IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

THURSDAY, THE 17TH DAY OF DECEMBER 2015/26TH AGRAHAYANA, 1937

WP(C).No. 19008 of 2013 (A)

PETITIONER(S):

THE KERALA AIDED L.P. & U.P. SCHOOL,
MANAGERS ASSOCIATION, REPRESENTED BY ITS PRESIDENT,
ARTHIYIL SHAJAHAN, KOLLAM.

BY ADVS.SRI.KURIAN GEORGE KANNANTHANAM (SR.)
SRI.TONY GEORGE KANNANTHANAM

RESPONDENT(S):

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1. **STATE OF KERALA,**
   REPRESENTED BY THE SECRETARY TO GOVERNMENT,
   GENERAL EDUCATION DEPT.,
   GOVT. SECRETARIAT, THIRUVANANTHAPURAM - 695 001.

2. **THE DIRECTOR OF PUBLIC INSTRUCTION,**
   THIRUVANANTHAPURAM - 695 001.

BY ADV. SRI.K.A.JALEEL, ADDL. ADVOCATE GENERAL
SPECIAL GOVERNMENT PLEADER SRI.T.T.MUHAMOOD

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 26.11.2015 ALONG WITH WPC.7948/2014 AND CONNECTED CASES, THE COURT ON 17-12-2015, DELIVERED THE FOLLOWING:

msv/

WP(C).No. 19008 of 2013 (A)

APPENDIX

PETITIONER(S)' EXHIBITS

EXT.P-1: TRUE COPY OF THE ORDER DATED 3.5.2013 OF THE GENERAL EDUCATION (J) DEPARTMENT.

EXT.P-2: TRUE COPY OF THE ORDER DATED 20.5.13 OF THE GENERAL EDUCATION (J) DEPARTMENT.

EXT.P-3: TRUE COPY OF THE ORDER DATED 1.10.2011 GENERAL EDUCATION (J) DEPARTMENT.

RESPONDENT(S)' EXHIBITS:

NIL

//TRUE COPY//

P.S.TO JUDGE

Ms**v/**

"C.R."

K. Vinod Chandran, J

W.P.(C) Nos.19008/2013-A, 7948/2014-P, 8684/2014-I, 8800/2014-Y, 8999/2014-Y, 10411/2014-B, 10654/2014-F, 18665/2014-G, 19279/2014-H, 19411/2014-B, 19449/2014-E, 19510/2014-K, 19702/2014-K, 21232/2014-D, 21466/2014-G, 23904/2014-K, 23933/2014-N, 24203/2014-A, 24289/2014-I, 24353/2014-T, 24455/2014-F, 24708/2014-K, 24709/2014-K, 24869/2014-G, 24909/2014-K, 24953/2014-T, 25151/2014-T, 25152/2014-T, 25157/2014-T, 25167/2014-U, 25304/2014-K, 25319/2014-L, 25485/2014-I, 25613/2014-B, 26218/2014-B 26717/2014-L, 26732/2014-N, 27206/2014-A, 27645/2014-E, 27701/2014-K, 27778/2014-V, 28058/2014-F, 28270/2014-G, 28419/2014-B, 28881/2014-I, 28901/2014-K, 29557/2014-T, 30497/2014-J, 30541/2014-P, 30547/2014-P, 32131/2014-N, 32546/2014-P, 32548/2014-P, 32552/2014-T, 32560/2014-T, 33267/2014-G, 35045/2014-E, 35535/2014-N, 67/2015-G, 436/2015-D, 708/2015-K, 1890/2015-I, 3098/2015-J, 4946/2015-P, 5748/2015-P, 6095/2015-J, 6361/2015-U, 8635/2015-D, 9783/2015-W, 9950/2015-P, 10011/2015-B, 11780/2015-V, 11824/2015-C, 12371/2015-V, 13555/2015-T, 15273/2015-H, 15288/2015-I, 24920/2015-L, 24927/2015-M, 25040/2015-D, 25164/2015-U, 25265/2015-G, 25294/2015-J, 25297/2015-J, 25298/2015-J, 25306/2015-K, 25307/2015-K, 25772/2015-V, 25824/2015-C, 25891/2015-J, 25998/2015-Y, 26111/2015-L, 26541/2015-P, 26588/2015-W, 26658/2015-F, 26876/2015-H, 26914/2015-L, 27059/2015-F, 27538/2015-N, 27539/2015-N, 27724/2015-M, 27925/2015-M, 28952/2015-T, 29125/2015-M, 29248/2015-E, 30130/2015-M, 30131/2015-N, 30673/2015-H, 31106/2015-K, 31706/2015-K, 31730/2015-M, 32357/2015-T & 33619/2015-B.

Dated, this the 17th day of December, 2015

JUDGMENT

Education is serious business; both in terms of the results it seeks to achieve, for the recipients and the returns it offers, to the organizers. Intriguing too, for the looser is the one, who actually imparts it; the Teacher. The State is the most important stake-holder who takes upon itself the financial liability, especially so with respect to elementary education, in the context of Article 21A introduced by the 86th amendment to the Constitution of India. The State has willingly taken up such financial liability considering the balancing and compensatory aspect of nation-building, which good education purports to undertake. However, there is a general tendency to ignore the person who is pivotal in administering education, the teachers, who are often sidelined and whose grievances remain unattended. World over, it is a phenomenon that the teachers, who occupy the highest position in human society are not remunerated, commensurate with such social status. The travails of teachers are more accentuated in our country, which struggles with myriad problems of poverty,

population, paucity of funds, inadequate infrastructure and so on and so forth.

2. State Of Kerala had been a harbinger, in the matter of providing for organized and regulated education under the aegis of the State with the Kerala Education Act, 1958 [for brevity “KE Act”] and Kerala Education Rules, 1959 [for brevity “KER”]. The Kerala Education Bill, 1957 which ignited widespread protests, turned into a revolution of sorts, with the introduction of the Kerala Agrarian Relations Bill, which eventually led to the Government, which introduced both these legislation, being over-thrown. But both the enactments however, survived, leading to revolutionary changes in the educational frame work and the social fabric of the State and also resulted in interpretative treatises, of which the law reports are a testimony; which still enlighten and guide the legal fraternity.

3. The highest literacy rate achieved by the State of Kerala, as against the comparably low literacy rate of the other States, has been achieved only by reason of the inroads made in education through the KE Act and KER and the aided schools. But, despite the working of the KER, for 5 decades and half a dozen

years; and the numerous orders, circulars and clarifications issued by the Government, as also the decisions of this Court and the Hon'ble Supreme Court, the grievances of teachers have not been redressed fully. The vagaries of the Managers as also the statutory mode of fixation of staff strength; often encased with the threat of retrenchment, has led to considerable uncertainty in the aided sector, leading to widespread disgruntlement among the teachers. The Government too, have tried to mitigate the woes of the teachers with schemes for protection and preferential appointments; the latest of which termed a 'package' is under challenge here. Whether the present challenge is against the final resolution of such travails of the teachers, is the essential question urged before this Court. There is also the issue of whether the Government Orders and the amendments impugned are in compliance of the Right of Children to Free and Compulsory Education Act, 2009 [for brevity “RTE Act”].

4. In addition to the various orders granting protection to teachers from retrenchment and the manner in which such protections are to be implemented, as against the conflicting statutory claims arising from the rules; the present action has its

genesis in the year 2006 when the Government brought in a ban of appointments in aided schools. Many Managers honoured such ban and did not make appointments; but quite a few ignored the same and made appointments. The Government by G.O.(P). No.10/10/G.Edn. dated 12.01.2010 lifted the ban and permitted approval on conditions. Appointments made during the ban period were permitted to be approved provided they were in accordance with KER and on condition of the Managers of such schools appointing one protected teacher as against each such appointments approved. It also provided for all future appointments to be on a ratio of 1:1, by direct recruitment and by appointment of a protected teacher. The challenge made *inter-alia* on the ground that, it unnecessarily penalizes those who complied with the ban, was negatived by a learned Single Judge, which decision was affirmed by a Division Bench, the latter reported in ***Nair Service Society v. Government of Kerala*** **[2015 (2) KHC 725 (DB)].**

5. The Government taking note of the increasing litigation with respect to approval of appointments and staff fixation orders, also considering the plight of the teachers, appointed by the Managers as per the Rules and even in violation, and reckoning

the workload of the educational authorities; brought out G.O.(P). No.199/2011/G.Edn. dated 01.10.2011 which purportedly set right the existing anomalies by postulating a package by which such aggrieved teachers could be given regular appointments and ensuring that the pupil-teacher ratio as per the norms in the RTE Act and the RTE Rules are implemented.

6. The said Government Order, along with other Government Orders, were challenged in a batch of writ petitions and a learned Single Judge of this Court found that the executive power of the Government was insufficient to bring in the changes brought out by the aforesaid Government Orders and hence found them to be beyond the scope of the powers conferred on the executive Government. It was also held that the same was repugnant to the RTE Act, a Central legislation. The Government had filed an appeal from the aforesaid judgment, in which though the judgment as such was not stayed, a *status quo* was ordered insofar as continuing the persons who had been granted benefit under the package.

7. The Government faced with the judgment of the learned Single Judge, accepted it. The further exercise of issuing

executive orders and making amendments to the KER itself attempted prior to and after the judgment are challenged here. The above batch of writ petitions can be categorized into seven. The surviving challenge is limited to five categories: (i) G.O.(MS) No.154/2013/G.Edn. dated 03.05.2013, (ii) G.O.(P) No.124/2014/G.Edn. dated 04.07.2014, (iii) S.R.O.No.485/2014 [G.O.(P) No.154/2014/G.Edn. dated 11.08.2014], (iv) Circular No.47002/J2/14/G.Edn. dated 26.08.2014 and (v) G.O.(P) No.213/2015/G.Edn. dated 06.08.2015, which shall be considered separately in this judgment.

8. The challenge against G.O.(P) No.313/2013/G.Edn. dated 29.11.2013, has already been considered and allowed by common judgment in W.P.(C).No.30107 of 2013 and connected matters. Hence, the said writ petitions are only to be allowed, following the afore-cited judgment. The challenge to G.O.(P) No.278/2014/G.Edn. dated 23.12.2014, need not be looked into since, the learned Additional Advocate General submits that the same is unworkable. Hence, the submission of the State regarding the unworkability of the said Government Order is recorded and the said writ petitions are allowed.

I. G.O.(MS) No.154/2013/G.Edn. dated 03.05.2013

9. The attempt of the Government by the above order is to make the Elementary Education within the State, compliant with the norms and conditions stipulated in the RTE Act. The challenge raised is with respect to Clause-2 and Clause-4 of the aforesaid G.O., which respectively deal with declaration of Standard I to VIII as Elementary Cycle and the revision of Pupil-Teacher Ratio [for brevity "PTR"]. The essential contention raised by the learned Counsel appearing for the petitioners is that, the provisions of the KER insofar as the same are repugnant to the provisions of the RTE Act would be rendered void by virtue of the proviso to Article 254 of the Constitution. The petitioners also place reliance on the decision in ***State of Kerala v. Mar Appraem Kuri Co. Ltd.*** **[(2012) 7 SCC 106],** to buttress their above contention. By virtue of the proviso to Article 254, a State legislation under List III of Seventh Schedule of the Constitution of India, which has received the assent of the President under the said Article, would be subject to any subsequent Central legislation and provisions of the State legislation repugnant to the Central legislation, which, either expressly or impliedly repeals the State law would be rendered void

to that extent. The specific contention is that the provisions of the KER to the extent of the repugnance to the RTE Act, would be rendered void. The principle is unassailable, but the applicability of the proposition on the instant case has to be tested.

(a) Elementary Cycle

10. The first contention is with respect to the declaration of Standard/Class I to VIII as Elementary Cycle, which is a mandate under the RTE Act. The KER had classified school education into three originally, and after the integration of Pre-degree to the Higher Secondary level; as four categories. Class I to IV were included in the Lower Primary (for brevity: LP) Schools, Class V to VII in Upper Primary (for brevity: UP) Schools, Class VIII to X as High Schools and Class XI and XII as Higher Secondary. It is also a fact that in the aided sector there are Lower Primary Schools, Upper Primary Schools and High Schools independently existing. There are also schools with Lower Primary and Upper Primary section, called “complete UP Schools” and Upper Primary and High School, termed as “complete High Schools”, which may or may not have Lower Primary section. The

RTE Act classifies Class I to VIII as Elementary cycle and makes it “free and compulsory” as contemplated under Article 21A of the Constitution of India. The RTE Act also treats Class I to V as a common entity and Class VI to VIII as another common entity with different PTR applicable for each. Hence, the first requirement is to bring Class V to the Lower Primary section after plucking it away from the Upper Primary section and bringing in Class VIII to the Upper Primary section, removing it from the High School, argues learned Counsel.

11. The Government Order definitely accepts this principle and classifies Class I to VIII within the Elementary Cycle. It also includes Standard I to V in the first stage of elementary education in the LP section and Standard VI to VIII in the second stage in the UP section. Considering the financial implications, it has been decided to retain Class V and Class VIII in the existing premises, under the Upper Primary and High School respectively, re-designating the Upper Primary schools with Class V as Lower and Upper Primary School and the High School with Standard VIII as Upper Primary and High School. This does not resolve the problem, since as noticed above, there are stand alone LP Schools

without Class V and UP Schools with Class V; but without Class VIII. A complete UP School would also lack Class VIII, to complete the Elementary Cycle as contemplated in the RTE Act.

12. The petitioners refer to the definition of “elementary education” and “school”, contained respectively in Section 2(f) and 2(n), to contend that as per the RTE Act, a school for elementary education is one having Class I to VIII. What is contemplated by elementary education is a wholesome education with admittance in Class I and uninterrupted continuance till Class VIII. A refusal, to upgrade the LP School to UP and a sanction of LP section to the UP Schools, would attract withdrawal of recognition under S18 (3); since effectively a child who is promoted to Class IV and Class VII, would be expelled for reason of the higher class, within the elementary cycle, being not available. Expulsion, it is pointed out is expressly prohibited under S16 of the RTE Act. This would run contrary to the provisions of the RTE Act and the State would be failing in its obligation to comply with the provisions of the Central legislation, is the argument.

13. A reading of the definition clause clearly stipulates that elementary education means, education from first class to

eighth class and a school, as defined under the RTE Act, is one imparting elementary education. Section 16 is a prohibition from holding back and expulsion. The contention of the petitioners is that a LP School which does not have Class V and an UP School which does not have Class VIII would be faced with the threat of withdrawal of recognition under Section 18, since a necessary consequence would be that a student studying in Standard IV or Standard VII would be expelled for reason only of the next higher standard not being available in the school. This Court is unable to accept the extreme contention of the petitioners, especially looking at Section 5 of the RTE Act, as pointed out by the learned Additional Advocate General. Section 5 contemplates a situation where; in a school, there is no provision for completion of elementary education, then, a child shall have a right to seek for transfer to any school excluding those specified in sub-clauses (iii) and (iv) of clause (n) of Section 2. Hence, it cannot be said that by not upgrading a LP or UP School or by not granting a higher standard of Class V and Class VIII, it would entail withdrawal of recognition. What is contemplated in S16 is a deliberate, conscious act of expulsion.

14. It is to be immediately noticed that the stand of the Government with respect to PTR, is that the same has to be maintained only with respect to a school and not with respect to each class. It is difficult to harmonize the said contention with the present one, since without class V &VII, there could be no complete elementary cycle. Nor could there be a ratio so computed, even if the two separate units, as envisaged in the RTE Act and understood by the Government as the first and second stage of elementary education, is taken separately. Clause-2 of G.O.(MS).No.154/2011 speaks of retaining Standard V and Standard VIII in the same premises, re-designating them as Lower and Upper Primary Schools and Upper Primary and High Schools. There is nothing wrong in that procedure adopted. But, this would not bring out the desired effect, since in stand alone LP and UP schools, the elementary cycle, even within the two distinct entities, would be absent. This could be effectively applied only in a complete High School with a LP section. The determination of PTR as contemplated by the Government, on school basis would be impossible, since Class V & VII, in the case of stand alone LP, UP and High schools would be in different schools.

15. The process of re-structuring would hence require more home work, as to the educational need of the area, where a particular school is situated and the proximity of nearby schools having higher standards. Definitely Clause 2 of G.O(P) 154/2013 may not alone suffice and would also depend on the interpretation of PTR ratio as provided in the RTE Act. Attention would also have to be drawn to the contemplation of the RTE Act, which places Class I to V as one unit and Class VI to VIII as another distinct unit. Though an up-gradation up-to Standard VIII would not be required, there should at-least be re-structuring of Lower and Upper Primary sections, including Class V in the former and Class VII in the latter; plucking them away respectively from the UP & High Schools. Prejudice may be caused to certain Managers and Schools; but, it is only an inevitable and necessary consequence of the implementation of the RTE Act, which could not be assailed on grounds merely of hardship.

16. There were a batch of writ petitions which dealt with the specific issue of such re-structuring of classes. The said batch of writ petitions were disposed of by judgment dated 18.06.2015 in W.P.(C).No.3060 of 2014 and connected cases. The said batch

consisted of Writ Petitions which sought consideration of individual applications for up-gradation and higher standards . The learned Single Judge noticed the steps taken by the Government to bring in the changes contemplated by the RTE Act and listed out what remained to be done, which future action was in the nature of the data to be collected and the decisions to be taken based on the educational need, to be determined with reference to the data collected. The Government was also granted time of four months to carry out the reforms, which time is not yet over. This Court would not pre-empt the State by making any declaration on that aspect, as the State, has been granted time to bring in such re-structuring in W.P.(C) 3060 of 2014 and connected matters. All would have to wait for the re-structuring to happen and as of now there could be no infirmity found in Clause-2 of G.O.(MS) No.154/2013.

(b) Pupil - Teacher Ratio [PTR]

17. The further contention against G.O.(MS) No.154/2013 is with respect to the revision of PTR. While the Managers contend that it has to be taken class-wise, the State contends that it is only to be maintained on a school basis. The

learned counsel for the petitioners would assert that a reading of the Schedule would indicate the number of teachers to be maintained is "**for** first class to fifth class" and not "**from** first class to fifth class"; which would clearly indicate that the ratio is prescribed on the individual class basis and not on the school basis.

18. The State, however, would contend that the Schedule itself lays down, otherwise; by its heading "Norms and Standards for **a School**". On a fluid reading of the items in the Schedule; ie: the norms and standards, it would be clear that, within the elementary cycle Class I to Class V is taken as a determinate unit and the ratio is prescribed for such determinate unit. It is also contended that the specification for "one Head-teacher" when there are students above 150 children would again indicate that the ratio is prescribed for the entire school or at least to the determinate unit, since one school would not have more than one Headmaster/Headmistress. Further reference is made to Sl.No.2(b), where the stipulation is, one teacher per class for 6th class to 8th class, with one teacher each for Science and Mathematics, Social Studies and Languages. Hence, where

teacher per class is required, the Schedule has been careful to indicate it so. The Learned Additional Advocate General would also emphasize on the huge financial liability of the State to provide for so many teachers, if the ratio is taken to be, on class basis

19. The resolution of the said issue is slightly complex, insofar as; generally understood the PTR is with respect to a school and not to a class. An examination of the various studies, with respect to PTR would also disclose that generally the ratio is intended on a school basis. However, the issue has to be considered on the basis of the specific enactment and the intention behind such enactment. The Bill introduced by the Minister of Human Resources Development in the Parliament was intended at discharging the Government's responsibility “to ensure universalization of elementary education” (sic). The legislation was avowed to be, one intended at providing 'free' elementary education to children and satisfying the constitutional mandate by making it a 'compulsory' obligation on the State to provide for elementary education to all children between the ages of 4 to 14; apposite is the distinctive meaning ascribed to the words in the title. One cannot but notice that the said principle was embodied in

Section 20 & 23 of the KE Act in 1958.

20. The Union Government was quite conscious of the financial obligation which did not deter them from introducing the legislation, since it was considered a Constitutional obligation. The Union Government also expected the help of the State Governments, the Non Governmental Organizations (NGO's) and generally of the civil society. Hence, it cannot be contended that the financial liability should be a criteria in considering whether the PTR is to be applied for the school or the determinate units of Class I to V and Class VI to VIII or to the individual class rooms.

21. Obviously, emphasis given to PTR, world over and as reflected from the provisions of the RTE Act, is to improve the quality of education and to provide young/little children with adequate attention. More the ratio, more the number of students an individual teacher is put in care of and then less would be the quality of training imparted to a student; which would be reflected in the education imbibed. Special emphasis has to be made to elementary education, which provides the very foundation of a child's growth. The need for individual attention at the elementary stage is significant since it forms the foundation on which the

edifice of the individual is built. The PTR is not a philosophy based merely on numbers, of the student population, but on the need to provide individual attention and cater to the needs of each student.

22. Viewed in this perspective none can ignore the special skills required in imparting elementary education, which cannot be acquired merely by higher qualifications. There is an onerous responsibility cast on a LP or an UP teacher to provide the focus and direction to children, who normally would get the first exposure to the outside world in the elementary school. Elementary education does not mean a mere imparting of lessons by rote, it lays the foundation on which would be built the character and career of the student, his future prospects and it is those children who would decide the destiny of the nation. Education, more so at the elementary stage, moulds the character of the individual student preparing him for life, with its professional challenges and personal aspects; thus building a generation of citizens to carry the nation forward.

23. That is the specific intention of the Parliament as reflected in sub-section (2) of Section 29 of RTE Act, which is extracted hereunder:

"S.29(2). The academic authority, while laying down the curriculum and the evaluation procedure under sub-section (1), shall take into consideration the following, namely:-

(a) conformity with the values enshrined in the Constitution;
(b) all round development of the child;
(c) building up child's knowledge, potentiality and talent;
(d) development of physical and mental abilities to the fullest extent;
(e) learning through activities, discovery and exploration in a child friendly and child-centered manner;
(f) medium of instructions shall, as far as practicable, be in child's mother tongue;
(g) making the child free of fear, trauma and anxiety and helping the child to express views freely;
(h) comprehensive and continuous evaluation of child's understanding of knowledge and his or her ability to apply the same".

24. It is in this context that PTR has to be examined. Considering the emphasis given on the lower PTR in the determinate units of Class I to V and Class VI to VIII, it has to be found that the PTR, as contemplated in the RTE Act, is class based and not school based. There is one another anomaly in the contention of the State, insofar as treating the PTR to be 1:30 as that to a school or in the determinate unit of Class I to V and 1:35

in Class VI to VIII. A reading of the Schedule would indicate that, for admitted children up-to 60, there should be two teachers. Since the stipulation is prescribed “up-to sixty”, the existence of a standard in a Lower Primary School would require two teachers to be posted and only on the number of admitted students exceeding 60, the ratio would be 1:30. The contention with respect to need of more than one Head-teacher is fallacious, since Head-teacher, as noticed in RTE Act, cannot be equated to the Headmaster. What is intended is that when there are above 150 children in either of the classes from I to V, then there should be a Head-teacher who is not assigned class duties, but has the sole duty to co-ordinate the studies. This requirement would be there even when the student strength exceeds again by 150. That is, 300 students in a class would mandate 10 divisions with two Head Teachers, each having charge of five divisions each. Rare would be the instance, but the stipulation is clear. The essential requirement is that for 30 or 35 students, in the respective elementary units, in each of the classes/divisions; there should be at least one teacher. The requirement of a Head Teacher for the divisions in a class arise, when the student strength exceeds that prescribed in the Schedule

to the RTE Act. The distinction is further made clear in sub-section (3) of Section 5 where either the 'Head-teacher' or 'in-charge of the School', is to issue a transfer certificate to a student who by reason of absence of provision for completion of elementary education, seeks transfer.

25. It cannot at all be said that, if there are only 90 students in all the classes put together from Class I to V, then the school would be continued with three teachers. The Schedule also provides for the minimum number of working days/instructional hours in an academic year in Sl.No.3. The norms and standards speaks of 200 working days for Class I to Class V and 220 working days for Class VI to Class VIII. The instructional hours are provided as 800 and 1000 per academic year respectively. In the situation contemplated above, of 90 students and three teachers, such instructional hours and working days would not be satisfied, since for every class taken by each of the teachers two classes would have to remain idle. It is also to be emphasized that the RTE Act, does not, unlike the KER, contemplate an 'un-economic' school; in the teeth of the Constitutional mandate which is sought to be advanced by providing for 'neighbourhood schools' in Sec.3.

26. The prescription of instructional hours and working days “for” Class I to V And Class VI to VIII cannot be said to be for all the classes together; of either the first stage or second stage of the elementary cycle. That is not the intention of the legislature in prescribing the PTR, as disclosed from the schedule to the RTE Act. “For” is used as a preposition with the meaning “intended” or designed to meet the needs of “first class to fifth class”, which can only mean that the requirement/need is for each of such classes. “From” is also used as a preposition, *inter alia* to indicate a specified point, as the first of two limits. For example 'from grades four to six' or the probable use herein “from first class to fifth class” indicating a collective unit. The use of “for” in the Schedule, hence aids the above interpretation.

27. One other contention raised is that under Sl.No.1(b) it has been specified as, “at least one teacher per class”; the absence of which in Sl.No.1(a) would support the contention of the PTR being on “school” basis. It is trite that there is no subject specification for Class I to V, since the essential purpose of education in the lower primary sector is to orient the students to a system of education and to expose them to the outer world and

inculcate in them the essential qualities, which would enable them to assimilate the education properly and advance in life. The stipulation for one teacher per class under Sl.No.1(b) for Class VI to Class VIII is for the reason that subject-specific education is first introduced in the Upper Primary stage. It is, hence, provided that there should be at least one teacher per class for Science and Mathematics, Social Studies and Languages, meaning that there should be at least three teachers, as specified thereunder, collectively in Class VI to VIII. There is also a further PTR prescribed, of one teacher for every 35 children.

28. It is to be pointedly noticed that satisfaction of the ratio becomes difficult only where there are minimal students in each class. Be that as it may, the Constitutional mandate being on the State to “compulsorily” provide for “free” education as per the “norms and standards” prescribed under the RTE Act, even in such situation the Government would have to provide for the required number of teachers per class in compliance of the PTR as stipulated in the Schedule and not based on the strength of the entire school. The Government Order holding that the RTE; does not envisage a PTR based on the number of divisions in a class,

cannot hence be upheld. The strength of individual class has to be taken into account and the divisions are to be arranged in such a manner that, there should be only 30 [thirty] or 35 [thirty-five] students in a class, in the respective units of elementary education, classified by the State as first stage and second stage.

29. This Court is quite conscious of the stipulation in the KER, as to PTR being 1:45 and a mandate for one teacher at least in a division. The decision with respect to repugnance, under Article 254 of the Constitution of India applies squarely. The KER as it existed, would have been definitely workable with the said ratio and the stipulation of one teacher for a division of 45 to 50 students. But, however, the later enactment of the Union Government render void the PTR provided in the KER; unless there could be harmonization of the two ratios, which in the present context is not possible. The State would have to provide for the ratio as provided in the RTE Act. The financial implication cannot be a consideration at all, in interpreting the instant legislation, the object and purpose of which commends such consideration to be totally eschewed. Reference is apposite here, to Section 7 of the RTE Act , which casts the responsibility on the Central Government, to share the

financial and other implications for the implementation of the provisions of the Act.

II. G.O.(P) No.124/2014/G.Edn. dated 04.07.2014

30. At the outset, it is to be noticed that the above Government Order, reads G.O.(P) Nos.199/2011/G.Edn. dated 01.10.2011 and G.O.(P) No.313/2013/G.Edn. dated 29.11.2013 as reference Nos.1 and 4; which Government Orders have already been set aside by this Court in W.P.(C).No.30107 of 2013. G.O.(P) No.199/2011 *inter alia* took away the powers of the Educational authority under Rule 12 of the KER. It prescribed that the staff fixation orders of 2010-2011 would be applicable to 2011-2012 and no additional divisional posts would be filled up after 31.03.2011. The staff fixation order to be made under Rule 12 and the provision as such was rendered otiose, insofar as providing for regular vacancies after 31.03.2011 only against promotion, death, retirement and resignation. G.O.(P) No.199/2011 also was made in supersession of G.O.(P) No.10/10/G.Edn. dated 12.01.2010 and the ratio of 1:1, by direct recruitment and from protected hands, was cancelled. In substitution, a “Teachers Bank” was introduced

from which appointments were to be made to the vacancies arising in the various aided schools. G.O.(P) No.313/2013 sought to implement the provisions of the RTE Act, insofar as stipulating staff fixation to be done notionally on the principles of the RTE Act, confined insofar as granting protection to all teachers already in the rolls till the academic year 2011-12. Both the aforesaid orders were found to be beyond the executive power of the State, since there was in existence a statutory rule; by which the staff fixation was to be made and the vacancies sanctioned, as against which, the approval of appointments were to be considered by the educational authority.

31. G.O.(P) No.124/2014 noticed the grievances of the teachers and Managers and the Sub-Committee appointed by the Cabinet decided on the implementation of teachers' package in the following manner:

(i) The posts in the academic year 2010-11 to be continued for 2013-14 also with new appointments permitted only in retirement, resignation, death and promotion vacancies; that too in the ratio of 1:45.

(ii) The staff fixation for 2014-15 under the KER to be

completed on 1:45 ratio, basing it on Unique Identification Number (UID) details as indicated in G.O.(P) No.313/2013 before 15th of July.

(iii) The excess teachers found on staff fixation of 2014-15 to be deployed as per the instructions therein, which were as under:

(a) The staff fixation of 2010-11 based on 1:45 ratio to be revised to 1:30 for Classes I to IV and 1:35 for Classes V to X only for the purpose of protecting the excess hands.

(b) If there are still excess hands, a Teachers Bank has to be created, the composition and implementation of which was to be clarified by further guidelines.

(c) The pooling of the Specialist Teachers shall be done by the Managers themselves. No additional posts were to be allowed and if the students strength falls below to that prescribed in the KER, only equivalent posts to be permitted on condition that the excess teachers would be included in the Teachers Bank.

Paragraph 5 of the said Government Order specifically indicates that the said G.O. was in modification of G.O.(P) Nos.199/2011 and G.O.(P) No.313/2013. It is pertinent that the very same defect found against the Government Orders read as reference Nos.1 and 4 would stare at G.O.(P) No.124/2014 also. The executive orders issued would be against the statutory rule, where a power of staff fixation is conferred on the educational authority. The staff strength on the basis of divisions arrived at on the pupil-strength, contemplates a right conferred, on the schools. This is in fact a vested right of the students, considering the educational needs; to seek for appointments to additional vacancies, which would arise under the provisions of the statutory rule. Further, it is to be noticed that the statutory rule itself stood amended by G.O.(P) No.154/2014/G.Edn. dated 11.08.2014, which is the next issue to be considered. In any event, the modifications made in G.O.(P) No.124/2014 are of the Government Orders already set aside by this Court. Such modifications also are vitiated for reason of the matters dealt with therein; being covered by the provisions of the statutory rules. G.O.(P) No.124/2014 has to be set aside, for the executive order seeks to infringe upon the field occupied by the

statutory rule.

III. G.O.(P) No.154/2014/G.Edn. dated 11.08.2014

32. Presumably, in an attempt to bring in a Teachers package, under the provisions of the statutory rule; the above Government Order attempts to amend the rule itself. So much is clear from the fact that the amendment has been made effective from 01.10.2011, which is the date on which G.O.(P) No.199/2011 has been issued. Immediately it is to be noticed that the retrospective operation to the amendment and the date specified, for retro operation; has absolutely no nexus with the object sought to be achieved; but relates back only to the decision of the Government to constitute a Teachers' Bank [G.O.(P) No.199/2011]. That was an executive action, which has been set aside by this Court; after the present amendments were brought in. The statutory rule existing prior to the amendment also conferred certain powers on the educational authorities, so constituted under the KER, which they had a consequent duty to carry out. The power conferred coupled with the duty cannot be easily effaced by the retrospective amendment. The retrospective operation, it is to

be mentioned at the outset, is specious and has no legal grounding {further elaborated in paragraphs 75 and 76}.

33. G.O.(P) No.199/2011 was set aside on the ground that the provisions therein are contrary to the KER. Pare 6B(i) of G.O.(P) No.199/2011 fixed the staff strength of 2010-11 to be the staff strength for 2011-12. This was held to be against the specific prescription under Rule 12 of Chapter XXIII KER, wherein an elaborate procedure for issuance of staff fixation orders, is provided; with an initial verification by AEO and then a higher level verification by the DEO/Deputy Director. On the higher verification alone, additional divisions and additional posts are sanctioned. Also, in special circumstances enumerated as super-check verification is provided for, by Rule 16 Chapter XXIII. The Divisions are to be determined by Rue 23 of Chapter VI, which provides the ratio of 1:45, limiting the maximum students in a class to 45 with additional divisions sanctioned, beyond every successive exceeding of the baseline strength; by five.

34. The permanent staff fixation was further advanced by Para 6B(ii) and (iii) of G.O.(P) No.199/2011 respectively prohibiting filling up of additional posts after 31.03.2011 and

permitting approval, only of vacancies arising on death, retirement, resignation and promotion and not of additional divisional vacancies; maintaining the staff strength to be constant from 2010-11. The stipulations were held to be contrary to Chapter XXIII of KER and it was found that the KER having laid down, by statutory rules, the procedure, there could be no executive order under Section 11 of the KE Act, since the field is already occupied by the statutory rules. The effort to amend Chapter XXIII and specifically Rule 12 was to bring the Rule in tune with G.O.(P) No.199/2011. It is also to be noticed that the amendment dated 11.08.2014 was prior to the judgment of this Court in W.P.(C). No.30107 of 2013 and connected cases, on 15.01.2015.

35. The amendments are to be noticed in detail. Before that, a fundamental defect pointed out by one of the Counsel appearing for the petitioners cannot but be noticed. By Rule 5 of the Kerala Education (Amendment) Rules, 2014, clause (v) is sought to be inserted after clause (iii) of Rule 5 of KER; without clause (iv) being introduced and without such clause existing in the rule. Again after Rule 2 (5) of the Amendment Rules of 2014, an amendment is noticed as clause (2) which does not serially fit in

under Rule 2 (5) (c). Obviously the mistake occurred since it was not noticed that sub-rule (5) of Rule 2 does not have clause (1). Then again the teachers' bank appended to G.O.(P) 199/2011 is sought to be approved from 01.06.2011, which provision at Rule 2 (5) (e) is not indicated as included at any appropriate place in the statutory rules. Definitely the Government could make suitable amendments thereunder; but it reveals the levity with which the amendment has been carried out.

36. The amendments have to be referred to individually. Rule 2(1), of the Amendment Rules, introduce sub-rule (6) in Rule 9 of the K.E.R, which stipulates that the appointment to aided schools, shall be against the sanctioned post and against the vacancies notified by the Government. Sub-rule(2) of Rule 2 substitutes certain words in the last sentence of sub-rule(1), by which the mandate on the Manager to follow the directions issued by the Government, from time to time for ascertaining the availability of qualified hand and for filling up of vacancy was changed, as the mandate to follow the Government directions for reporting the vacancies to the Government for ascertaining the availability of qualified hand and filling up of vacancies as notified

by the Government.

37. This has to be tested, along with the procedure of notification, brought out by the newly added Chapter XXI of the Rules and hence Chapter XXI is immediately referred to. Rule 1 of Chapter XXI mandates that the Manager shall appoint the teachers and non-teaching staff, possessing the qualification prescribed by the Government, in the aided schools, against vacancies notified by the Government. Rule 2 provides for reporting of regular vacancies including anticipatory vacancies as on the 31st May of the succeeding year by the Manager and the Headmaster, to the D.EO/A.E.O concerned, within a period of 7 days. Rule 3 requires the D.E.O/A.E.O to report the category wise vacancies to the Director. By Rule 4, the Director has to prepare the category wise and district wise vacancies, as per the direction of the Government, by notification on or before 30th of April, every year. The appointments are to be made by the Managers on the re-opening day itself, every year, on receipt of applications from fully qualified candidates as per Rule 5. On line approval is provided by Rule 6 for such appointments on or before 30th June of every year. Rule 7 has to be extracted in its entirety, which reads

so:

> "7. Appointments to vacancies occur due to exemption of Head Teacher from Class charges as per Rule 1 b(iii) & (iv) Chapter XXIII, leave vacancies and short term vacancies including vacancies of teachers deputed for training shall be filled up from among the list of fully qualified hands supplied from Teachers Bank. The Teachers Bank is a temporary arrangement for retaining excess teachers for suitable deployment to schools. The eligibility criteria of teachers for inclusion in Teachers Bank and the guidelines for their deployment shall be decided as per the orders issued by Government from time to time. Appointment from Teachers Bank shall have no claim for future appointment in schools other than their schools".

38. Then, by amendment rule 2 (2) (b), a proviso is added to Rule 51A, which gives a preference to teachers from the teachers bank for appointment in vacancies as specified in Rule 7 of Chapter XX1, which is extracted herein above. By rule 2 (3) after Rule 20 of Chapter XV of the KER, Rule 21 is inserted, which provides for a Teachers Appraisal Committee.

39. Further; by Rule 2 (5), in Rule 1 of Chapter XXIII, after item (ii) of clause (b), item (iii) is inserted, providing for a post of Headmaster, on the pupil strength exceeding 150, in classes 1 to

5. This post is said to be over and above the class divisions admissible. After clause (iii) of Rule 5, a similar provision for a post of Headmaster, on the pupil strength exceeding 100 in classes 6 to 8 is made by insertion of clause (v). The said amendments are brought in, for compliance with the R.T.E Act, which provides for a Head Teacher, when the student strength exceeds a particular limit, which Head Teacher should not have assigned any class duties.

40. The amendments referred to in the above paragraph [para 39] are brought in, on the understanding of the Government, that the P.T.R prescribed under the R.T.E. Act, is respectively for the first stage and second stage of elementary education or the schools as such and not for individual classes. This Court has found otherwise, in this judgement. But in any event, the Rule only amends the K.E.R., which earlier provided for the Headmaster in the L.P and U.P section to have teaching duties, which is purportedly taken away by prescribing a sanction of post, over and above class divisions. This Court need not interfere with that at all, since the executive Government has prescribed a condition, which cannot be said to be illegal or arbitrary and definitely not unreasonable.

41. Substantial amendments also have been made in Chapter XXIII taking away the extant procedure of staff fixation, sanction of additional divisional vacancies on higher verification, appointments to such vacancies and retrenchment on fall of division, as earlier provided, in Rule 12 of Chapter XXIII. A new rule is substituted by amendment Rule 2 (5) (c), providing for a new procedure. The amendments brought in by clause (c) of Rule 2(5), of the S.R.O, now mandates the strength of teaching staff in each aided school to be fixed by the Educational Officer, as per the effective strength of pupils reckoned for the academic year 2010-11, which is to remain permanent, unless Government revises it, based on Unique Identification Number (UID) of students. The additional posts over and above such permanent fixation of strength of teaching staff, is to be sanctioned only ***(i)*** subject to availability of accommodation and ***(ii)*** by determining the actual number of pupils in each school as per the procedure laid down as 1 to 6; using UID.

42. The procedure is delineated in clause 1 to 6. Clause 1 provides that the existing staff strength has to be furnished by the head of school to the D.E.O/A.EO on the 31st of

March or the last working day of the year. The details of UID of students as on the 6th working day is to be updated, using the school code and locked by 5 P.M. of the 6th working day [Clause (2)]. The D.E.O/A.E.O is to verify the data from 7th to 15th and confirm it [Clause (3)]. By 15th June, the D.E.O/A.E.O has to certify and forward the details to the Deputy Director of Education [Clause (4)]. Hard copy of the data verified is to be maintained in the office concerned, for verification by the DPI [Clause (5)]. The fixation of staff of each school shall be finalised by the Educational Officer not later than 15th July of every year, which is to take effect from that date [Clause (6)].

43. Rule 12B was removed and clause (e) was included in the SRO, the latter, without indicating the place at which it would be included in the KER. It cannot be pinpointed as a specific rule from the SRO, nor is it specified as to where exactly, the rule book has to show the aforesaid clause(e). It is exasperating to note that the amendments have been made casually and in quite a shabby manner; without even showing the amended rule in its proper place, with a proper numerical serial and without indicating as to where it has to be introduced in the rule book. This Court cannot

but notice that the manner in which the SRO was brought out indicates; even the rudimentary principles of drafting having been ignored. In any event clause (e) is to be extracted and it reads so:-

> "(e) The teachers of aided schools included in the appended list of G.O(p) 199/11/G.Edn. dated 1-10-2011 stand approved w.e.f. 1-6-2011 on condition that the educational officers concerned shall ensure that they are appointed against regular vacancies and are otherwise qualified. Their prior service shall not be reckoned for any service benefits but shall only be deemed to commence afresh w.e.f. 1-6-2011".

44. The challenge against a subordinate legislation, unlike in England, can be also raised on the ground of unreasonableness and arbitrariness. Suffice it to refer to the decision of the Hon'ble Supreme Court in ***Indian Express Newspapers (Bombay) Private Ltd. And others*** v. ***Union of India and others [(1985) 1 SCC 641]***, paragraphs 75, 77 and 78 of which are extracted hereunder:-

> "75. A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent Legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may

also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary. In England, the Judges would say "Parliament never intended authority to make such rules. They are unreasonable and ultra vires"

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77. In India arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. In India any enquiry into the vires of delegated legislation must be confined to the grounds on which plenary legislation may be questioned, to the ground that it is contrary to the statute under which it is made, to the ground that it is contrary to other statutory provisions or that it is so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution.

78. That subordinate legislation cannot be questioned on the ground of violation of principles of natural justice on which administrative action may be questioned has been held by this Court in The *Tulsipur Sugar Co.Ltd. v. Notified Area Committee, Tulsipur, Rameshchandra Kachardas Porwasl v. State of Maharashtra* and in *Bates v. Lord Hailsham of St. Marylebone*. A distinction must be made between

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

45. The said view has been reiterated in ***Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth*** **[1984 (4) SCC 27]** and the declared position is that the question whether a particular piece of legislative exercise, is in excess of the power conferred of

subordinate legislation; has to be determined with reference to the specific provisions contained in the relevant statute, conferring the power to make the rule, regulation etc. and also the object and purpose of the Act as can be gathered from the various provisions of the enactment. Though reasonableness is a ground on which challenge can be raised, it does not mean the substitution of the Court's opinion, on that of the legislature or its delegate; as to what principle or policy would best serve the objects and purpose of the Act. To formulate a policy is the prerogative of the legislature. The subtle distinction often noticed is that, the finding should not be that a particular rule is not reasonable or could have been more reasonable, but it should be totally unreasonable; demonstrably so in its application and implication. The emphasis being of an objective determination totally eschewing any subjectivity. Arbitrariness as has been noticed, is engrained in Article 14 of the Constitution of India. It is in this perspective that the amended rule has to be looked into.

46. The newly introduced Chapter XXI has to be considered along with the amendment to Chapter III and Rule 1 of Chapter XIV A and with reference to the substantial amendments

made to Rule 12 of Chapter XIV A. The appointment of teachers and non-teaching staff in aided schools is a power conferred on the Manager under Section 11 of the K.E. Act; subject to conditions laid down by the Government. Rule 9 of Chapter III of KER, deals with the duties and powers of the Managers of the aided school, who is responsible for the conduct of the school in accordance with the provisions of the Act and Rules. The Manager is definitely obliged to abide by the orders of the Government and the department, issued from time to time. Such orders issued by the Government and the department also have to be in conformity with the Act and Rules. By sub-rule (5) of Rule 9, the Manager has to verify the staff position of the school in conformity with the number of class divisions sanctioned by the department. In the said rule, sub-rule (6) is introduced, mandating the Manager to make appointments against the sanctioned post , as notified by the Government. By sub-rule(2) of Rule 2 of the SRO, Rule 1 of Chapter XIV A, dealing with the conditions of services of aided school teachers, has been amended. The amended rule 1 of Chapter XIV-A substitute the words employed, making the need for ascertaining the availability of qualified hand and for filling up vacancy; to be on the vacancies

notified by the Government. This is purportedly to comply with Chapter XXI, wherein notification of post has been brought in.

47. The anticipated vacancies, referred to in Chapter XXI, as on 31st May of the succeeding year, has to be reported to the D.E.O/A.E.O, within a period of 7 days. The learned Additional Advocate General contends that such reporting has to be done within 7 days from the occurrence of the vacancy. However, a reading of Rule 2 of Chapter XXI does not indicate as to when the 7 day limit would commence or cease. The reading only indicates that regular vacancies and anticipated vacancies as on the 31st May of the succeeding year, has to be reported within a period of 7 days. The anticipated vacancies can only be the vacancies anticipated by the Manager at the commencement of the academic year, on the basis of the student strength of that year. The word 'succeeding year' is also quite strange, since when one considers a subject academic year for example, 2014-15, the preceding year is 2013-14 and the succeeding year is 2015-16. If in the subject year the anticipated vacancy as on 31.05.2016 is to be reported, it does not stand to reason. Such an anticipation can only be there on the commencement of the year, looking at the admissions of that year.

The regular vacancies can be taken as liable to be reported within seven days of it arising. But it is not clear when the anticipated vacancies as on 31st May of the succeeding year is to be reported. When and how the anticipated vacancy of a subject year is to be reported is also not clear. If appointments are to be made on the commencement of the subject year, as provided in the amended Rule 5 of Chapter XXI, then the same would be revealed only before 6th March of that year, which details, even as per the amended Rule 12 of Chapter XXIII, the Manager is obliged to upload and lock as on that date.

48. One cannot also comprehend what exactly is the distinction made in the rules, of regular vacancy and anticipated vacancies. The regular vacancies are, to name a few, those arising on retirement, resignation, death, transfer etc. and the anticipated vacancies can only be those anticipated on admission. No reason comes forth as to why the regular vacancy is to be notified. There is a purpose discernible, in notifying additional vacancies, which has to be on the basis of student strength and the staff fixation orders. But none commends notification of regular vacancies; which do not take in the additional vacancies.

49. Chapter XXI, newly introduced in the KER, and Rule 12 of Chapter XXIII, substituted by the Amendment Act, are incongruous. As per Chapter XXI whenever regular vacancies occur, including the anticipated vacancies as on 31st May of the succeeding year, they have to be reported within a period of seven days to the DEO/AEO, who has to report it to the Director and the Director has to issue a notification on or before 30th April every year. On receipt of such application, the Managers are entitled to appoint fully qualified candidates, but only on the re-opening day itself. On line approval of such appointments are also indicated in Chapter XXI. The newly introduced Rule 12 of Chapter XXI, on the other hand, makes permanent, the effective strength of pupils reckoned for the year 2010-11, with power to revise, conferred on the Government, based on UID of students. It is to be noticed that the revision takes in, only sanction of additional posts and does not contemplate a situation of division fall as earlier provided. When such revision is effected, then it is not discernible as to why for the continuation of the same, on the incumbent appointed vacating office, for whatever reason, why a notification is required; since then it would be a regular vacancy. An anticipated vacancy in which

appointment is made by the Manager, becomes a regular vacancy on the same being sanctioned, and continues based on the student strength in the subsequent years. The threat would be only of a retrenchment if there is a division fall. The retrenched teacher then would also have a claim under rule 51A; which by statute has to be enforced in the next arising regular vacancy.

50. The determination of student strength, on the basis of UID, is as per a procedure introduced by the amended Rules, which mandates the head of schools to furnish to the DEO/AEO, the existing staff strength as on 31st March or the last working day of every year. The details of UID of students are to be uploaded on the 6th working day and the facility locked. This has to be verified with the data, between the 7th to 15th June, by the DEO and the AEO, so as to certify it by 15th July by which time the fixation of staff strength of each school could be finalised. Hence, the notification of anticipated vacancies, insofar as it relates to a rise in the pupil strength, is taken care of by the staff fixation order to be issued under the amended rule 12 of Chapter XXIII and there would be no requirement for a notification as such.

51. The only category of anticipated vacancies; at the

risk of repetition, is that anticipated on commencement of an academic year on the basis of pupil strength. When Class I has more students than Class II, the Manager could also anticipate more vacancies on promotion to Class II and a like inflow in Class I, on commencement of the academic year. The other regular vacancies, which arise on death, resignation or such other cause, cannot be anticipated, except of retirement. The notification of vacancy does not serve any purpose; since the student strength would be the base on which the staff strength of a school is decided and the creation and sanction of additional vacancies are made. In such circumstance, it has to be stated that the prescription of notification of regular vacancies and anticipated vacancies, brought in by Chapter XXI, and the amendment to Rule 9 of Chapter III and Rule 1 of Chapter XIV-A, has to be found to be quite unreasonable and arbitrary. It meddles with the authority of the Managers to make appointments, as and when the vacancy occurs, which is also based on the educational need. The educational need, going by the scheme of the K.E.Act and KER, cannot be so fettered by a requirement for notification, and is only subject to the staff fixation orders. The staff fixation under the

newly introduced Rule 12 and the procedure delineated is proper, though the earlier Rule provided for more comprehensive checks and balances insofar as providing for cross verification, by way of re-visit and re-fixation, which is taken away in the new Rule. However, that is the prerogative of the Government which need not be looked into by this Court, which is not acting as a watch-dog, of how the Government functions and arranges its affairs. Prejudice, arbitrariness and unreasonableness being absent; this Court would not instruct the Government as to how the administration could be made more efficient; which would only infringe upon the executive powers. Suffice it to notice that even now scrutiny of staff fixation by higher officers is permitted by Rule 12C, re-fixation on ground of bogus admission by Rule 15 and under Rule 12E(3)based on an enquiry report, super check under Rule 16, all coming under Chapter XXIII.

52. Despite the prescription with respect to staff fixation being found to be proper, this Court is unable to uphold the permanent fixation of strength of teaching staff as reckoned for the academic year 2010-2011. The same would run contrary to the prescription of the PTR, as per the KER and more so as per the

RTE Act. The KER earlier provided for a PTR of 1:45, on which basis the staff fixation was to be made under the unamended Rule 12. When such PTR, or a divisional strength is prescribed by the rules with reference to which the probable divisions are to be determined and on which rests the fixation of staff strength; there cannot be a rule incorporated making the strength of teaching staff, permanent as on 2010-2011. The newly introduced Rule also contains a procedure by which the fixation of staff of each school has to be finalised by the Educational Officer, not later than 15th July of every year. This has to be done on the PTR, as contained in the KER and now, as contained in the RTE Act also. The fixation of a permanent staff strength as on 2010-11 would also run against the provisions of the RTE Act. The adoption of 2010-11 staff strength would run foul of Section 26 of the RTE Act which prohibits the vacancies of teachers in aided schools, remaining unfilled in excess of 10%. The vacancies are to be taken on the basis of the staff strength determined as per the PTR provided by the RTE Act. Hence, such prescription of permanent staff strength as reckoned, of the year 2010-2011, as per the unamended Rule 12, has to be struck down.

53. The further challenge is to the proviso introduced to Rule 51A. Rule 51A is a preferential claim conferred on qualified teachers who are relieved as per Rule 49 or 52 or on account of termination of vacancies. Hence, the preference given in the Rule is to three categories: ***(i)*** those who are relieved as per Rule 49, ***(ii)*** Rule 52 or ***(iii)*** on account of termination of vacancies. Two provisos are already available in Rule 51A. The first proviso restricts the claim, to teachers relieved under Rule 49 or Rule 52, who have a minimum continuous service of one academic year, as on the date of relief. The second proviso, from among the three categories provided in Rule 51A, gives a preference to protected teachers. Hence, though a teacher relieved under Rule 49 or 52 or on termination of vacancy, may not be a protected teacher, under the KER; a protected teacher would necessarily be one falling under either of these categories, but continued either in the school in which he/she has lien or deployed to another school by virtue of the protection. A protected teacher would always be a Rule 51A claimant but a Rule 51A claimant need not be a protected teacher.

54. The present proviso introduced creates a further category, termed as teachers included in the teachers' bank.

Unless, they are teachers who are included in the three categories, as provided in the Rule itself, the proviso cannot be sustained. If the persons included in the Teachers Bank fall under any of the categories under Rule 51A and if they are protected, then, there need not be any preference specifically given to such persons, as it is already available. Those not included, in the three categories under Rule 51A, cannot be allowed to over-ride the statutory claim, by a proviso. There could also be no further category added with a better preferential claim, than that provided in the Rule; by a proviso.

55. The proviso is a well-known devise of statutory construction, which cannot be interpreted as stating a general rule and creates either a qualification of or an exception from, what is stated in the substantive section or rule. It cannot be said to include or add what is not available in the original enactment. In ***Madras and Southern Maharatta Railway Co. vs. Bezwada Municipality*** **[AIR 1944 PC 71]** the question was the levy of property tax on the annual value which was determined, on assessment, as a percentage of the capital value of the lands. The provision provided for a tax to be levied at a percentage of such annual value of lands

or buildings or both, which again was deemed to be gross annual rent at which they are reasonably expected to be let from month to month or from year to year. The proviso to the deeming provision provided *inter alia* that for any building of a class not ordinarily let, the gross annual rent of which cannot be estimated, the annual value shall be deemed to be six percent of the total estimated value of the land and estimated cost of erecting a building after deducting depreciation. The contention raised by the assessee was that the proviso having provided for such a determination, none other could be resorted to. Their Lordships held that the proviso cannot dominate the rule and the respondents were not precluded from adopting a percentage of the capital value of the land as a method of ascertaining the annual value. The particular instance mentioned in the proviso would not be the exclusive manner of determining the annual value was the finding. It was held so:

> "The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. Where, as in the present case, the language of the main enactment is clear and unambiguous, a proviso can have no

> repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms".

Ram Narain Sons Ltd. v. Asst. Sales Tax Commr. **[AIR 1955 SC 765]** spoke so:

> "It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other".

In ***Abdul Jabar Butt vs. State of Jammu and Kashmir*** **[1957 SCR 51]** it was stated so:

> "In the first place it is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso".

56. "Interpretation of Statutes" by Prof.D.S.Chopra [First Edition] in Chapter III at page 135; describes the function of a proviso to be:

> "A proviso may have three separate functions. Normally, a proviso is meant to be an exception to something within the main enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. In other words, a proviso cannot be torn apart from the main enactment nor can it be used to nullify or set at naught the real object of the main enactment. While interpreting a proviso care must be taken that it is used to remove special cases from the general enactment and provide for them separately. In short, generally speaking, a proviso is intended to limit the enacted provision so as to except something which **would have otherwise been within it or in some measure to modify the enacting clause.** Sometimes a proviso may be embedded in the main provision and becomes an integral part of it so as to amount to a substantive provision itself".

57. The principle in ***Madras and Southern Maharatta Railway Co.*** (*supra*) was reiterated in ***Commr. of Income Tax, Mysore vs. Indo Mercantile Bank Ltd.*** **[1959 Supp (2) SCR 256 = AIR 1959 SC 713]** where it was held that : "The proper function of a proviso was merely to qualify the generality of the main

enactment by providing an exception and taking out, as it were, from the main enactment a portion which, but for the proviso, would fall within the main enactment. Ordinarily it is foreign to the proper function of a proviso to read it as providing something by way of an addendum or dealing with a subject foreign to the main enactment. (sic)"

58. In ***Shah Bhojraj Kuverji Oil Mills and Ginning Factory vs. Subhash Chandra Yogaj Sinha*** **[(1962) 2 SCR 159 = AIR 1961 SC 1596]** it was held so:

> "As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule".

Dwarka Prasad vs. Dwarka Das Saraf **[(1976) 1 SCC 128 = AIR 1975 SC 1758],** said so:

> "If, on a fair construction, the principal provision is clear, a proviso cannot expand or limit it. Sometimes a proviso is engrafted by an apprehensive draftsman to remove possible doubts, to make matters plain, to light up ambiguous edges." [Para16]

"We may mention in fairness to counsel that the following, among other decisions, were cited at the bar bearing on the uses of provisos in statutes: *Commr. of Income-tax v. Indo-Mercantile Bank Ltd.* (1959) Supp 2 SCR 256 at p. 266 = (AIR 1959 SC 713 at p. 718); *M/s. Ram Narain Sons Ltd. v. Asst. Commissioner of Sales Tax,* (1955) 2 SCR 483 at p. 493 = (AIR 1955 SC 765 at p. 769); *Thompson v. Dibdin*, 1912 AC 533 at p. 541; *Rex v. Dibdin*, 1910 P.D. 57 at pp. l10, 125 and T*ahsildar Singh v. State of U.P.,* (1959) Supp 2 SCR 785 at p. 893 = (AIR 1959 SC 1012 at p. 1022). The law is trite. A proviso must be limited to the subject-matter of the enacting clause. It is a settled rule of construction that a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment. 'Words are dependent on the principal enacting words, to which they are tacked as a proviso. They cannot be read as divorced from their context' (1912 A.C. 544) If the rule of construction is that prima facie a proviso should be limited in its operation to the subject-matter of the enacting clause, the stand we have taken is sound. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. A proviso

> ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction.
>
> "The proper course is to apply the broad general rule of construction which is that a section or enactment must be construed as a whole, each portion throwing light if need be on the rest.
>
> The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together is to prevail."
>
> (Maxwell on Interpretation of Statutes, 10th Edn. p. 162)" [Para 18].

The principle so reiterated in ***Dwarka Prasad*** (*supra*) has stood the test of seasons and the vicissitudes of time and has been quoted and relied on recently by the Hon'ble Supreme Court in ***Dashrath Rupsingh Rathod v. State of Maharashtra*** **[(2014) 9 SCC 129]** and ***Union of India v. Dileep Kumar Singh*** **[(2015) 4 SCC 421].**

59. It is in this context the effect of the present proviso has to be considered. Rule 51A of Chapter XIV-A KER creates three categories of persons who have a claim to be appointed to a future vacancy subject only to a claim under Rule 43 of the very same Chapter. The first proviso makes a condition insofar as a

teacher who stakes his/her claim under Rule 49 or 52 being entitled to make such claim only if his/her earlier appointment had a minimum continuous service of one academic year as on the date of relief. This is a condition provided, which is permissible by the proviso and carves out something which was always there. The second proviso also creates first preference, among the three categories, to those who are protected. This is a qualification, which also could be validly made in a proviso. As was noticed above, a protected teacher would always be a Rule 51A claimant but a Rule 51A claimant need not be a protected teacher. Hence, a protected teacher, who has claim under Rule 51A, by the second proviso itself has a better claim than a claimant under Rule 51A who is not a protected teacher. What is intended by the third proviso brought in by the amendment, is to provide for a still better claim to persons who were not included in Rule 51A. To illustrate, if 'A' has a claim under Rule 51A to be appointed to future vacancies in 'X' school, 'B', who is a protected teacher and not having a claim under Rule 51A with respect to 'Y' school, is granted preference by the third proviso to be appointed to 'X' school if he/she is included in the protected teachers' list. Obviously this is to prevent an

excess teacher being continued in a school, by virtue of protection orders and be deployed in another School were a temporary vacancy arises. This cannot be sustained, since it creates a right which is not available in the statute or the rule itself. As per the rule, even a Rule 51A claimant with reference to a school, cannot have a better claim as against another Rule 51A claimant in another school, even if the former claimant sources such claim to an antecedent point of time than the later. A protected teacher or one who is included in a package, having been thrown out after a valid tenure in a school can be deployed in another school, even in temporary vacancies, only if there are no statutory claimants in that school, remaining out of the rolls of the school. The prohibition or preference can be only applied against a fresh appointment. The proviso introduced, hence, has to be set at naught and the same is declared invalid.

60. The next challenge is with respect to the appointment of a Teacher Appraisal Committee, under the Chairmanship of a well reputed educational expert and the Deputy Director of Education, in the district concerned, as the Convener. The other members of the Committee is to be appointed by the

Director. The Teacher Appraisal Committee is also to receive the approval of the Government. The function of the Committee is to apprise the performance of teachers once in three years and to suggest measures for their efficiency and enrichment. The managements, both minority and otherwise, cry hoarse on the inroads made into their powers and the infringement of their fundamental rights, which in the case of the former, also is regulated by Article 30(1) of the Constitution of India. The minority institutions specifically assert their special status as granted under the Constitution of India, to assail the appointment of such Teacher Appraisal Committee, which according to them, would lead to interference in the management and administration of the institutions. The other institutions also asserted their right to management and appointment of teachers and assailed the Rule as arbitrary and unilateral insofar as, neither the Manager or the Headmaster/ Headmistress of the schools are participated. The Manager has the control of the conduct of the school and the administration, without any interference caused to the academic work of schools, and the Headmaster/ Headmistress has the absolute authority insofar as the academic stream is concerned as

per Rule 9(4) of Chapter III KER. Without their involvement, it is contended, the Rule introduced is bad.

61. This Court is of the opinion that none of the judgments relied on need be referred to, since the function of the Teachers Appraisal Committee, as deducible from the Rules, is only to appraise the performance of teachers once in three years and to suggest measures for their efficiency and enrichment. Such suggestions are to be given to the Government, for their consideration and an implementation would also be, only with the sanction of the Government, which is permissible under the KE Act and KER. The functioning of a Teachers Appraisal Committee, according to this Court, does not, at all, make any inroads into the administration or management, as claimed by the managements. It can at best be advisory in nature and content. The Rule making power of the Government, as per the KE Act, specifically deals with the standard of education and courses of study under Section 36 (2)(k), to which; the power of the delegate to make such a rule can be sourced.

62. However, it is to be noticed that though an approval is to be made by the Government, there is nothing indicating who

would appoint the Chairman but for saying that he would be a well reputed educational expert, which is as vague and broad as possible. The Deputy Director of Education has been indicated as the Convenor with the other members; other than the Chairman and the Convener, to be appointed as may be specified by the Director. Again, it is not clear as to who would make the appointment and the Rule making authority has thought it fit to further delegate the specification to the Director which, on the face of it, is bad. The Rule, as it stands, cannot be sustained for reason of the executive Government having not laid down any guidelines as to how the Committee is to be formed and how it should function. The appointing authority, of the Chairman and the other members is also not specified and the retention of the Rule in the Statute Book would only lead to arbitrary actions on the part of the educational authorities and the same has to be struck down.

63. What remains is Rule 7 of Chapter XXI and stand alone clause (e) in the amendment, both of which refers to the Teachers Bank. Here it is to be noted that the Teachers Bank was a concept, brought in by G.O.(P)No.199/2011 and G.O.(P) No.212/2013, both of which stand set aside by this Court. The

Government would in fact contend that there is a further Teachers Bank brought in by G.O.(P) No.213/2015, which is also under challenge here. It is also contended that Rule 7 specifies that guidelines for inclusion of teachers in the Teachers Bank could be decided as per orders issued by the Government which has now been decided as per G.O. (P) No.213/2015. The Rule provide that appointments to vacancies which occur due to exemption of a teacher from class charge as also leave vacancies and short term vacancies including vacancies of teachers deputed for training, shall be filled up from among the list of fully qualified hands supplied from Teachers Bank. The arrangement is said to be one for retaining the excess teachers for suitable deployment to schools. It is essentially intended at absolving the Government of double liability to salary, on ground of retention of excess teachers in certain schools for reason of protection; while fresh appointments to short term vacancies are carried on in other aided schools. These short term appointments again give rise to claims under Rule 51A. The deployment of teachers, in a manner by which the protected hand is accommodated, in the short term vacancies in another aided school, with lien created only in the

parent school, cannot at all be faulted; as permitted by a Division Bench ***Nair Service Society*** (*supra*).

64. The Managers contend that it is not the short term vacancies alone and even the vacancy created by promotion, to the post of a head teacher would be covered under the Rule. It cannot strictly be said that the post creation of a head teacher would give rise to a permanent vacancy. It has to be noticed that Rule 5 and Rule 1 of Chapter XXIII had been amended for creation of the post of Headmaster over and above the class divisions admissible, only based on the student strength and in compliance of the RTE Act. It is also to be noticed that there is some confusion, in equating the post of Head Master and Head Teacher, which according to this court is not possible of equation. The Head Teacher referred in the schedule to the RTE Act is with respect to the class and the Head Master in the KER, is for a school. Viewed in that context, the minute the student strength falls below the prescribed limit [150 in Class I to class V and 200 in Class VI to Class VIII], the head teacher would have to be accommodated in accordance with the divisional strength of the School, with teaching duties. Hence the same is also a temporary vacancy, the

continuance of which would depend on the student strength. In such circumstance, this Court does not find any infirmity in clause 7 of Chapter XXI.

65. However, clause (e) cannot be retained for reason of G.O.(P) No.199/2011 having already been set aside. In addition is the simple fact that the SRO bringing in the amendment, does not provide the specific place in the rule book, where clause (e) is to be inserted. Be that as it may, there is also no requirement for the teachers bank itself to be a part of the rules, which Rule 7 of Chapter XXI permits the Government to draw up, by executive orders, but only including those teachers specified in that rule. The executive action of drawing up a list of teachers, as permissible under Rule 7 of Chapter XXI, would be perfectly possible, for appointment to the temporary vacancies as stipulated in the rule.

IV. Circular No.47002/J2/14/G.Edn. dated 26.08.2014

66. The aforesaid Circular has been brought out obviously noticing the amendment to Rule 12 of Chapter XXIII KER. The Circular directs a higher level verification by the Deputy Director of Education of the High Schools and District Educational

Officers of the Primary and Upper Primary Schools. This higher level verification was available, in the unamended Rule 12. The entire scheme was amended and a new procedure was brought in, based on UID of students and online registration of students as also verification by the Educational authorities for issuance of staff fixation orders by 15th July. It is not clear as to why the Circular again brought in the higher level verification. The higher level verification definitely cannot meddle with staff fixation order issued under the Rules, since those would be statutory orders which are incapable of being interfered with, on the strength of Circulars. The powers under rule 12C and 12E read with Rule 16 and Rule 15 of Chapter XXIII definitely would be available.

67. The Circular goes on to talk about deployment of teachers in Government schools and then speaks of deployment of excess hands in uneconomic schools under the Corporate managements. Further by paragraph-3, there is a stipulation to decide the staff strength on 1:45 ratio and retain excess hands by computing the strength respectively on 1:30 and 1:35 ratio. It is also contemplated that the junior-most juniors who were not capable of being adjusted on either of the aforesaid ratio should be

included in the teachers package.

68. The 4th paragraph notices certain Managers having made appointments resorting to 1:30 / 1:35 ratio, which are found to be against the prescription of 1:45 as per the KER. Hence, the Government by Circular prohibits approval of vacancies filled up on the basis of 1:30 / 1:35 ratio and directs termination of teachers, failing which action is threatened against the Managers. The Circular in its entirety, cannot be sustained, for reason of such Circular being incapable of causing any interference to the procedure contemplated by the statutory rule. The ratio of 1:45 which is sought to be asserted by the Circular is also not sustainable for reason of this Court having already found the ratio in the RTE Act being mandatory and the same being class-wise. The said Circular, hence, would stand set aside.

V. G.O.(P) No.213/2015/G.Edn. dated 6.8.2015

69. The constitution of a teachers' package as contemplated by the KER, by the present amendment, introducing Clause-7, has been upheld by this Court in this judgment. The right of the Government to direct the aided school managements to

appoint such teachers who are so protected, by inclusion in the package, to even schools in which the protected teacher has no lien, has already been upheld by a Division Bench of this Court in ***Nair Service Society*** (*supra*). What remains is the consideration of G.O.(P) No. 213/2015, which according to the Government, is the executive order brought out by the Government to implement the teachers' package. At the outset it is to be noticed that G.O.(P) 199/2011 has been withdrawn by the Government in this Government Order. Hence, the package, as per the Government Order, is no more available, though the provision to bring in a package, is now available in the KER [Rule 7 Chapter XXI]. The Government can create and constitute such a package for filling up short term vacancies. One has to examine whether the above G.O. formulates such a package.

70. The present Government Order speaks of five categories of teaching and non-teaching staff who are protected, which are the following:

(1) Those who are continuing in regular service with approval of appointment as on 31.3.2011.

(2) Those persons who have got approval as per the teachers' package on 1.6.2011

(3) Teaching and non teaching staff who are protected by earlier protection orders.

(4) The retrenched teachers who are deployed as cluster co-ordinators and specialists teachers deployed to other schools as per the teachers' package.

(5) Teachers who are appointed from 2011-2012 in vacancies arising on resignation, death, retirement, promotion and transfer in the ratio of 1:30 in L.P. and 1:35 in U.P.

This is contained in Paragraph I of the Government Order.

71. Paragraph II of the Government Order deals with determination of posts, appointment and their approval. Clause (1) specifies that the same has to be done in accordance with KER, on the basis of UID. Clause (2) has two limbs: one, the prescription of 1:30 ratio for L.P. Schools and 1:35 ratio for U.P. Schools for appointments to posts existing as on 2011-2012 in vacancies arising on resignation, death, retirement, promotion and transfer. This cannot be sustained since this Court has already held that the PTR as per the RTE Act, cannot be based on the strength of students in the school and has to be on the basis of the strength of students of each class; with 30 and 35 being the maximum

possible strength in each class/division. The declared ratio in the G.O. can be accepted for the year 2011-2012, but however from 2012-2013 onwards the ratio has to be as per the RTE Act. It is so, since Section 25 of the RTE Act provides for three years for satisfaction of the PTR as per the RTE Act. The second limb is continuance of the permanent staff strength as on 2011-2012, which, incorporated in the rules by the amendment, has been set aside by this Court, herein above. Hence the second limb cannot be sustained. The specification of PTR at the ratio of 1:30 for L.P. and 1:35 for U.P. for the year 2011-2012, based on the student strength of the respective school, is permissible. However, from the year 2012-2013, the posts have to be determined on the basis of 1:30 and 1.35 for Class I to V and Class VI to VIII respectively, but individually for each class.

72. Clause (3) speaks of appointment from 2011-2012 in additional posts for which approval would be granted only on the basis of 1:45 ratio. With respect to the said clause also, what is applicable to clause (2), would be applicable and the ratio has to be based on the PTR of the RTE from 2012-2013 for L.P. and U.P. However, it can be retained as 1:45 for the High School section, as

per the KER. Clause (4) is with respect to the determination of student strength on the basis of the UID on the 6th academic day and the declaration in lieu of that, which brooks of no dispute. Clause (5) also does not call for any consideration since it deals with the manner in which the payments are to be made. Clause (6) speaks of 1:45 ratio from the year 2015-2016, which cannot be so, for L.P. and U.P. Schools, which has to concede to the ratio under the RTE Act.

73. Clause (7) speaks of appointments to be made only after Government approval. This has a direct nexus to the notification of vacancies brought in by the amendment, which has been struck down by this Court, herein above. The appointment has to precede the approval as contemplated by the KE Act and KER. This is so since the educational need is the paramount consideration in making the appointments. That is the scheme of the KE Act and KER as also the scheme of the RTE Act. The emphasis is on education and not on the financial burden of the Government who has taken upon itself the said burden, willingly and in furtherance of the Constitutional obligation; which obligation is in the nature of a mandate. As has been held herein above, the

educational need for a teacher, cannot await a notification of vacancy by the Government. Nor can it wait for the approval of the Government. The approval has to necessarily be, on the terms provided in the rules and it has to follow the appointment. The same would also have to concede to the PTR provided in the RTE Act.

74. The appointments have to be by the newly introduced Rule 12, from the academic year 2015-2016; which speaks of the staff fixation orders based on the student strength, as determined from the UID of students which details are to be uploaded by the school and logged on before 5.00 p.m. of the 6th working day and the DEO/AEO has to bring out the staff fixation order by the 15th July of every year. The removal of Explanation (2) in the unamended Rule 12 also removes the power of the Government to revise the date for reckoning the staff strength. Clause (7) of the G.O. hence cannot be sustained and has to be set aside.

75. Clause (8) refers again to the PTR of 1:30 for L.P. and 1:35 for U.P., which has to concede to the RTE Act, meaning not to the first and second stage of elementary education, but to

each of the classes. Clause (9) prohibits the approval of appointments made to the additional division vacancies, from 2011-2012 and declines protection to such teachers. Herein it is to be noticed that the KER as it existed in the said year enjoined a statutory duty upon the educational authority (DEO/AEO) to bring out staff fixation orders at the commencement of each academic year, looking at the student strength. It is an admitted fact that the Government had directed the educational authorities to keep in abeyance, the issuance of such orders. Hence, the executive Government had directed the statutory authorities to refrain from exercising their statutory function, which was enjoined upon them by the subordinate legislation, the KER.

76. The permanent fixation of staff strength as on 2010-2011, now brought in by an amendment, has been struck off, from the statutory rule, by this Court. The retrospective effect given to the amendment has also been set aside. In such circumstance, necessary consequences would follow and based on the records maintained by the Managers as to the student strength of each academic year, the respective educational authorities would have to determine the additional vacancies which arose in each year.

However approval can be made only to those appointments made to such vacancies, already intimated and sent for approval, i.e., sent within the time provided in the KER for intimation of such appointment, for the purpose of approval. The approval also shall be considered in accordance with the staff fixation orders to be now issued, on the basis of the unamended Rule 12 of Chapter XXIII. The amended Rule 12 brought in by August 2014, can have only prospective operation, as has been already held by this Court. The staff fixation order for the academic year 2014-15 had to be fixed by 15th July, 2014. The amended rule would only apply from 2015-16, since it also delineates a procedure, which time was already over for 2014-15, by the time the amendment came into force. The retrospective operation conferred on the amendment hence stands set aside for the said reasoning and also that provided in paragraph 32.

77. Clause (10) deals with the appointment of teachers under a particular management, who are included in the teachers' package, to be appointed in the schools under ***such*** managements, in vacancies arising on resignation, death, retirement, promotion and transfer and leave. The said provision is

superfluous, insofar as the claim for protection under the KER and under Rules 51A are even otherwise available in the statutory rule, for appointment to the very same school or schools under a Corporate management. The further prescription of additional vacancies, in the future years from 2015-2016 to be on 1:45, can be upheld only for Class IX and X and to the first stage and second stage of elementary education, the ratio has to concede to the RTE Act.

78. Clause (11) refers to persons included in the protection list, to be appointed to the ***very same*** managements wherein they retain a lien; to the promotion post of Higher Secondary School Teacher. This would be contrary to the method of appointment prescribed under Chapter XXXII of the KER, which prescribes a ratio, and has to be set aside for the executive order infringes on the statutory rule.

79. Clause (12) also speaks of deployment of teachers included in the protected teacher's list, but as in clause (10), it too specifies such appointments to be made to the ***respective managements*** (അതാത് മാനേജർമാരുടെ കീഴിൽ വരുന്ന ഒഴിവുകളിൽ ഇവരെ നിയമിക്കേണ്ടതാണ്). Hence, there is no provision for

appointment of a teacher, protected in one school of a management, to be appointed in another school, under a different management, even in temporary vacancies. Though that is permitted in the decision of this Court under ***Nair Service Society*** (*supra*), there is nothing in the present GO, to permit such appointments of teachers included in the list of protected hands.

80. Paragraph III speaks of deployment of protected teachers; in which clause (1) deals with a Government School with which we are not concerned. Clause (2) speaks of the protected teachers in aided list, to be appointed to the following posts: ***(i)*** posts arising on a teacher being relieved of class duties ***(ii)*** to the posts in the projects under SSA and schools under RMSA and again ***(iii)*** in all vacancies arising under the ***respective*** managements. It has to be reiterated that there is no deployment provided, even in short term vacancies, to a school in which there is no lien, for a teacher included in the protected teachers' list, as the GO stands now.

81. Paragraph IV of the Government Order, are the general instructions, most of which need not be looked into. Clause (5) speaks of a higher verification and super check. As was noticed

earlier, the unamended Rule 12 of Chapter XXIII empowers the Educational Officer to fix the staff strength in accordance with the availability of divisions, which is based on effective student strength of each class as on the 6th working day. It also provided for a verification by the Educational Officers or officers authorised by the Director, by visiting schools on a single day fixed by the Director for staff fixation purpose. Further, though such a visit is not contemplated in the amended Rule 12, there could be no infirmity found if such visit is made and staff fixation is done on the basis of the facts disclosed in such a visit.

82. The unamended Rule 12 provided for a further verification of the strength at the higher level by the DEO in the case of Lower Primary and Upper Primary Schools and Deputy Director of Education in the case of High Schools, wherever additional staff are found necessary after a one day verification, as above referred. It was also provided that the final orders shall be issued only on such re-verification of strength. Such a provision is not available in the amended Rule and the staff fixation orders made by the Educational Officers as provided now cannot be interfered with by a higher level verification, as provided in the

executive order. Clause (5) of Paragraph IV of the aforesaid Government Order speaks of such a higher level verification, which cannot be permitted, to interfere with the statutory orders of staff fixation passed under the amended Rule 12. However, the super-check as provided in the general instructions of the above Government Order cannot be interfered with, since Rule 12C, Rule 12E read with Rule 16 and Rule 15 is still retained in Chapter XXIII. Hence, a super-check could be conducted; but, a higher level verification would not be possible. Paragraphs V, VI, VIII, IX, X and XI need not be looked into.

83. What remains is paragraph VII, which deals with leave vacancy appointments. The prescription in the said instruction as to 1:45 ratio being followed from 2011-2012 again for L.P. and U.P., has to concede to, 1:30 and 1:35 respectively, from the year 2012-2013 onwards. The further prescription that the teachers from the protected teachers' list are to be first appointed in preference to Rule 43 / 51A and 51B runs contrary to the Rule and the Government is tied down by the fact that the field is occupied by the statutory rule. No executive order could be brought in impromptu, to occupy a field already occupied by the

subordinate legislation. The proviso introduced in the Rule with respect to such preferential claim has also been set aside by this Court. G.O.(P) No.213/2015 would have to be read with the modifications as indicated by this Court, herein above.

Conclusions

84. Considering the fact that the various writ petitions in the batch of cases, challenge the various orders individually, together or in different combinations, this Court is of the opinion that the writ petitions can be disposed of on the basis of the afore stated reasoning, with respect to each of the orders and issues highlighted by this Court, under sub-headings and the general conclusions would be as follows:

(i) The challenge to the conversion of Elementary Cycle as brought out by Clause-2 of G.O.(Ms) No.154/2013/G.Edn. dated 03.05.2013 would be negatived; but, however, leaving open the question of up-gradation or grant of higher standards to be considered after the Government comes out with the comprehensive measure as directed in W.P.(C).No.3060 of 2014 and connected cases, by judgment dated18.06.2015. Clause-4 of

the aforesaid G.O. stipulating 1:30 and 1:35 ratio to determine the staff strength, as contemplated under the RTE Act to the schools as such; retaining the 1:45 ratio as per the KER, would stand set aside. The provisions of the KER with respect to 1:45 ratio would be rendered, void on the RTE Act coming into force and the stipulation would be as per the Schedule of the said Central legislation, wherein different PTR is provided for Class I to V and Class VI to VIII, which has to be taken for individual class/divisions in the Elementary Cycle of the schools.

(ii) G.O.(P) No.124/2014/G.Edn. dated 04.07.2014 would stand set aside, since the modifications attempted in the said Government Order are of Government Orders already set aside by this Court in W.P.(C) No. 30107 of 2013 and connected cases, dated 15.01.2015.

(iii) The amendments made to the KER as per S.R.O.No.485/2014 [G.O.(P) No.154/2014/G.Edn. dated 11.08.2014] would have only prospective application. The amendment made by Rules 2(1), 2(2)(a), 2(2)(b) and 2(3) of the Amendment Rules of 2014 would stand set aside, as being arbitrary and unreasonable. Amendment Rule 2(4) introduces

Chapter XXI to the KER in which Chapter, Rules 1 to 6 would stand set aside, again as being arbitrary and unreasonable. Rule 7 in Chapter XXI alone would be sustained. Amended rule 2(5)(a) and 2 (5)(b) would be sustained. Amended Rule 2(5)(c), being the substitution of Rule 12 of KER would also be sustained; but, however, finding the effective strength of pupils reckoned for the academic year 2010-11, made permanent; as being ultra vires the provisions of the KE Act and the other provisions of the KER, as also running counter to the provisions of the RTE Act. The procedure for staff fixation orders based on UID would stand sustained. Amended Rule 2(5)(2)(d) would be sustained, while clause (e) of the said Rule would stand set aside.

(iv) Circular No.47002/J2/14/G.Edn. dated 26.08.2014 would stand set aide.

(v) G.O.(P) No.213/2015/G.Edn. dated 06.08.2015 would stand sustained, holding that the said Government Order does not speak of protected teachers having lien under one management; to be deployed to a school under another management. The stipulation of following the ratio of 1:45 in elementary education and prescription for staff fixation at 1:45 ratio

as per the KER would stand nullified in elementary education; for reason of the stipulation under the RTE Act of 1:30 and 1:35, which is mandatory. The staff fixation for the years 2011-12 has to be carried out by the Educational authorities on the basis of the unamended Rule 12 upto the academic year 2014-15 as directed hereinabove.

(vi) Challenge against G.O.(P) No.313/2913/G.Edn. dated 29.11.2013 would stand sustained, following the common judgment in W.P.(C) No.30107 of 2013 and connected cases, dated 15.01.2015. The challenge against G.O.(P) No.278/2014/G.Edn. dated 23.12.2014 also would stand sustained recording the submission of the learned Additional Advocate General that the same is unworkable.

The writ petitions would stand disposed of on the above lines. Parties are left to suffer their own costs.

Sd/-
K.Vinod Chandran,
Judge

vku/-

[true copy]