Indira, M. Vs State of Kerala and Others

Court: High Court Of Kerala

Date of Decision: Dec. 19, 1997

Acts Referred: Constitution of India, 1950 â€" Article 14, 16, 309, 311, 39
Kerala Education Act, 1958 â€" Section 36
Kerala Education Rules, 1959 â€" Rule 1, 1(1), 2, 2(2), 3

Hon'ble Judges: N. Dhinakar, J; C.S. Rajan, J; B.M. Thulasidas, J

Bench: Full Bench

Advocate: C.P. Sudhakara Prasad, for the Appellant; Jayakumar, Government Pleader for Respondents 1 and 2, for the Respondent

Final Decision: Allowed

Judgement

B.M. Thulasidas, J.
These Original Petitions and O.P. No. 10125 of 1989 have come before us pursuant to the order of reference dated

25th June 1996 by a Division Bench, which held that the decision in W.A. Nos. 965 of 1987 and 519 of 1988 requires re-consideration. The

Division Bench itself had them on a reference made by order passed on O.P. No. 301 of 1988 dated 10th January 1993, where a doubt was

expressed as to the correctness of some of the findings and observations in the above writ appeals. But before we consider the questions raised in

these Original Petitions, we must record the submission that O.P. No. 10125 of 1989 is in regard to a different question, which will not fall for

consideration along with the above Original Petitions, where alone common questions of law are involved. Accordingly that Original Petition shall

stand deleted from O.P. Nos. 301 of 1988 and 3113 of 1989 and is directed to be placed before the appropriate Court.

2. The Petitioners are respectively Headmistresses of Parvathi Vilasom L.P.S., Kailasamkunnu and U.M.A.L.P.S. Chathangottupuram, under the

management of the concerned Managers arrayed as Respondents 3 and 4 in those Original Petitions. The order of appointment of the Petitioner in

O.P. No. 301 of 1988 is Ext. P-1. The other Petitioner was stated to have been appointed as Headmistress on 13th June 1976. These

appointments were approved by the Assistant Educational Officers, Kilimanoor and Quilon respectively. The staff fixation of Parvathi Vilasom L.P.

School was made as per Ext. P-2 order dated 15th July 1976, where the post of Headmaster was also included among the staff of the school. As

per G.O. (Ms.) 55/73/G. Edn., dated 24th April 1973, which is Ext. P-3 in O.P. 301 of 1988 (Ext. P-1 in the other O.P.), the Government

sanctioned a new scale of pay for Headmasters of L.P. and U.P. schools with effect from 1st June 1973. They have said that they were not given

that scale of pay, which was subsequently revised with effect from 1st July 1978 in view of G.O. (Ms.) 242/74/G. Edn., dated 11th December

1974, which is Ext. P-4 in O.P. 301 of 1988 and Ext. P-2 in the other O.P. One Ambika Kumari Amma, Headmistress, Ayiravilly U.P. School,

who was similarly placed as the Petitioners, challenged Ext. P-4/P-2 in O.P. No. 3260 of 1980 and by Ext. P-5/P-3 judgment this Court repelled

the contention of the Government and held that Headmasters of both aided and Government Upper Primary Schools should get the same scale of

pay, that the Government Order violated the said rule and it was accordingly set aside. It was further held that:

the only rule that could hold the field from the date of her appointment is the rule recognised in Chapter XXVI Rule (1) and Ext. P-6. Her case that

she should be given the scale of pay, which as per Ext. P-2 is the scale of pay of Headmasters in her school, has, therefore, to be accepted. There

is no question of any alteration in her scale of pay because of the reference therein that it will take effect from 1st July 1978.

The Respondents in that Original Petition were directed to pay salary due to her in the scale of Rs. 330-375 from 26th March 1975. In the wake

of this judgment the Government issued G.O. (P) No. 191/80/G. Edn., dated 18th November 1980, which is Ext. P-6/10, which was given

retrospective effect from 1st July 1978.

3. Claiming the same benefits as granted to Ambika Kumari Amma, Petitioners submitted representations. By G.O. (Rt.) No. 884/86/G. Edn.,

dated 10th March 1986, the Petitioner in O.P. No. 301 of 1988 was found entitled to get the Headmasters'' scale of pay from 1st July 1976.

Copy of the order is Ext. P-7. But in the case of the other Petitioner, Government turned down her request by Order, Ext. P-9 in O.P. No. 3113

of 1989 on the ground that she will be entitled to claim Headmasters'' scale only after completing 15 years of service as a teacher, relying upon

Ext. P-10 order, which was already considered in O.P. No. 3160 of 1980, where it was held that it will not apply to appointments made earlier

than 1st July 1978, the date on which the order was given effect to. It is submitted bv Petitioner in O.P. No. 301 of 1988 that in spite of Ext. P-7

Government Order, she was not given the Headmasters'' scale of pay. Allegedly the Assistant Educational Officer wrote to the Director of Public

Instruction that she could not be paid Headmasters'' scale since the school became a High School only during 1980. He had in turn informed the

Government as per Ext. P-8 dated 22nd July 1986. She sent a detailed representation on 10th September 1987 to the Government, copy of

which is Ext. P-9. Thereafter, the Government as per G.O. (Rt.) No. 3091/87/G. Edn., dated 19th October 1987, copy of which is Ext. P-10,

cancelled Ext. P-7, whereby she was held not entitled to claim Headmasters'' scale of pay from the date of her appointment. The Petitioner in O.P.

No. 3113 of 1989 received Ext. P-11 communication dated 5th June 1985, to which she sent Ext. P-12. Since nothing was heard, she filed O.P.

No. 10812 of 1985 to quash Ext. P-9 and for a direction to give her the scale of pay as due to Headmasters from 13th Tune 1976, that was

dismissed as per Ext. P-13, against which she filed W.A. No. 66 of 1986, pending which the Government amended Rule 1 in Chapter 26 of the

K.E.R. by substituting Sub-rule (1) in the place of the earlier one, as per G.O. (P) No. 136/88/G. Edn. dated 8th September 1988, copy of which

is Ext. P-11 in O.P. No. 301 of 1988 and Ext. P-14 in the other. Eventually by Ext. P-15 (in O.P. No. 3113 of 1989) judgment the Writ Appeal

was dismissed as withdrawn, giving the Petitioner liberty to file a fresh petition challenging the amendment to the rule as aforesaid. In both these

petitions Petitioners have challenged Ext. P-11/14 as illegal, unconstitutional and ultra vires. The Petitioner in O.P. No. 301 of 1988 has prayed for

the following, reliefs:

(i) issue a writ of certiorari or any other appropriate writ, direction or order calling for the records leading to Exts. P-6, P-8 and P-10 and

quashing the same;

(ii) issue a writ of mandamus or any other appropriate writ, direction or order asking Respondents 1 and 2 give Headmasters'' scale of pay to the

Petitioner with effect from 1st June 1976, the date on which she was appointed in that post;

(iii) issue a writ of mandamus or any other appropriate writ, direction or order asking Respondents to give all arrears of pay to the Petitioner

forthwith and also fix her salary in the Headmasters'' scale of pay;

(iv) issue a writ of mandamus or any other appropriate writ, direction or order declaring that Ext. P-11 amendment to Sub-rule (1) of Rule 1 of

Chapter XXVI of the Kerala Education Rules is unconstitutional, illegal and ultra vires; and

(v) grant such other and further reliefs as this Hon''ble Court may deem fit and proper in the circumstances of this case.

In the other Original Petition, the following reliefs were claimed:

(i) issue a writ of certiorari or any other appropriate writ, direction or order calling for the records leading to Ext, P-9 and quashing the same;

(ii) issue a writ of mandamus or any other appropriate writ, direction or order declaring that Ext. P-14 amendment to Sub-rule (1) of Rule 1 in

Chapter XXVI of the Kerala Education Rules is unconstitutional, illegal and ultra vires;

(iii) issue a writ of mandamus or any other appropriate writ, direction or order asking the Respondents to grant Headmasters" scale of pay to the

Petitioner from 13th June 1976 and to give her periodical revisions on the basis of that;

(iv) issue a writ of mandamus or any other appropriate writ, direction or order asking the Respondents to give arrears of salary due to the

Petitioner fixing her pay in the Headmasters" scale of pay with effect from 13th June 1976; and

(iv) grant such other and further reliefs as this Hon"ble Court may deem fit and proper in the circumstances of this case.

4. In O.P. No. 301 of 1988 a counter-affidavit has been filed on behalf of Respondents 1 and 2, viz. the Chief Secretary and the Assistant

Educational Officer, where it was not disputed that as per the staff fixation order for 1976-77 one temporary post of Headmaster and two

temporary posts of L.P. School Assistants were sanctioned and the Manager appointed her as Headmistress with the approval of the department.

But she was not paid the scale of pay admissible to Headmasters because the Government as per order dated 11th December 1974 (Ext. P-4/P-

2) prescribed 15 years" minimum service ""as pre requisite qualification for a new scale of pay for Headmasters"". Those who have less than the

minimum experience are eligible to get their grade pay as primary school teacher and supervision allowance admissible as per the existing rules and

rates. It was further said that there was no post of Headmaster at that time in the school, which was incomplete. She was also not identically

placed as Ambika Kumari Amma since there was no sanctioned post of Headmaster at the time of her appointment. Petitioner has misconstrued

the judgment in O.P. No. 3260 of 1980. The requirement of minimum 15 years service has been extended to departmental candidates as well. She

was denied the new scale of pay for Headmasters because at the relevant time she had not 15 years of minimum service. Her school was opened

on 1st July 1976 with Standard I and it became a complete L.P. School only in 1980, on and after which alone the post of Headmaster was

admissible. The post of Headmaster was sanctioned and approved during staff fixation order of 1976-77 erroneously. The appointment was

against the provisions in Rule 45A of Chapter 14A of K.E.R. She is not entitled to the benefits claimed and the Original Petition deserved to be

dismissed.

5. In the other Original Petition counter-affidavit has been filed on behalf of the first Respondent (Special Secretary to Government, Education

Department) where it was said that the Petitioner was first appointed as L.P.S.A. on 30th November 1972 in U.M.A.L.P.S. Chathamkottupuram

and had a continuous service in that school upto 12th June 1976. She was appointed as Headmistress in Vadakkevila Panchayat L.P. School with

effect from 13th June 1976. At the time of her appointment the school was an incomplete L.P. School having Standard I only and became a

complete L.P. School in 1979-80. Since she had not then 15 years of service and had also not test qualified, she was ineligible to the new scale of

pay for Headmasters. Her claim was considered in detail and rejected for valid reasons and that the orders could not be challenged. The minimum

requirement as to the length of service is common to Headmasters of both Government and aided Primary School Headmasters and that their

claims are untenable.

6. In the reply affidavit the Petitioner has denied almost all the averments and has submitted that even if the school has only Standard I, it is an L.P.

School and that the post of Headmaster has to be sanctioned. However as a matter of fact, during 1976-77 in the Vadakkevila Panchayat L.P.

School besides the post of Headmaster, six posts of L.P. School Assistants and one post of Arabic teacher were also sanctioned as per the order

of the Assistant Educational Officer dated 14th July 1976, copy of which is Ext. P-16. She was appointed as Headmistress with effect from 13th

June 1976. In the staff fixation orders during 1977-78, 1978-79 and 1979-80, Exts. P-17 to P-19, the post of Headmistress was allowed and

approved. She has continuous service as Headmistress effective from 13th June 1976. By order dated 16th November 1991 of the A.E.O.,

Kollam, copy of which is Ext. P-20, she was given Headmasters'' scale of pay from 30th November 1987, where her service with effect from 13th

June 1976 as Headmistress had been recorded. This was also noted in Ext. P-21 proceedings of the D.P.I. The prescription as to 15 years service

for claiming scale of pay of Headmasters has to be understood to have only prospective operation. At the time when Ext. P-14 amendment was

introduced, she had already obtained a right to claim Headmasters'' scale of pay, that was accepted in Ext. P-3 judgment, the benefits of which she

is also entitled to. There were proceedings before this Court at the instance of several other aggrieved persons and reference is made to O.P. No.

10029 of 1983 and pursuant to the judgment marked as Ext. P-22 the Petitioner in that Original Petition was given Headmasters'' scale of pay by

Government Order dated 29th November 1989, copy of which is Ext. P-23. Similarly one Ambujam, Headmistress, Government L.P. School,

Kozhikode also obtained the new scale of pay vide Ext. P-24 order. Ext. P-14 amendment is discriminatory.

7. Heard.

8. These Original Petitions have come before us on a reference by a Division Bench, which has doubted the correctness of the decision in Writ

Appeal Nos. 965 of 1987 and 519 of 1988, which it is said requires re-consideration. The relevant and basic facts in both cases are almost

identical. Petitioners are Headmistresses of Aided Primary Schools. Petitioner in O.P. No. 301 of 1988 was appointed as Headmistress with

effect from 1st June 1976 and the Petitioner in the other from 13th June 1976. By Government Order dated 24th April 1973 (we shall refer to the

documents as they are marked in O.P. No. 301 of 1988), Ext. P-3, a new scale of pay for Headmasters of both L.P. and U.P. Schools in the

State, who satisfied the conditions prescribed by Government Order dated 19th March 1971, was sanctioned with effect from 1st. June 1973.

They were however not given the Headmaster"s new scale of pay in view of Ext. P-4 dated 11th December 1974, whereby its eligibility was

restricted to those who completed a minimum 15 years service in a Primary School. This order was challenged in O.P. No. 3260 of 1980 by one

Ambika Kumari Amma, who was appointed as Headmistress from 20th March 1975, but was paid only the salary of a teacher. The authorities

denied her claim for the new scale of pay on the ground that she had not completed 15 years of continuous service in that school. It was

successfully argued that Ext. P-4 order discriminated between teachers in aided and departmental schools, which was violative of Rule 1, Chapter

XVI K.E.R., which the Court held entitled the Headmasters of both Aided U.P. Schools to get the same scale of pay that Ext. P-4 was violative of

that rule and was set aside. While that Original Petition was pending, the Government issued G.O. (P) No. 191/80, copy of which is Ext. P-6,

which was to take effect from 1st July 1978, by which ""minimum service of 15 years prescribed by Ext. P-4 to aided school teachers was

extended to departmental teachers as well"". Parity in regard to minimum service of 15 years was thus stated to have been achieved. But the Court

did not countenance the contention and said that Ext. P-6, which came into effect only from 1st July 1978, would not apply to her since she

became Headmistress on 26th March 1975 and observed that ""the only rule that could hold the field from the date of her appointment is the rule

recognised in Chapter XXVI Rule (1) and Ext. P-6. Her case that she should be given the scale of pay, which as per Ext. P-2 is the scale of pay

of Headmasters in her school, has, therefore, to be accepted. There is no question of any alteration in her scale of pay because of the reference

therein that it will take effect from 1st July 1978."" In the wake of this judgment the Petitioners made representations to the authorities. In the case

of the Petitioner in O.P. No. 301 of 1988, the representation was accepted, that resulted in Ext. P-7 order dated 10th March 1986, whereby she

was found eligible for the Headmaster''s scale of pay from the date of her appointment i.e. 1st June 1976. But then on the basis of the

communication from the D.P.I. dated 22nd July 1986, copy of which is Ext. P-8, Ext. P-7 was cancelled by Ext. P-10 dated 19th October 1987

stating that under Rule 45A, Chapter 14A of K.E.R. the post of Headmaster in a school would arise only when it becomes a complete L.P. or

U.P. School, that at the relevant time when she became Headmistress, the school had only Standard I and therefore was an incomplete L.P.

School in which the post of a Headmaster was impermissible. It was further said that ""the action of the A.E.O. in having sanctioned the post of

Headmaster in an incomplete L.P.S. having only one standard and the approval of the appointment of the Petitioner to that post was against the

provisions in the K.E.R. and was therefore illegal. It was a strange coincidence that the teacher and the Assistant Educational Officer chose to be

ignorant of Rule 45A K.E.R. and to bypass it. The fact that Headmasters'' post was sanctioned irregularly did not confer on her any right for being

appointed as Headmistress and to claim Headmasters'' scale of pay. The Government order prescribing minimum service of 15 years for allowing

Headmasters'' scale of pay has effect from 1st July 1978. The school in question became a complete one only in the year 1979-80 and then only

one post of Headmaster could be sanctioned. Even then, the person appointed as Headmaster could not draw the Headmasters'' scale unless he

has fifteen years continuous service as teacher because the Government Order had come into effect on 1st July 1978."" (Probably referring to Ext.

P-2 dated 15th July 1976). Subsequently the Government by Ext. P-11 substituted Sub-rule (1) of Rule 1 in Chapter XVI, which was deemed to

have come into force on 1st June 1973, whereby substantially Ext. P-4 was incorporated in the statute. As we have said, the facts in the other case

are more or less similar except that the Government had no occasion to pass an order similar to Ext. P-7 as in the other, that was re-called by a

subsequent order. The dates of appointment are different, but were much before Ext. P-6 came into force.

9. The question that falls for consideration is whether the denial of the Headmasters'' scale of pay to the Petitioners on the ground that they had not

the required qualifying experience in terms of Ext. P-11, that was deemed to have come into force with effect from 1st June 1973 is legal and

justified. As per Ext. P-3 no distinction was made as between Headmasters of U.P. and L.P. Schools in aided and departmental schools and they

were entitled to the new scale of pay for Headmasters provided they satisfied the conditions prescribed in G.O. (Ms.) 32/71/G. Edn., dated 19th

March 1971, with effect from 1st June 1973. For the first time distinction was made by Ext. P-4 Government Order dated 11th December 1974,

by which minimum 15 years service in primary schools was stipulated for eligibility to the new scale of pay for Headmasters. In the counter-

affidavit filed on behalf of Respondents 1 and 2 in O.P. No. 301 of 1988 it was admitted that as per the staff fixation order for 1976-77, one

temporary posts of Headmaster and two temporary posts of L.P. School Assistants were sanctioned and that the Petitioner was appointed as

Headmistress with effect from 1st June 1976. But then she had not the minimum 15 years experience and further there was no post of Headmaster

at the time of her appointment to the school, which was then an ""incomplete"" one in the sense that the school, which was opened only on 1st June

1976 with Standard I became a complete L.P. School only in 1979-80. Under Rule 45A of Chapter 14A, a post of Headmaster would arise only

in a complete L.P. School. Therefore the post of Headmaster in the above school was admissible only in that year. It was therefore said that the

post of Headmaster sanctioned and the Petitioners'' appointment to the same were irregular, the Assistant Educational Officer ought not to have

approved.

10. In the case of the other Petitioner too it is said that she was first appointed as L.P. School Assistant on 30th November 1972 in U.M.A.L.P.

School, Chathangottupuram and was in continuous service in that school from 12th June 1976. She was appointed as Headmistress in

Vadakkevila Panchayat L.P. School with effect from 13th June 1976. At that time the school was an incomplete L.P. School since it had only

Standard I and became a complete L.P. School during 1980. Therefore the school was entitled to have only one post of Assistant-in-charge as

per Chapter 13 K.E.R. Besides she had not the required 15 years minimum experience and test qualification. But then these contentions, in our

view, are not justified. The provisions for classification of schools are contained in Chapter 2 of K.E.R., where under Rule 2, Schools for General

Education are classified as Primary and Secondary. Primary Schools are subdivided into Lower Primary and Upper Primary Schools. Lower

Primary School is defined in Rule 2(2)(a) of K.E.R. as one containing any or all of Standard I to IV. A Lower Primary School may have only

Standard I or it may be a complete L.P. School having Standards I to IV. Therefore, even if there is only Standard I, it would still be a L.P.

School, where there could be a post of Headmaster. It is not legally necessary that for the post of Headmaster there should be a complete L.P.

School in the sense in which it is sought to be made out. During 1976-77 in Vadakkevila Panchayat L.P. School one post of Headmaster, six

posts of L.P. School Assistants and one post of Arabic Teacher had been sanctioned by the order of the Assistant Educational Officer, Kollam,. a

copy of which is Ext. P-16 in O.P. No. 3113 of 1989. It was to that post of Headmaster that the Petitioner was appointed with effect from 13th

June 1976. This staff pattern continued during the subsequent years too as could be seen from Exts. P-17 to P-19. There was no dispute that she

had been a Headmistress of the school all these years. It was only by Ext. P-20 that she was given the Headmaster''s scale of pay from 30th

November 1987 after completing 15 years of service on 29th November 1987.

11. Reliance placed upon Rule 45 and 45A of Chapter 14 K.E.R. seems to us to be not justified. Those rules which speak about appointments of

Headmasters in L.P. and U.P. Schools cannot be taken to imply or warrant that appointment of Headmaster could only be made in a complete

L.P. or U.P. School. Under Rule 45A when there is a complete L.P. School, appointment of Headmaster has to be made from among the

qualified teachers of the school. In other words, it should be on the basis of seniority of the staff in the school as per the principles laid down in

Rule 44. But when a school was initially started, there would indeed be no scope for application of Rule 44A and the post of Headmaster has to

be filled up necessarily by a fresh hand. It is obvious therefore that Rule 45A of Chapter 14A could not have any application to a school newly

opened. We agree that the reasons given in Ext. P-10 in O.P. No. 301 of 1988 for cancelling Ext. P-7 are unsustainable, as rightly submitted on

behalf of the Petitioner.

12. It seems to us that Ext. P-5 (in O.P. 301 of 1988) judgment in ''O.P. No. 3260 of 1980 should have given a quietus to the dispute as to the

eligibility of the Petitioners'' claim for the Headmaster''s scale of pay. There as here the appointment of the Petitioner as Headmaster in Ayiravally

L.P. School was on 26th March 1975 and she claimed the new scale of pay with effect from that date, but was given only the salary of a teacher.

The authorities denied her claim made in the representation mainly on the ground that she had not completed 15 years continuous service in that

school and in support reliance was placed upon the Government Order dated 11th December 1974 (Ext. P-4 in O.P. 301 of 1988), that it was

argued on her behalf, discriminated between teachers in aided schools and departmental schools, which was violative of Rule 1 of Chapter XXVI

K.E.R., as it stood then, that did not discriminate between Headmasters of aided and departmental primary schools, who should get the same

scale of pay. This contention was accepted and the Court struck down Ext. P-4. The Government also relied upon G.O. (P) No. 191/80/G. Edn.,

dated 18th November 1980 (Ext. P-6 in O.P. 301 of 1988), whereby minimum service of 15 years prescribed by G.O. (Ms.) 242/74/G. Edn.,

dated 11th December 1974 was extended to the departmental school teachers as well, effective from 1st July 1978, whereby parity was achieved

as far as minimum service was concerned. But that submission too was not accepted and the learned Single Judge held that:

the only rule that could hold the field from the date of her appointment is the rule recognised in Chapter XXVI Rule (1) and Ext. P-6. Her case that

she should be given the scale of pay, which as per Ext. P-2 is the scale of pay of Headmasters in her school, has, therefore to be accepted. There

is no question of any alteration in her scale of pay because of the reference therein that it will take effect from 1st July 1978.

What has been now done is to replace Ext. P-6 by Ext. P-11 (in O.P. 301 of 1988) that shall be deemed to have come into force on 1st June

1973. The question for decision is as to whether Ext. P-11 Government Order could take away the claim of the Petitioners as advanced.

13. It cannot be denied that the Headmasters in all schools discharge the same duties, and functions. This is so whether or not they had the 15

years of minimum service. It is well accepted that there should be equal pay for equal work. No doubt, experience, qualification of a teacher is not

altogether irrelevant. Our attention was drawn to the judgment dated 6th October 1987 in O.P. No. 2753 of 1981 D, where the Petitioners, who

were working in aided schools, were graduates having B.Ed. qualification, who had passed Account and other obligatory tests to earn eligibility for

promotion to the cadre of Headmasters. Under Rule 44A of Chapter XIV A, for appointment to the cadre of Headmasters in aided complete

schools/training schools, a candidate should have 12 years continuous graduate service with a pass in the test in the Kerala Education Act and

Rules and a pass in Account Test (Lower) conducted by the Kerala Public Service Commission. Petitioners had these qualifications and they were

promoted to the cadre of Headmasters on different dates. Rule 3 in Chapter XXVI regulated the pay to be fixed to the Headmasters of aided

schools. When the Petitioners were appointed as Headmasters they did not have to their credit a minimum of 15 years" continuous service as

graduate teachers to become eligible for the departmental Headmasters" scale of pay in accordance with Rule 3 of Chapter XXVI. As provided

by the Rules they Were given the allowance fixed by the State Government having regard to the onerous duties they discharged as Headmasters. It

was argued that:

once a teacher is qualified according to the rules for appointment as Headmaster on acquiring the requisite qualifications and experience of 12

years as also the passing of the obligatory tests prescribed, all the Hedmasters on their appointment perform the same duties and discharge the

same responsibilities irrespective of the number of service they have rendered as graduate teachers.

and that therefore there was no justification for classifying them into two categories based upon their continuous service as graduate teachers. But

the plea was repelled and it was observed that:

We have therefore no hesitation in taking the view that a person who has put in longer number of years of continuous service will have acquired

greater experience and competence than the one who has lesser number of years. If therefore the number of years of continuous service that he has

put in the particular cadre is taken into account in the matter of according of higher scale of pay, it cannot be said that the State has taken irrelevant

factor into consideration for the purpose of fixation of an appropriate scale of pay.

In a common judgment rendered in W.A. Nos. 519 of 1988 and connected cases, where Ext. P-11 Government Order, dated 8th September

1988 fell for consideration, it was held:

A higher scale of pay is granted only when the teacher completes 15 years of service. Thus, it becomes clear that lower emoluments are paid to a

Headmaster who does not have 15 years of service as a teacher and that the Headmaster who has 15 years of service as a teacher is entitled to

higher emoluments. Though the Headmaster with a lesser teaching experience and Headmaster with longer teaching experience discharge the same

functions as Headmaster on his promotion to that cadre. There is difference in the quality of service between the two classes of Headmasters. The

experience makes a person more efficient and competent. That is also a reason why higher emoluments are paid depending upon the number of

years a person puts in a particular service. It cannot, therefore, be said that the length of service is not a relevant criteria in the matter of fixing

different emoluments.

The learned Judges affirmed what they had said in O.P. No. 2753 of 1981, where, as already said, the validity of Rule 3 of Chapter XXVI had

been unsuccessfully challenged as discriminatory and violative of Articles 14 and 16 of the Constitution.

14. In the Order of Reference dated 20th January 1993 it was said that the Division Bench had not considered the question of discrimination that

was sought to be perpetrated among aided primary school teachers and their counter parts in the departmental schools, that the question whether

or not the accrued/vested right of the former to claim the Headmaster''s scale of pay could also be taken away, had not been considered, that the

principle of equal pay for equal work enshrined in Article 39(d) of the Constitution also did not fall for consideration and therefore the decision of

the Division Bench in W.A. Nos. 519 of 1988 and connected cases did not cover the cases in question and is inapplicable. We agree with the

correctness of these observations and hold that the judgment in the above Writ Appeals is of no avail in support of the stand of the Government.

As held in State of Himachal Pradesh v. H.P. State Recognised and Aided Schools Managing Committees and Ors. (1995) 4 S.C.C. 597.

It is late in the day to say that teachers in the aided schools are not entitled to parity in the matter of salary, allowance etc. with their counter parts

in Government schools. (see also 1988 S.C. 1663).

15. In our view, we need only consider Ext. P-11 to the extent it was sought to be applied to the Petitioners, who had by Ext. P-3 dated 24th

April 1973 (marked in O.P. No. 301 of 1988) obtained a right to get the new scale of pay for Headmaster of both L.P. and U.P. Schools in the

State, provided they satisfied the conditions in the Government Order dated 19th March 1971 with effect from 1st June 1,973. It is not in dispute

that they satisfied the conditions and became eligible to get the scale of pay, a right to which had accrued to them, that could not be taken away by

Ext. P-11 even if it was brought into force with effect from 1st June 1973. In an almost identical situation this Court had also said so and held that

Ext. P-4 dated 11th December 1974 (in O.P. No. 301. of 1988) was unsustainable.

16. In State of Gujarat and Another Vs. Raman Lal Keshav Lal Soni and Others, , where the constitutional validity of the proviso to Section

102(1)(a) of the Gujarat Panchayat Act, 1961, as introduced by the Gujarat Panchayat (Third Amendment) Act, 1978 fell for consideration, the

Supreme Court observed that:

Now in 1978 before the amending Act was passed thanks to the provisions of the Principal Act of 1961, the ex-municipal employees who had

been allocated to the Panchayat Service as Secretaries, Officers and servants of Gram and Nagar Panchayats, had achieved the status of

Government servants. Their status as Government servants could not be extinguished, so long as the posts were not abolished and their services

were not terminated in accordance with the provisions of Article 311 of the Constitution. Nor was it permissible to single them out for differential

treatment. That would offend Article 14 of the Constitution.

The amending Act was sought to be given retrospective effect and it was observed that:

The legislation is pure and simple, self deceptive, if we may use such an expression with reference to a legislature-made law. The legislature is

undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under ''existing laws but since the

laws are made under a written Constitution, and have to conform to the do"s and dont"s of the Constitution neither prospective nor retrospective

laws" can be made so as to contravene Fundamental Rights. The law must satisfy the requirements of the Constitution today taking into account the

accrued or acquired rights of the parties today. The law cannot say, twenty years ago the parties had no rights, therefore, the requirements of the

Constitution will be satisfied if the law is dated back by twenty years. We are concerned with today"s rights and not yesterday"s. A legislature

cannot legislate today with reference to a situation that obtained twenty years ago and ignore the march of events and the constitutions 1 rights

accrued in 1 he course of the twenty years. That would be most arbitrary, unreasonable and a negation of history.

The learned Judge also quoted with approval the following observations of Chief Justice Chandrachud in B.S. Tadav v. State of Punjab AIR 1981

S.C. 581.

Since the Governor exercises the legislative power under the proviso to Article 309 of the Constitution, it is open to him to give retrospective

operation to the rules made under that provision. But the date from which the rules are made to operate must be shown to bear either from the face

of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules, especially when the retrospective effect extends

over a long period as in this case.

and held that:

Today"s equals cannot be made unequal by saying that they were unequal twenty years ago and we will restore that position by making a law

today and making it retrospective. Constitutional rights, constitutional obligations and constitutional consequences cannot be tampered with that

way. A law which if made today would be plainly invalid as offending constitutional provisions in the context of the existing situation cannot become

valid by being made retrospective. Past virtue (constitutional) cannot be made to wipe out present vice (constitutional) by making retrospective

laws. We are, therefore, firmly of the view that the Gujarat Panchayats (Third Amendment) Act, 1978 is unconstitutional, as it offends Articles 311

and 14 and is arbitrary and unreasonable.

There should not be arbitrariness in State action, which must ensure fairness and equality of treatment. Retrospective amendment of the rules that

takes away vested right without any justification would indeed be arbitrary. See 1989 (2) S.C.C. 84 and 1994 (5) S.C.C. 450

17. As observed in K. Narayanan and others Vs. State of Karnataka and others, :

Rules operate prospectively. Retrospectivity is exception. Even where the Statutes permits framing of rule with retrospective effect the exercise of

power must not operate discriminately or in violation of any constitutional right so as to affect vested right. The rule making authority should not be

permitted normally to act in the past. The impugned rule made in 1985 permitting appointment by transfer and making it operative from 1976

subject to availability of vacancy in effect results in appointing a Junior Engineer in 1986 with effect from 1976. Retrospectivity of the rules is a

camouflage for appointment of Junior Engineers from a back date. In our opinion the rule operates viciously against all those Assistant Engineers

who were appointed between 1976 to 1985. In Ex-Capt. K.C. Arora and Another Vs. State of Haryana and Others, and P.D. Aggarwal and

Others Vs. State of U.P. and Others, it was held by this Court that the President or Governor cannot make such retrospective rules under Article

309 of the Constitution as contravene Articles 14, 16 or 311 and affect vested right of an employee. Even in B.S. Yadav and Others Vs. State of

Haryana and Others, where the power to frame rules retrospectively was upheld it was observed (para 76 of A.I.R.):

Since the Governor exercises a Legislative power under the proviso to Article 309 of the Constitution, it is open to him to give retrospective

operation to the rules made under that provision. But the date from which the rules are made to operate must be shown to bear, either from the

face of the rules or by extrinsic evidence reasonable nexus with the provisions contained in the rules, especially when the retrospective effect

extends over a long period as in this case.

Precisely the amendment made as per Ext. P-11 dated 8th September 1978 has that effect and therefore would not bind the Petitioners'' right to

claim Headmasters'' scale of pay from the date of their effective appointment as per the staff pattern sanctioned and approved by the authorities.

The contention that sanction/approval of the appointment was made irregularly/illegally and will not therefore confer upon them the right to the

Headmasters'' scale of pay, we hold is unmerited. There is also no force in the submission that there could not be a post of Headmaster in an L.P.

School, where there was only Standard I at its commencement, in view of Clause (a) of Sub-rule (2) of Rule 2 of Chapter II and (i) of Clause (b)

of Rule 1 of Chapter XXIII. There can be an L.P. School even if it contained ""any or all of Standards I to IV"".

18. Section 36 of the Act, empowers the Government to make rules to operate prospectively or retrospectively for the purpose of carrying into

effect the provisions of the Act and Ext. P-11 was sought to be justified in exercise of that power. It was further submitted that the State can by a

statute/rule withdraw the benefits already granted, that Ext. P-11 was such a valid exercise made in public good and that in such a case there will

not be any question of violation of Articles 14 and 16 of the Constitution. In support of this contention reliance was placed upon the decisions in

Hav Bhagat Singh and Others Vs. State of Haryana and Another, and Bhakta Rame Gowda and others Vs. State of Karnataka and another, .

Briefly the facts in Hav Bhagat Singh and Others Vs. State of Haryana and Another, were these: The Appellant was enrolled as a Sepoy in the

Army on 30th January 1959 and served until some date in the year 1976, by which time he was promoted to the post of Hawaldar. In 1978 he

joined the service of the State of Haryana as a Clerk. The Government of Punjab framed the Punjab National Emergency (Concession) Rules,

1965, which were adopted by the State of Haryana when it was formed. Those rules benefitted the persons who had been in military service

before joining the Government service. 4 ""Military service"" meant commissioned service in any of the three wings of the Indian Armed Forces

rendered by a person during the period of operation of the proclamation of emergency made on 26th October 1962 or such other service as

declared as military service for the purpose of the rules. Any period of military training followed by military service was also allowed to be

reckoned as military service. On 4th August 1976 the definition was amended by the State of Haryana, by which it meant service rendered by a

person who had been enrolled or commissioned during the period of operation of the proclamation of emergency in any of the three wings of the

Indian Armed Forces during the period of the said emergency. By the amended provision therefore military service meant only the service that was

rendered by a person who was enrolled or commissioned in the Armed Forces during the period the emergency remained in force. Therefore it

curtailed the definition of military service and excluded there from those who had been enrolled or commissioned before the proclamation of the

emergency and had served during its operation. It was held that the retrospective amendment was bad to the extent it adversely affected the vested

right of Ex-servicemen, who had entered military service before the proclamation of emergency. It was observed after referring to the decisions in

Ex-Capt. K.C. Arora and Another Vs. State of Haryana and Others, and Dhan Singh and others Vs. State of Haryana and others, that:

The Rules offered benefits to those who joined State Government service after having seen military service during the emergency. It was open to

the State to withdraw the offer, but not qua those who had already accepted the offer and joined the State Government service. Hence was

rendered the decision in K.C. Arora case. The State Government did not withdraw the offer wholly but restricted it to those who had enrolled or

where commissioned in the armed forces during the emergency. The State Government was entitled to do so. In our view, there is a clear and

intelligible difference between those who had already chosen the armed forces as a career when the emergency was declared and those who, in

response to the nation''s call, joined the armed forces after the emergency was declared. It was in the country''s interest at that critical juncture to

make service in the armed forces attractive and compensate those who would otherwise have chosen other vocations. The grant of benefits to the

latter class while denying them to the former class is in no way arbitrary or discriminatory. The Rules did not confer an indefensible right on all

persons who had served in the armed forces during the emergency. Only those of them who had joined the State Government''s service while the

unamended Rules operated acquired a vested right, by reason of their having accepted the offer made thereby, which could not be defeated by the

amendment.

In the other case what was in question was the validity of the provision for reservation of appointment or posts in Karnataka Civil Service (General

Recruitment) Rules, 1977, by which the Government introduced the principle of filling up of the posts reserved for Scheduled Castes/Scheduled

Tribes and Other Backward Classes including the backlog vacancies in promotional quota effective from 27th April 1978. What was urged was

that the said provision brought in by an order dated 1st April 1992, could not be made with retrospective effect, which was accepted by the

Karnataka Administrative Tribunal, which, the Supreme Court reversed observing ""that is exfacie illegal and unsustainable"" relying upon a catena of

decision The Principal, Cambridge School and another Vs. Ms. Payal Gupta and others, , Supreme Court Employees'' Welfare Association and

Others Vs. Union of India (UOI) and Another, , P.D. Aggarwal and Others Vs. State of U.P. and Others, that the rules made under the proviso to

Article 309 of the Constitution are legislative in character and therefore they could be made with retrospective effect. In our view, the reliance

placed upon these decisions was misplaced. As we have already said, it is not in dispute that the Government can enact a rule and give it

retrospective effect, which is however subject to the limitation, that it shall not affect or take away the accrued or vested rights, that could not be

justified even on the plea of public interest as now advanced by the learned Government Pleader. The impugned amendment of the rule by G.O.

(P) No. 136/88/G. Edn., dated 8th September 1988 (Ext. P-11 in O.P. No. 301 of 1988) we declare is bad and unsustainable as against the

Petitioners and persons similarly placed in as much as it has sought to take away their vested right to the new scale of pay for Headmasters from

the date of their respective appointment to the said post. We direct the Respondents to pay and disburse the Petitioners the salary and allowance

due to them as Headmistresses, within two months from the date of receipt of a copy of the judgment.

The Original Petitions are allowed as above.