, directing the posts of teachers in educational institutions in the scheduled tribe areas shall be reserved for Scheduled Tribes only notwithstanding anything contained in any other order or rule or law in force. Several questions were referred to the Constitutional Bench. The following questions were ultimately framed for consideration by the Constitutional Bench:

- (1) What is the scope of paragraph 5(1), Schedule V to the Constitution of India?
 - (a) Does the provision empower the Governor to make a new law?
 - (b) Does the power extend to subordinate legislation?
 - (c) Can the exercise of the power conferred therein override fundamental rights guaranteed under Part III?
 - (d) Does the exercise of such power override any parallel exercise of power by the President under Article 371D?
- (2) Whether 100% reservation is permissible under the Constitution?
- (3) Whether the notification merely contemplates a classification under Article 16 (1) and not reservation under Article 16(4)?
- (4) Whether the conditions of eligibility (i.e., origin and cut-off date) to avail the

benefit of reservation in the notification are reasonable?"

87. Question No. 1(a), (b), (c) and question no. 3 referred to herein above are relevant for our purpose.

88. After taking into consideration the relevant Constitutional provisions viz. Article 244, Fifth Schedule, so far as question No. 1(a) viz. whether the provision empower the Governor to make a new law is concerned, it is observed and held by the Constitution Bench that the Governor's power to make new law is not available in view of the clear language of Para 5(1) Fifth Schedule does not recognize or confer such power, but only power is not to apply the law or to apply it with exceptions or modifications. (para 51)

89. Answering question no. 1(b) viz. does the power extend to subordinate legislation, it is observed and held that Rules framed under the proviso to Article 309 of the Constitution cannot be said to be an Act of Parliament or of State Legislature. It is observed and held that the power of Governor under Para 5(1) of Schedule V of the Constitution is restricted to modifying or not to apply, Acts of the Parliament or Legislature of the State. Thus, Rules could not have been amended in the exercise of the powers conferred under Para 5(1) of the Schedule V. It is further observed and held that the Rules made under the proviso to Article 309 of the Constitution cannot be said to be an enactment by the State Legislature. (paras 52 to 57).

90. While answering question 1(c) viz. can the exercise of the powers conferred under Para 5(1) of Fifth Schedule override fundamental rights guaranteed under Part III, after considering the decisions of this Court in the case of *Kesavananda Bharati v. State of Kerala* reported in (1973) 4 SCC 225; *Waman Rao v. Union of India* reported in (1981) 2 SCC 362; *I.R. Coelho (Dead) by Lrs. v. State of T.N.* reported in (2007) 2 SCC 1; *S.R. Chaudhuri v. State of Punjab* reported in (2001) 7 SCC 126; *Ajay Hasia v. Khalid Mujib Sehravadi* reported in (1981) 1 SCC 722; *E.P. Royappa v. State of Tamil Nadu* reported in (1974) 4 SCC 3; *Maneka Gandhi v. Union of India* reported in (1978) 1 SCC 248; *Ramana Dayaram Shetty v. International Airport Authority of India* reported in (1979) 3 SCC 489; *Neelima Misra v. Harinder Kaur Paintal* reported in (1990) 2 SCC 746 and *Peerless General Finance and Investment Co. Ltd v. Reserve Bank of India* reported in (1992) 2 SCC 343, it is finally observed and held that the power conferred on the Governor to deal with the scheduled areas is not meant to prevail over the Constitution. The power of the Governor is *pari passu* with the legislative power of Parliament and the State. The legislative power can be exercised by the Parliament or the State subject to the provisions of Part III of the Constitution. Thereafter, it is ultimately observed and held that the power of the Governor does not supersede the fundamental rights guaranteed under Part III of the Constitution. It has to be exercised subject to Part III and other provisions of the Constitution. It is further observed and held that when Para 5 of the Fifth Schedule confers power on the Governor, it is not meant to confer an arbitrary power. The Constitution can never aim to confer any arbitrary power on the constitutional authorities. They are to be exercised in a legal and rational manner keeping in view the objectives and provisions of the Constitution. The powers are not in derogation but in the furtherance of the Constitutional aims and objectives. (para 78). While holding so, the Constitutional Bench also considered the effect of the non-obstante clause used in para 5(1) of the Fifth Schedule of the Constitution. While considering the effect of the non-obstante clause, it is observed in para 69, 70, 74 and 75 as under:

"69. Para 5(1) of the Fifth Schedule of the Constitution starts with a nonobstante clause. What is the effect of the non obstante clause vis-avis the applicability to other provisions of the Constitution? Whether the provisions of Para 5(1) prevail over all other provisions of the Constitution? Whether the fundamental rights in Part III of the Constitution are inapplicable and need not be satisfied?

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

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74. The nonobstante clause contained in Para 5(1) of the Fifth Schedule of the Constitution means the Governor can exercise power in spite of the provisions contained in Article 245 of the Constitution, conferring the power upon Parliament to make laws and the legislature of the State. The Parliament has the power to enact the law. It cannot be questioned on the ground that it would have extra territorial operation.

75. The nonobstante clause has also been considered in *Smt. Parayankandiyal Eravath Kanapraavan Kalliani Amma v. K. Devi*, (1996) 4 SCC 76 : AIR 1996 SC 1963. The scope has to be considered in the context and purpose for which it has been carved out."

91. As observed herein above, we are also of the opinion that the non-obstante clause contained in para 5(1) of the Fifth Schedule of the Constitution shall be read with respect to power of the Governor to suspend and/or modify the law made by the Parliament despite Articles 244 and 245 of the Constitution of India. It cannot be read as conferring upon the Governor absolute power and/or unfettered power, notwithstanding the provisions contained in Part III of the Constitution.

92. While answering question no. 2 viz. whether 100% reservation is permissible under the Constitution, after referring to and/or considering various decisions of this Court on 100% reservation and after considering Articles 14, 15 and 16 and other relevant Constitutional provisions and after taking into consideration decision of this Court in the case of *Indra Sawhney* (supra), it is ultimately observed and held that the reservation that is permissible by protective mode, by making it 100 percent would become discriminatory and impermissible. It is further observed and held that the opportunity of public employment cannot be denied unjustly to the incumbents, and it is not the prerogative of a few. The citizens have equal rights, and the total exclusion of others by creating an opportunity for one class is not contemplated by the founding fathers of the Constitution of India.

93. Thus, in the case of *Chebrolu Leela Prasad Rao* (supra), after considering the relevant Constitutional provisions in detail including the powers of the Governor conferred in para 5(1) of the Fifth Schedule of the Constitution of India, it is ultimately observed and held as under:

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

Question No. 1 : The Governor in the exercise of powers under Para 5(1), Fifth Schedule of the Constitution, can exercise the powers concerning any particular Act of the Parliament or the legislature of the State. The Governor can direct that such law shall not apply to the Scheduled Areas or any part thereof. The Governor is empowered to apply such law to the Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and can also issue a notification with retrospective effect.

Question No. 1(a) : The Governor is empowered under Para 5(1), Fifth Schedule of the Constitution, to direct that any particular Act of Parliament or the Legislature of the State, shall not apply to a Scheduled Area or apply the same with exceptions and modifications. The Governor can make a provision within the parameters of amendment/modification of the Act of Parliament or State legislature. The power to make new laws/regulations, is provided in Para 5(2),

Fifth Schedule of the Constitution for the purpose mentioned therein, not under Para 5(1) of the Fifth Schedule to the Constitution of India.

Question No. 1(b) : The power of the Governor under Para 5(1), Fifth Schedule to the Constitution does not extend to subordinate legislation, it is with respect to an Act enacted in the sovereign function by the Parliament or legislature of the State which can be dealt with.

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

Question No. 1(d) : In exercise of power under Para 5(1) of the Fifth Schedule to the Constitution of India, the Governor cannot override the notification issued by the President in the exercise of powers under Article 371D. The power has to be exercised harmoniously with such an order issued under Article 371D, not in conflict thereof.

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

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

Question No. 4 : The conditions of eligibility in the notification with a cut-off date i.e. 26-1-1950, to avail the benefits of reservation, is unreasonable and arbitrary one."

94. Applying law laid down by the Constitution Bench of this Court in the case of *Chebrolu Leela Prasad Rao* (supra), to the facts of the case on hand, the impugned Order/Notification No. 5938 and the Order No. 5939 dated 14.07.2016 providing 100% reservation for the local residents of concerned Scheduled Districts/Areas only can be said to be

- (1) beyond the scope and ambit of powers conferred upon the Governor under para 5(1) of the Fifth Schedule of the Constitution of India;
- (2) 100% reservation provided for the local residents of the concerned Scheduled Districts/Areas only would be violative of Article 16(2) of the Constitution of India and affecting rights of the other candidates/citizens of non-scheduled areas/Districts guaranteed under Part III of the Constitution of India;
- (3) the exercise of powers by the Governor under para 5(1) of the Fifth Schedule of the Constitution of India modifying Recruitment Rules, 2015 which are framed under Article 309 of the Constitution of India which can be said to be subordinate legislation and cannot be said to be an Act or the Law made by the Parliament and/or State Legislature is beyond the scope and ambit of Governor's power under para 5(1) of the Fifth Schedule of the Constitution of India.

95. The submission on behalf of the appellants and State that the decision of this Court in the case of *Chebrolu Leela Prasad Rao* (supra) shall not be applicable to the facts of the case on hand inasmuch as in the said case there was 100% reservation for Scheduled Tribe candidates which was held to be violating the rights of the other reserved category candidates also and that the decision of this Court in the case of *Chebrolu Leela Prasad Rao* (supra) is required to be reconsidered is concerned has no substance. What is required to be considered is the ratio decidendi and law laid down by this Court. There is clear law laid down by Constitution Bench of this Court as noted above. The decision of the Constitution Bench which is rendered after considering the

relevant constitutional provisions and a number of decisions of this Court is as such binding on us. It cannot be said that the relevant Constitutional provisions and/or binding decisions of this Court have not been dealt with and/or considered by this Court. The Constitutional Bench decision of this Court in the case of *Chebrolu Leela Prasad Rao* (supra) also cannot be said to be per incuriam ignoring and/or taking a contrary view than any of the binding decision of this Court. As such and as observed herein above, we reiterate that we are bound by the law laid down by this Court, more particularly, a Constitution Bench decision of this Court. We see no reason not to follow the binding Constitution Bench decision of this Court in the case of *Chebrolu Leela Prasad Rao* (supra). We see no reason to take a different view than the view taken by the Constitution Bench of this court in the case of *Chebrolu Leela Prasad Rao* (supra). We also see no reason to refer the matter to a Larger Bench as prayed by some of the counsel appearing on behalf of the appellants - candidates belonging to the Scheduled Areas/Districts.

96. One other submission which is made by the learned Advocate General appearing on behalf of the State before the High Court was that in order to overcome the factors of low human development indices, backwardness, poverty etc., in the scheduled districts and to secure justice - social, economic and political, the notification was issued by the Governor of the State for protecting the interests of the residents in the scheduled districts. That even otherwise, it would be of immense benefit to the school-going children in the scheduled districts, if they are taught in their own tribal language by the local teachers, than the outsiders, who may not be well conversant with the local language. At the outset, it is required to be noted that such submission was not pressed into service heavily by any of the counsel appearing on behalf of the appellants before the High Court. However, it is to be noted that in the case of *Chebrolu Leela Prasad Rao* (supra) the Constitution Bench of this Court also considered the very submission and negated the same by observing in para 130 and 131 as under:

"130. No law mandates that only tribal teachers can teach in the scheduled areas; thus, the action defies the logic. Another reason given is the phenomenal absenteeism of teachers in schools. That could not have been a ground for providing 100 percent reservation to the tribal teachers in the areas. It is not the case that incumbents of other categories are not available in the areas. When a district is a unit for the employment, the ground applied for providing reservation for phenomenal absenteeism is irrelevant and could not have formed the basis for providing 100 percent reservation. The problem of absenteeism could have been taken care of by providing better facilities and other incentives.

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

97. Even otherwise, it is to be noted that it may be true that so far as basic education (at the level of primary section) is concerned, it may help student at the primary level (while providing basic education) to be taught in their own tribal language. But the same principle may not be applicable when question is of providing education at higher level viz. above 5th standard. Therefore, if the candidates

belonging to other areas (non-Scheduled Areas/Districts) are given an opportunity to impart education (who may be more meritorious than the candidates belonging to the Scheduled Areas/Districts) than it will be more beneficial to the students belonging to the Scheduled Areas and their quality of the education shall certainly improve. The quality of education of the school-going children cannot be compromised by giving 100% reservation in favour of the teachers of the same/some districts and prohibiting the appointment to more meritorious teachers.

98. At this stage, it is required to be noted that even the impugned Order/Notification dated 14.07.2016 and the advertisement providing 100% reservations for local residents of concerned Scheduled Areas/Districts can be said to be violative of Article 13 of the Constitution of India also. As observed herein above, the impugned Order/Notification making 100% reservation for the local resident of the concerned Scheduled Districts/Areas is violative of Article 16(2) of the Constitution of India as it affects the fundamental rights guaranteed to the candidate belonging to the non-Scheduled Areas guaranteed under part III of the Constitution of India. As per Article 13 of the Constitution of India, the State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of Article 13(2) shall to the extent of the contravention, be void. Therefore, also impugned Notification/Order/Advertisement making 100% reservation for the local resident of the concerned Scheduled Areas/Districts shall be ultra vires Article 13 of the Constitution of India and shall be void.

99. Even under Article 16(3) of the Constitution of India, it is the Parliament alone, which is authorized to make any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union Territory, any requirement as to residence within the State or Union territory prior to such employment or appointment. As per Article 35 of the Constitution of India, notwithstanding anything contained in the Constitution, the Parliament shall have and the Legislature of a State shall not have the power to make laws with respect to any of the matters which, under clause (3) of Article 16 may be provided for law made by Parliament. Therefore, impugned Notification/Order making 100% reservation for the local resident of the concerned Scheduled Area/Districts (reservation on the basis of resident) is ultra vires to Article 35 r/w Article 16(3) of the Constitution of India.

100. Applying the law laid down by this Court in the case of *Chebrolu Leela Prasad Rao* (supra) and in view of the above discussion and for the reasons stated above, the High Court has not committed any error in concluding and holding that the Notification No. 5938 and Order No. 5939 dated 14.7.2016 issued by the State Government providing 100% reservation for the local residents of concerned Scheduled Districts/Areas as being unconstitutional and ultra vires Articles 14, 13(2), 15 and 16 (2) of the Constitution of India. It is rightly observed and held that said Notification and Order would also violate Articles 16(3) and 35(a-i) of the Constitution of India. The High Court has also rightly observed and held that aforesaid Notification and Order is ultra vires to paragraph 5(1) of the Fifth Schedule of the Constitution of India. We are in complete agreement with the view taken by the High Court.

101. Now, so far as the prayer made on behalf of the respective appellants herein-candidates belonging to the Scheduled Districts/Areas who were already appointed and whose appointments are held to be illegal is concerned and their plea that the judgment of the High Court may be made applicable prospectively is concerned, the same may not be accepted. Reliance is placed upon the order passed by this Court in the case of *Chebrolu Leela Prasad Rao* (supra), by which, even this Court saved the appointments already made and the another decision of this Court in the case of *Kailash Chand Sharma* (supra) is concerned, such a prayer is not to be accepted. Once the Notification/Order dated 14.07.2016 are held to be ultra vires. as a necessary

consequences, appointments made pursuant to such unconstitutional Notification/Order shall have to be set aside and such appointments as such cannot be regularized. As observed and held by this Court in the case of *Secretary, State of Karnataka v. Umadevi* (supra), there is a distinction between illegal and irregular appointment and that the former cannot be regularized.

102. Now, so far as reliance placed upon the decision/order passed by this Court in the case of *Chebrolu Leela Prasad Rao* (supra) (para 167 to 169) is concerned, at the outset, it is required to be noted that before this Court the appointments were made since 1986 onwards and such appointments continued for a number of years and therefore, this Court saved the appointments already made which were continued for a number of years. While saving the appointments already made (which as such were found to be illegal), this Court specifically observed that "in the peculiar facts and circumstances, the incumbents, who have been appointed, cannot be said to be at fault and they belong to the Scheduled Tribes". Even saving of the appointments was conditional as observed in para 168.

103. Now, so far as reliance placed upon the decision of this Court in the case of *Kailash Chand Sharma* (supra) in support of the prayer to apply judgment of the High Court prospectively and/or to save appointments already made is concerned, it is to be noted that in the said judgment also in para 47, it is specifically observed by this Court that the Court has moulded the relief on a consideration of special facts and circumstances of the case by acting within the framework of powers vested in this Court under Article 142 of the Constitution. It is further observed that even the judgment may not be treated as a binding precedent in any case that may arise in future. Therefore, once this Court has specifically observed that the said judgment may not be treated as a binding precedent in any case that may arise in future, the said judgment ought not to have been relied upon on behalf of the appellants.

104. In the present case, impugned Notification/Order is of the year 2016. The TGT recruitment process was initiated vide advertisement dated 28.12.2016 as modified on 04.02.2017 and same came to be challenged during the pendency of the recruitment process in the year 2017 itself. It is also required to be noted that by order dated 21.2.2019 the Division Bench of the High Court directed that notice be published in the daily newspapers having wide circulation about institution of the writ petition so that the person interested may intervene in the writ petition. Pursuant to such notice, several interlocutory applications/intervener applications came to be filed, which came to be allowed by the High Court. Thereafter, by order dated 18.09.2019, taking into consideration the question of Constitutional importance involved in the matters, the Division Bench of the High Court referred the matter to be decided by a Larger Bench. By the same order dated 18.09.2019, the High Court stayed the further implementation and operation of the impugned Notification No. 5938 and Order No. 5939 dated 14.7.2016, subject to the appointments already made, if any. Thus, from the aforesaid it can be seen that the original writ petitioners are always vigilant and diligent and approached the High Court at the first available opportunity. Their valuable right for consideration of their cases for appointment in the Scheduled Districts/Areas have been taken away. They have been successful before the High Court. Therefore, in the facts and circumstance of the case, the decision relied upon on behalf of the appellants to make impugned judgment and order passed by the High Court prospectively shall not be applicable to the facts of the case on hand. In the facts and circumstances of the case, the prayer on behalf of the appellants herein to make the impugned judgment and order passed by the High Court applicable prospectively, deserves to be rejected and is accordingly rejected.

105. However, at the same time and in the facts and circumstances of the case and more particularly, by quashing and setting aside the appointments already made there

is a likelihood of more complication which would not be in the larger public interest. Hence, we are of the opinion that this is a fit case to mould the relief. Apart from the fact that the appellants herein - selected candidates belonging to the Scheduled Districts/Areas are already working since last about three years, in case appointments already made are not protected then thousands of schools in the State of Jharkhand would be without teachers and the ultimate sufferers would be the children of tribal areas. In view of the impugned judgment and order passed by the High Court, by which, the High Court has held all the appointments made in Scheduled Districts/Areas illegal and has further directed to go for fresh recruitment, the State will have to undergo fresh recruitment process which may take considerable time and, in the meantime, there shall be vacancies and number of schools in the tribal areas shall be without teachers. Therefore, the Court has to strike a balance between the rights of the original writ petitioners as well as persons/teachers already appointed (whose appointments are held to be illegal) and also the public interest. Hence, we are of the opinion that while moulding the relief, instead of initiating a fresh recruitment process, if directions are issued for preparation of fresh selection list based on revised merit and based on already published cut off obtained by the last selected candidate in each TGT subject against respective categories., it will meet ends of justice and striking the balance between the competing rights so that persons already appointed may not have to lose their employment/job and at the same time the candidates belonging to the non-Scheduled Districts/Areas may also get their opportunity for appointment as a teacher on merits in the Scheduled Districts/Areas. We are of the view that no useful purpose will be served to go in for fresh/de novo recruitment process as directed by the High Court in the impugned judgment and order.

106. In view of the above discussion and for the reasons stated above, we uphold the common impugned judgment and order passed by the High Court declaring the impugned Notification/Order dated 14.07.2016 as unconstitutional and ultra vires Articles 14, 16(2), 16(3) and 35(a-i) of the Constitution of India. We are in complete agreement with the view taken by the High Court. Present Appeals challenging the impugned common judgment and order passed by the High Court are hereby dismissed to the aforesaid extent.

107. However, at the same time, the directions issued by the High Court in the impugned judgment and order while setting aside all the appointments made pursuant to the Notification/Order dated 14.07.2016 and Advertisement No. 21 of 2016 dated 28.12.2016 as modified on 04.12.2017 and to go in for fresh/de novo recruitment process for the Scheduled Areas/Districts is hereby modified. It is now directed that instead of fresh/de novo recruitment process by setting aside the appointments already made in the Scheduled Districts/Areas, the State shall revise the merit list based on the already published cut off obtained by the last selected candidates in each TGT subject against the respective categories with respect to entire State and respective candidates belonging to the non-Scheduled Areas and Scheduled Areas (Districts) shall be adjusted accordingly on the basis of individual merit of the candidates. The present directions are issued considering the peculiar facts and circumstances of the case and more particularly considering the fact that there are already vacant posts of teachers in the State (in both Scheduled and non-Scheduled Area). We are of the view that if the appointments already made are set aside and fresh de novo recruitment process for such posts is initiated, a number of schools in the Scheduled Areas shall be without any teacher which may ultimately affect larger public interest and education of concerned children in the Scheduled Areas.

108. Present direction is issued in exercise of powers under Article 142 of the Constitution of India in the larger public interest of Scheduled Areas/Districts.

109. Present appeals are partly allowed to the aforesaid extent modifying the impugned common judgment and order passed by the High Court as observed herein

above.

110. In the facts and circumstances of the case, there shall be no order as to costs.

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