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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 22.05.2019.
Date of Decision: 02.07.2019.

\+ **W.P.(C) 1200/2016**

SYED MEHEDI ..... Petitioners

Through: Mr.Ashok Agarwal, Mr.Anuj Aggarwal, Mr.Tenzing Thinglay & Mr.Kumar Utkarsh, Advs.

versus

GOVT OF NCT OF DELHI & ORS. ….. Respondents

Through: Mr.Avnish Ahlawat, Standing Counsel, GNCTD (Services) along with Mr.Nilesh Kumar Singh & Ms.Sakshi Shairwal, Advs.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J

JUDGMENT

1. The present writ petition under Articles 226 & 227 of the Constitution of India assails the order dated 05.01.2016 passed by the Principal Bench, Central Administrative Tribunal, New Delhi dismissing O.A.No.3805/2014 preferred by the petitioner, wherein he had challenged the respondents' rejection of his request to be granted age relaxation in order to qualify for the post of Special Education Teacher in Delhi government schools.

2. The petitioner, whose date of birth is 09.08.1976, acquired his degree in B. Ed. (Special Education) in the year 2009 from Durga Bhai Deshmukh College of Education Teacher (affiliated with the University of Delhi). The petitioner also holds a degree in M.A. (Psychology) and had qualified the Central Teaching Eligibility Test (CTET) conducted by the Central Board of Secondary Education (CBSE) in June, 2011.

3. On 16.09.2009, this Court, vide its judgment in ***Social Jurist v. Govt. of NCT of Delhi (2009) 163 DLT 498***, had directed the respondents and other government agencies to take steps to recruit special educators in all schools managed by the state government and local government bodies. This direction was issued keeping in view the provisions of the Persons with Disability Act (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. In compliance with the aforesaid directions, the respondents notified the Directorate of Education, Special Education Teacher for (a) Physically Handicapped, (b) Speech Impaired, (c) Mentally Retarded and (d) Partially Sighted Group 'B' Post Recruitment Rules,2010 (hereinafter referred to as 'the Recruitment Rules') on 04.11.2010 which provided for, *inter alia*, the qualifications for the post of Special Education Teacher (SET). Although the Recruitment Rules prescribed an upper age limit of 30 years for an applicant from the unreserved category applying for the post of SET, the said age limit could be relaxed upto 5 years for a government servant, as per the instructions issued by the government. It is noteworthy that Rule 5 of the Recruitment Rules - the provision dealing with the power to

grant relaxation in recruitment criteria, grants the government the specific power to relax any of the provisions of the Recruitment Rules pertaining to any class or category of persons.

4. Upon notifying the Recruitment Rules, the respondent nos.1 & 2 sent a requisition to the DSSB/respondent no.3 for selection to the post of SET. In pursuance thereof, the respondent no.3 advertised vacancies for the said post in the year 2011, for which the petitioner had submitted his application. However, the said advertisement was cancelled on 02.06.2012 and, in 2013, a fresh requisition for selection to the post of SET was made by the respondent no. 2 pursuant whereto, the respondent no. 3 issued advertisement no. 01/2013 inviting applications for appointment to the posts of various categories of teachers in schools run by the Government of National Capital Territory of Delhi (GNCTD). Soon thereafter, the respondent no. 3, issued a public notice dated 26.03.2013 informing the candidates that, under the directions issued by the Lieutenant Governor, GNCTD, the Recruitment Rules pertaining to the post of SET were being relaxed; the said relaxation was to the effect that those candidates who were working as resource persons for children with special needs in Sarva Shiksha Abhiyan (SSA) were to be granted age relaxation to the extent of the number of years they had worked in the SSA and that, additionally, a blanket age relaxation of 10 years was being granted to all female candidates. Since the petitioner was not eligible for any relaxation under the aforesaid notice and was already overage, having attained the age of 36 years, he submitted representations to the Lieutenant Governor, GNCTD,

as also to the Chief Secretary, GNCTD on 28.03.2013, seeking relaxation of the age limit applicable to his case and with the same prayer, he preferred O.A. No. 1173/2013 before the Tribunal on 05.04.2013. The Tribunal, vide its interim order dated 09.04.2013 passed in the aforesaid OA, directed the respondents to permit the petitioner to participate in the selection process, while clarifying that his result was to be kept in a sealed cover. On 28.04.2013, the petitioner appeared in the examination conducted by the respondent no. 3 and his result was kept in a sealed cover. After completion of pleadings, though the Tribunal dismissed the OA vide its order dated 07.03.2014, but while doing so, it noted the fact that a number of posts of SET in the country were lying vacant despite the availability of qualified, but overage, candidates by observing as under:

> *" However, before parting with the case, we are constrained to observe that the posts of Special Education Teachers are created on the directions of the Courts for a laudable purpose to help, assist, train and guide those unfortunate children who are differently abled, to meet the challenges of the life. If the posts of Special Education Teachers are allowed to be lying vacant, despite qualified persons are available (may be overaged), not only the purpose for which they are created is frustrated but also it affects the rights of those innocent specially/differently abled children. Hence, we expect that the Respondent shall address the whole issue in a proper perspective and take a conscious decision to provide one time age relaxation to all those persons, who are otherwise eligible and qualified for appointment, so that all the Special Education Teacher posts are filled up, as expeditiously as possible, preferably before the next notification for filling up the Special Education Teacher posts, is issued.*
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> *9. In the result, the OA is dismissed, and the interim order is vacated. No order as to costs."*

5. The petitioner impugned the aforesaid order of the Tribunal before this Court, by way of a writ petition being WP(C) No. 2887/2014. This Court, after considering the fact that the appointments to the post of SET had been initiated after an inordinate delay, allowed the petition vide its order dated 10.07.2014, and directed the respondents to consider the petitioner's request for age relaxation by taking into consideration the fact that due to the delay in the initiation of the recruitment process, many eligible candidates might have become ineligible, as also the fact that a blanket relaxation of 10 years had been extended to female candidates for the same post. The respondent/GNCTD was granted six weeks to comply with the said order.

6. In purported compliance of the order dated 10.07.2014, the respondents issued Office Order dated 17.09.2014 wherein, after acknowledging that female candidates had been granted age relaxation of 10 years, the petitioner's request was rejected on the ground that no case had been made out for extending the same age relaxation to male candidates. The petitioner, aggrieved by this office order, initially submitted a representation to the respondents and, thereafter, preferred O.A. No. 3805/2014 before the Tribunal seeking *inter-alia* grant of age relaxation to him as also quashing of the Office Order dated 17.09.2014.

7. Before the Tribunal, the respondents once again took the plea that it was the prerogative of the employer to prescribe the method of selection, qualification and age criteria for filling up vacant posts and that no challenge thereto can be entertained by the courts. It was

contended that once the respondents did not find sufficient cause to grant relaxation to the petitioner, who admittedly did not fulfil the prescribed eligibility criteria, no direction could be issued to them for grant of relaxation to the petitioner. It was further contended that relaxation could not be claimed by the petitioner as a matter of right.

8. After considering the rival contention of the parties, the Tribunal, vide its impugned order, dismissed O.A. No. 3805/2014 by observing as under:

> *"16. In its order dated 7.03.2014 in OA 1173/2013 (supra), a Coordinate Bench of this Tribunal had agreed with the contention of the respondents that the relief seeking direction to the respondents to give age relaxation is not permissible as per law and it is totally the prerogative of the executive in exercising the power under Rule 5 of the Recruitment Rules and unless sufficient ground has been shown, this Tribunal cannot interfere in such matters. This reasoning is also supported by various judgments of the Hon'ble Apex Court cited by the respondents (para 9 above). Based on this reasoning, the OA was dismissed. In other words, the Tribunal held that different criteria for male and female candidates is a reasonable classification and is not violative of Articles 14 and 16 of the Constitution of India. We cannot take a view contrary to that.*
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> *17. Moreover, the fact is that for balance 670 vacancies, the examination has already been held, which indicates the sincerity of the respondents to honour the observations of the Courts to fill up the vacancies on priority basis.*
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> *18. In view of above discussion, we do not find merit in this OA and it is, therefore, dismissed. No costs."*

9. In these circumstances, the present petition has been preferred, impugning the order passed by the Tribunal in OA No. 3805/2014.

10. When the present petition came up for preliminary hearing, this Court, after considering the fact that there was a huge shortfall of Special Education Teachers and that there was a crying need for

filling up such posts to provide education and training to children with special needs, directed the respondents to place the same for reconsideration before the Lieutenant Governor, GNCTD. This Court, while remanding the matter to the Lieutenant Governor, GNCTD vide its order dated 28.11.2018, noted that the process of recruitment for the post of SET was not similar to other recruitments carried out ordinarily inasmuch as, the number of applications received in the case of other recruitments was far higher. The Court also noted the fact that once female candidates had been granted age relaxation of 10 years, there was no reason as to why, in the present facts, male candidates were being denied the same age relaxation. Pursuant to the aforesaid orders, the respondents have issued an Office Order dated 19.02.2019, once again rejecting the petitioner's request for age relaxation. The relevant extract of the order dated 19.02.2019 reads as under:

> "*AND WHEREAS, the Hon'ble High Court in its judgment dated 10.07.2014 in WPC 2887/2014 has observed that its earlier judgment directing the Government to ensure availability of special teachers was delivered in 2009. It has further observed that "however, the first recruitment drive appears to have been undertaken more than four years later in 2013. Naturally, at the stage when the rules were notified, the eligible candidates/individuals who might have been otherwise eligible to hold the posts became ineligible, by sheer lapse of time. In these circumstances, it was to cater these situations and other exigency that the provision for age relaxation has been apparently factored in the rules". The Hon'ble Court also pointed out that "the Govt. had sought applications for 927 posts of which only about 200 could be filled-up and even as on date, several vacancies exist. The posts were re-advertised. It is pointed out further that despite successive examinations, the posts have not been filled.*

AND WHEREAS, it is observed that the petitioner was not a 'eligible candidate' even in 2009 when the Hon'ble Court delivered the onginal direction to provide for Special Education Teachers in all the schools since he was already 31 years of age even in the year 2009. Further, against examination conducted for 927 posts, 639 candidates appeared for the examination. Obliviously, number of candidates who applied may have been many more, which shows that the position with regard to availability of eligible candidates at that time was not so grim as has been projected by the appellant before the Hon'ble Court.

AND WHEREAS, the petitioner acquired the qualification required for the post of SET in 2009 when he was already overage as per the prevailing recruitment rules for the post of TGT. The opportunity to the petitioner became available only after RCl requested Chief Secretaries of all States to relax the upper age limit. Thus, the petitioner was quite aware, at the time of taking admission for B.Ed. (Special Education), of the fact that he will not be eligible for job in Directorate of Education even after the B.Ed. (Special Education).

AND WHEREAS, the clause 5 of the Recruitment Rules mentions that "Where the Government is of the opinion that it is necessary or expedient so to do, it may by order and for reasons to be recorded in writing, relax any of the provisions of these rules with respect to any class or category of persons." The provision under Clause 5 of the Recruitment Rules bestows power to relax the provisions of the Recruitment Rules for any class or category of persons and not for any individual.

AND WHEREAS, in compliance of Hon'ble High Court directions issued on 11/09/2017 in W.P.(C) No. 1200/2016, the matter was placed before Hon'ble LG, Delhi for his kind consideration and Hon'ble LG after considering the submission made by the department did not find any merit in the request of Shri Syed Mehedi for age relaxation and rejected the same.

AND WHEREAS, in compliance of Hon'ble High Court directions issued on 28.11.2018 in W.P.(C) No. 1200/2016, the matter was placed before Hon'ble L.G. Delhi for re-consideration and Hon'ble LG after reconsidering the submission made by the

deponent did not find any merit in the request of Shri. Syed Mehedi for age relaxation as the number of candidates appearing in the entrance test was more than the available vacancies as well as the examination has already been held and rejected the same."

11. In the light of the facts as noted hereinabove, Mr.Ashok Agarwal while impugning the order of the Tribunal, submits that the respondent, as also the Tribunal, have failed to appreciate the peculiar facts of the present case as noted by this Court in its earlier decision dated 10.07.2014 passed in WP(C) No. 2887/2014**.** He submits that this Court had already noted that even though the respondents were duty bound to appoint SET in compliance with their statutory duty to ensure provision of inclusive education to children with disabilities, by taking steps such as training and employing teachers who are trained for the purpose; the respondents had failed to perform their duty. He submits that this Court, therefore, was constrained to intervene and direct the respondents to frame recruitment rules for the post of SET and make appointments to the said post in an expeditious manner. He submits that it is only after the directions of this Court issued on 16.09.2009, that the respondents took steps to notify the Recruitment Rules and, thereafter, to initiate the selection process for appointment of Special Education Teachers. He submits that the process was ultimately initiated only in 2013, by which time not only the petitioner, but many other qualified Special Education Teachers, had become overage. He submits that the respondents, despite being aware that they may not be able to get the requisite number of applicants, did not exercise their power to relax the age criteria for the said post

while inviting applications to fill-up the 937 vacancies available for the post of SET. He submits that, in fact, the respondents received only 700 applications for the 937 total vacancies advertised; out of which, ultimately, 200 candidates were selected and appointed as Special Education Teachers. He submits that the respondents have wrongly equated the post of SET with the posts of teachers of other disciplines, for which a large number of qualified candidates vie for the vacant seats. He submits that in these circumstances, the respondents ought to have acted rationally – with concern for the differently – abled students in mind, and exercised their power to relax the age criteria, especially when they were aware that appointment to the said posts were being made for the first time in schools run by the GNCTD.

12. Mr.Agarwal further submits that even though the Tribunal, vide its order dated 07.03.2014, had dismissed the petitioner's first O.A., it had observed that the respondents should consider the aspect that the post of SET had been created on the directions of the Courts for a laudable purpose, i.e., to help, train and guide children who are differently-abled. However, if a large number of existing vacancies for the post of SET were permitted to remain unfilled, despite the availability of 'overaged' qualified candidates, the very purpose for which such posts were created would be frustrated, thereby affecting the rights of differently-abled children across the country. He submits that the Tribunal had specifically directed the respondents to provide a one-time age relaxation to all persons, who were otherwise eligible and qualified for appointment, in order to ensure that all the

posts of SET lying vacant are filled expeditiously. He submits that upon the petitioner challenging the said decision of the Tribunal, this Court had, while directing the respondents to reconsider the matter of granting age relaxation, once again observed that there was a crying need to fill up the posts of SET and that, once, all eligible female candidates had been granted age relaxation of 10 years, the petitioner's request for grant of age relaxation should be reconsidered, keeping in mind the fact that the first recruitment drive for the said post had been undertaken only in 2013, i.e., four years after the order dated 16.09.2009 passed by this Court directing the respondents to create and fill up the post of SET. He submits that despite such observations and directions by this Court, the respondents once again rejected the petitioner's request for grant of age relaxation on 17.09.2014 by holding that grant of age relaxation to male candidates, such as the petitioner, could not be acceded to. Mr.Agarwal submits that on 28.11.2018, during the pendency of these proceedings, this Court had, after perusing the order dated 17.09.2014, once again directed the respondents to reconsider the case of the petitioner for grant of age relaxation but the respondents have once again, vide the order dated 19.02.2019, rejected the petitioner's request by passing a wholly unreasoned order. He submits that a bare perusal of the said order shows that the respondents have not only overlooked the rationale highlighted in the repeated orders passed by this Court, but they have also ignored the relevant considerations and, in fact, have chosen to stick to their stand that no age relaxation would be granted to male candidates.

He submits that the attitude of the respondents clearly shows that they are not even conscious of their duties towards differently-abled children, who are being deprived of trained Special Educators like the petitioner and, as a result, even today atleast 1029 posts of SET are lying vacant owing to which, untrained guest teachers are purportedly imparting education to children with special needs. He submits that the differently-abled children have a fundamental right to receive education from trained and qualified teachers and, therefore, contends that the respondents – by adopting the rigid approach of denying the grant of age relaxation to qualified Special Educators like the petitioner, are perpetuating the injustice caused to these children. Mr.Agarwal, thus, urges this Court to direct the respondents to grant age relaxation to the petitioner, and any other over aged candidate who had applied for the post of SET in 2013 or even subsequently, in the light of the admitted position that over 1000 posts of Special Education Teachers are still lying vacant.

13. In support of his plea that this Court itself ought to direct the respondents to grant age relaxation to the petitioner, Mr.Agarwal places reliance on the following decisions:-

(i) Harigovind Yadav v. Rewa Sidhi Gramin Bank & Ors. [AIR 2006 SC 3596]

(ii) Sangita Srivastava v. University of Allahabad & Ors. [2002 3 AWC 2088 All]

(iii) B.C Chaturvedi v. Union of India & Ors. [AIR 1996 SC 484]

(iv) Comptroller and Auditor General of India, Gian Prakas, New Delhi & Ors. v. K.S. Jagannathan & Ors. [AIR 1987 SC 537]

14. On the other hand, Ms. Ahlawat while supporting the impugned order submits that the Tribunal was fully justified in holding that it is the prerogative of the executive to exercise its power to grant age relaxation by invoking Rule 5 of the Recruitment Rules. She submits that the Tribunal has relied upon various decisions of the Supreme Court while holding that the Tribunal is not competent to interfere in such matters relating to policy. She further contends that the power to grant relaxation under Rule 5 of the Recruitment Rules cannot be exercised especially for any particular individual and can be resorted to only when the competent authority is of the opinion that such relaxation is required to be granted to an entire class of persons. She, therefore, prays that the writ petition be dismissed.

15. Having considered the rival contentions of the parties and perused the record we find that the present petition raises a short, but important issue regarding the exercise of power of relaxation of recruitment criteria by the executive. The question really is whether the authority, which is vested with the power to grant relaxation, can simply state that the prevailing circumstances do not require grant of such relaxation – without the order disclosing application of mind to the relevant considerations repeatedly highlighted by the Court, and yet the Courts cannot interfere with the said decision, or whether, once the Court finds that the competent authority has failed to take into account all relevant factors, can the Court interfere with the said decision, particularly when the executive decision appears to be unreasoned and the fundamental rights of the differently – abled

children are at stake. An ancillary issue which arises is whether the Court, after finding that the decision of the competent authority is not based on due consideration of the relevant factors, can itself direct the authority to exercise the power of relaxation.

16. Before we deal with the rival contentions of the parties, we may refer to Rule 5 of the Recruitment Rules, which empowers the respondents to relax the provisions of the rules in appropriate circumstances. The same reads as under:

> *"5. Power to relax – Where the Government is of the opinion that it is necessary or expedient so to do, it may by order* ***and for reasons to be recorded in writing****, relax any of the provisions of these rules with respect in any class or category of persons."* (emphasis supplied)

17. Thus, the aspect whether, or not, to grant relaxation of any rule – like all other decisions of the executive, has to be governed by good reason and rationality. It is not a whimsical or arbitrary power that the executive is vested with. The reasons should exist and should be disclosed by recording the same in writing. Reasons should exist, and be recorded, not only when the power of relaxation is exercised, but also when the executive declines the relaxation. It may also be appropriate to refer to Section 3 of the Right of Children to Free and Compulsory Education Act, 2009 ("Right to Education Act" for short) which reads as under:

> *"3(1)* ***Every child of the age of six to fourteen years****, including a child referred to in clause (d) or clause (e) of section 2,* ***shall have the right to free and compulsory education in a neighbourhood school till the completion of his or her elementary education****.*

3(3) A child with disability referred to in sub-clause (A) of clause (ee) of section 2 shall, without prejudice to the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, and a child referred to in sub-clauses (B) and (C) of clause (ee) of section 2, have the same rights to pursue free and compulsory elementary education which children with disabilities have under the provisions of Chapter V of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995(1 of 1996):

Provided that a child with "multiple disabilities" referred to in clause (h) and a child with "severe disability" referred to in clause (o) of section 2 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999(44 of 1999) may also have the right to opt for home-based education.]" (emphasis supplied)

We may now refer to Sections 16 and 17 of the Rights of Persons with Disabilities Act, 2016, ("Disabilities Act" for short) which read as under:

"Section 16: Duty of educational institutions.

The appropriate Government and the local authorities shall endeavour that all educational institutions funded or recognised by them provide inclusive education to the children with disabilities and towards that end shall--

(i) ***admit them without discrimination and provide education and opportunities for sports and recreation*** *activities equally with others;*

(ii) make building, campus and various facilities accessible;

(iii) provide reasonable accommodation according to the individual's requirements;

(iv) provide necessary support individualised or otherwise in environments that maximise academic and social development consistent with the goal of full inclusion;

(v) ***ensure that the education to persons who are blind or deaf or both is imparted in the most appropriate languages and modes and means of communication****;*

(vi) *detect specific learning disabilities in children at the earliest and take suitable pedagogical and other measures to overcome them;*

(vii) monitor participation, progress in terms of attainment levels and completion of education in respect of every student with disability;

(viii) *provide transportation facilities to the children with disabilities and also the attendant of the children with disabilities having high support needs."* (Emphasis supplied)

"Section 17: Specific measures to promote and facilitate inclusive education,

The appropriate Government and the local authorities shall take the following measures for the purpose of section 16, namely*:--*

(a) to conduct survey of school going children in every five years for identifying children with disabilities, ascertaining their special needs and the extent to which these are being met:

Provided that the first survey shall be conducted within a period of two years from the date of commencement of this Act;

(b) to establish adequate number of teacher training institutions;

(c) to train and employ teachers, including teachers with disability who are qualified in sign language and Braille and also teachers who are trained in teaching children with intellectual disability;

(d) to train professionals and staff to support inclusive education at all levels of school education;

(e) to establish adequate number of resource centres to support educational institutions at all levels of school education;

(f) to promote the use of appropriate augmentative and alternative modes including means and formats of communication, Braille and sign language to supplement the use of one's own speech to fulfill the daily

communication needs of persons with speech, communication or language disabilities and enables them to participate and contribute to their community and society;

(g) to provide books, other learning materials and appropriate assistive devices to students with benchmark disabilities free of cost up to the age of eighteen years;

(h) to provide scholarships in appropriate cases to students with benchmark disability;

(i) to make suitable modifications in the curriculum and examination system to meet the needs of students with disabilities such as extra time for completion of examination paper, facility of scribe or amanuensis, exemption from second and third language courses;

(j) to promote research to improve learning; and

(k) *any other measures, as may be required."*(emphasis supplied)

18. Thus, what emerges from a combined reading of these three provisions is that the legislature, while extending free and compulsory education to all children in the country as per its constitutional mandate, was sensitive to the special care and assistance required by differently - abled children while pursuing their education and has, thus, endeavoured to protect and further their rights to education by inserting special provision to that effect. For the discharge of the statutory duties and responsibilities cast on the State in Section 3 of the Right to Education Act, and Sections 16 and 17 of the Disabilities Act, the engagement of SET is absolutely essential, as only those teachers who are specially trained to deal with children with special needs can effectively achieve the said objectives. A statutory duty has been cast upon the respondents to ensure that all educational institutions, funded and recognised by them, provide inclusive education to children with special needs and

raise the requisite infrastructure to serve that purpose. The respondents have, in fact, been directed to ensure that this process of inclusivity of disabled children begins by ensuring that they are admitted in educational institutions without discrimination, and are granted equal opportunities to partake in activities with other children. The respondents are also obligated to put in place and promote adequate measures in furtherance of the objective to attain inclusive education for children with special needs by *inter alia* facilitating research to improve the methodology adopted to teach them and monitoring their overall progress within the existing educational system.

19. In the light of these statutory duties cast upon the respondents what emerges is that, though, the respondents initiated the process of creating the post of SET for schools under the GNCTD, they filled the same only under the directions of this Court; even though there was a statutory duty cast upon them to do so on their own accord, not only under the Disabilities Act but also under the Right to Education Act.

20. It is also an undisputed position that despite their repeated attempts, the respondents have not been able to fill the said posts of SET because the respondents are not willing to budge from their rigid mindset – not to grant age relaxation to male teachers – irrespective of which ever subject they have specialised in; offered their candidature for; the number of vacancies existing in the concerned post; the number of qualified applicants available; the nature of posts for which the age relaxation is required to be

considered, and; other relevant factors noticed above. Mrs. Ahlawat has categorically admitted during the course of hearing that despite the recent recruitment drive initiated in 2018, the respondents still have over 1000 posts of SET lying vacant. Despite such grim figures, and this Court repeatedly urging the respondents to view this matter holistically and with the sensitivity that it deserves – by not treating the distinct post of SET at par with other posts of teachers in other regular disciplines, the respondents rejected the petitioner's request for consideration of grant of age relaxation.

21. In our view, the question which the respondents ought to have addressed while considering the petitioner's request, was: Whether, in the light of the fact that the posts of SET are not being filled despite the respondents' repeated attempts to do so, should the power to grant age relaxation not have been invoked by the respondents in the present case? A further question which ought to have been addressed by the respondents was: Whether, while considering the case for grant of age relaxation, the rights and interests of differently-abled children who are being deprived of qualified teachers, should also have been considered?

22. The respondents, while dealing with the petitioner's prayer, ought to have taken into account the fact that, even though it is the employer's prerogative to prescribe the recruitment norms, including the age criteria, the employer has a simultaneous duty to ensure that vacant posts are substantially filled by qualified persons, even if that implies the grant of age relaxation to a certain extent.

23. There is no taboo against age relaxation. This is evident from the fact that the respondents have granted age relaxation to all female candidates – in respect of all subjects/posts, irrespective of availability of qualified candidates even without age relaxation to fill the advertised posts. The power of age relaxation has been vested in the competent authority by the legislature, being mindful of the fact that situations may arise when, in the interest of ensuring availability of sufficient number of candidates, age relaxation may be necessary. The said duty of the government to grant age relaxation is even more onerous when it comes to the posts of SET, keeping in view the fact that these teachers play a very important role in the development, growth and assimilation into society of differently-abled children.

24. Here we may observe that the differently abled children belonging to poor and middle – class families are the worst sufferers. So far as the affluent families are concerned, they can make private arrangements to teach/train such children, as they have the necessary resources. It is the poor and middle class families, who send their children to schools funded by and run by the respondents, who are wholly dependent on the State to tackle the difficult situation they find themselves in. The parents of such children are not trained to impart education and skill to such children, and they cannot afford to admit their children – who need special care, to private institutions.

25. The issue of age relaxation had to be considered by the respondents in a wholesome manner; with the right sensitivities, and; not with a narrow straight jacket perspective, as they have done in the present case. In fact, a perusal of both the rejection orders shows

that the respondents have merely reproduced the past history of the post of SET and the orders passed by this Court in the present petition, without applying their mind to the factors repeatedly highlighted by this Court. Their only reason is that the petitioner was already overage in 2009 when he acquired the qualification required for the post of SET, and that he could not be granted age relaxation individually. We cannot appreciate how such objections can come in the way of grant of age relaxation! It is clear to us that the germane aspects – we have referred to above, have been completely omitted from consideration by the respondents. The lack of concern and sensitivity towards their own constitutional and statutory obligations – to ensure that the right to education of the differently enabled children is not violated, and that they are imparted knowledge and skill effectively through specially trained and qualified SET, can be gauged from the fact that they do not consider the huge gap in the number of vacant posts and the number of application received as significant.

26. We, thus, have no hesitation in coming to the conclusion that the respondents, despite being vested with the power – which is coupled with the duty to act reasonably and with responsibility, to grant relaxation in appropriate cases, have failed to consider the relevant factors and misdirected themselves by examining the issue in a myopic manner, without taking into consideration the constitutionally and statutorily recognised and protected rights of children with disabilities. The respondents' rejection of the petitioner's request by way of the orders dated 17.09.2014 and

19.02.2019 is, therefore, not sustainable and liable to be set aside. We, accordingly, quash these orders.

27. In these circumstances, the next question before this Court is that once we have come to conclusion that the decision of the respondents not to grant the age relaxation is erroneous, whether we should once again remit the matter back to the respondents, or whether we should take it upon ourselves to consider the petitioner's request for grant of age relaxation. We have given our thoughtful consideration to this issue. We are conscious that, ordinarily, it is for the competent authority to decide on administrative and policy matters, such as, whether to grant relaxation of criteria for recruitment in terms of the powers prescribed to it under the recruitment rules; but in the present matter, in view of the respondents' refusal to consider the said aspect by due application of mind to the relevant consideration – despite the same being repeatedly highlighted by this Court, we have no doubt in mind that yet another remand to the respondents would only cause further delay and hardship, not only to the petitioner but also to the beneficiaries, who are young and innocent children with special needs studying in schools run by the respondents GNCTD.

28. The plea of the respondents that in the absence of regularly appointed SET, education is currently being imparted to these children by guest teachers needs only to be noted, to be rejected. The guest teachers, who evidently do not fulfil the eligibility criteria prescribed in the recruitment rules, cannot be considered an appropriate substitute for Special Education Teachers possessing the

requisite qualifications. Once we find that the respondents are acting in a patently arbitrary, stubborn and mindless manner, and now that all the relevant material in the present case has been placed before us, we will be failing in our duty if we do not consider the aspect of age relaxation on merits, not as much for the benefit of the petitioner – who has no vested right to demand age relaxation as a matter of right, but keeping in view the constitutional and statutory obligation of the respondents and corresponding rights of the differently – abled children. In this regard, reference may be made to the decision in ***B.C. Chaturvedi*** (supra) which has been relied upon by the petitioner and states as under:

> "*25. No doubt, while exercising power under Article 226 of the Constitution, the High Courts have to bear in mind the restraints inherent in exercising power of judicial review. It is because of this that substitution of the High Court's view regarding appropriate punishment is not permissible. But for this constraint, I would have thought that the law-makers do desire application of judicial mind to the question of even proportionality of punishment/penalty. I have said so because the Industrial Disputes Act, 1947 was amended to insert Section 11-A in it to confer this power even on a labour court/industrial tribunal. It may be that this power was conferred on these adjudicating authorities because of the prevalence of unfair labour practice or victimisation by the management. Even so, the power under Section 11-A is available to be exercised, even if there be no victimisation or taking recourse to unfair labour practice. In this background, I do not think if we would be justified in giving much weight to the decision of the employer on the question of appropriate punishment in service matters relating to government employees or employees of public corporations. I have said so because if need for maintenance of office discipline be the reason of our adopting a strict attitude qua the public servants, discipline has to be maintained in the industrial sector also. The availability of appeal etc. to public servants does not make a real difference, as the*

appellate/revisional authority is known to have taken a different view on the question of sentence only rarely. ***I would, therefore, think that but for the self-imposed limitation while exercising power under Article 226 of the Constitution, there is no inherent reason to disallow application of judicial mind to the question of proportionality of punishment/penalty. But then, while seized with this question as a writ court interference is permissible only when the punishment/penalty is shockingly disproportionate***." (emphasis supplied)

Further, reference may be made to the decision in ***Sangita Srivastava*** (supra), which was also relied upon by the petitioner and the relevant paragraphs therein read as under:

"33. ***Ordinarily suitability is to be judged by the executive Council and not by this Court. But what are we to do when the Executive Council acts in a patently unfair manner, as it has done in this case? This Court is a Court of Justice. No doubt it has to do justice based on law, but the Court will interpret law in a way that leads to justice and not injustice****.*

34. On the facts of this case, and ***in view of the fact that the Executive Council has acted on irrelevant considerations and has misdirected itself, and since a remand to it would lead to further delay and harassment of the petitioner, we ourselves have judged the petitioner's suitability and we find her suitable to be appointed as regular lecturer, and we hold that she fulfils all the requirements of Section 31(3)(c) of the Act, In the circumstances a mandamus is issued to the respondents to regularise the petitioner as lecturer in Home science forthwith and pay her salary of regular lecturer. The petition is allowed. No order as to costs.****"* (emphasis supplied)

29. In the light of the aforesaid decisions, we are of the considered opinion that remanding the matter back to the respondents for consideration of the petitioner's request for age relaxation would

lead to failure of justice. We are of the view that in a case like this, where there is a dearth of suitably qualified candidates for SET, it is qualification and merit which should be given due precedence. Relaxation of age ought to have been granted for appointment to the post of SET to all, who were otherwise eligible. While directing so, we are also mindful of the fact that women candidates selected for the same post have been granted a blanket relaxation of 10 years and, therefore, we see no reason as to why, in the light of the admitted shortage of SETs, the same relaxation was not granted to the male candidates as well. At this stage, we may also note that during the course of hearing, the result of the petitioner was produced before us, and having perused the same, we find that he possesses the requisite merit for selection.

30. So far as the submission of the respondents that the power of relaxation cannot be exercised in respect of an individual candidate is concerned, we are of the view that it is open to the respondents to grant such relaxation not only to the petitioner, but also to others, who may have similarly applied against the advertisement in question and whose candidature may not have been considered on account of the age bar. Moreover, that cannot be a reason to deny age relaxation to the petitioner, since the petitioner has been single-handedly pursuing this cause before the Court for a long time now.

31. To be fair to those candidates, who may not have applied in response to the advertisement in question on account of being age barred, we direct that the respondents undertake a further process of recruitment to fill up the vacant posts of SET without any delay, and

to incorporate the clause of grant of age relaxation to all candidates applying for the said posts to the extent required.

32. We allow this petition in the aforesaid terms and direct the respondents to ensure compliance qua the petitioner within the next four weeks, by granting him relaxation with regard to his age and considering his appointment to the post of SET on the basis of his merit position in the selection process already concluded. He will, however, be entitled to all benefits resulting from the said appointment, only from the date of his actual appointment to the said post. The respondents will also initiate the process for fresh recruitment to the post of SET, as directed hereinabove, within the same period of four weeks.

33. The parties are left to bear their respective costs.

(REKHA PALLI)
JUDGE

(VIPIN SANGHI)
JUDGE

JULY 2nd, 2019