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Rosily Augustine Vs. State of Kerala

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Court : Kerala

Decided On : Dec-31-2012

Judge : Honourable Mr.Justice P.R.Ramachandra Menon

Appellant : Rosily Augustine

Respondent : State of Kerala

Advocate for Pet/Ap. : Mr. S.P. Aravindakshan Pillay

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON MONDAY, THE 31ST DAY OF DECEMBER 2012 10TH POUSHA 193 WP(C).No. 19058 of 2012 (F) ---------- PETITIONER(S) : ---------- ROSILY AUGUSTINE ASSISTANT ENGINEER KERALA WATER AUTHORITY PUBLIC HEALTH SECTION, MANANTHAVADY. BY ADVS.SRI.S.P.ARAVINDAKSHAN PILLAY SMT.N.SANTHA SRI.K.A.BALAN SRI.PETER JOSE CHRISTO SRI.S.A.ANAND RESPONDENT(S) : ---------- 1. STATE OF KERALA REPRESENTED BY THE SECRETARY TO GOVERNMENT WATER RESOURCES DEPARTMENT SECRETARIAT,THIRUVANANTHAPURAM, PIN-695 001.

2. THE KERALA WATER AUTHORITY REPRESENTED BY ITS MANAGING DIRECTOR JALA BHAVAN, VELLAYAMBALAM THIRUVANANTHAPURAM-695 033.

3. THE CHIEF ENGINEER (HRD & GENERAL) KERALA WATER AUTHORITY VELLAYAMBALAM, THIRUVANANTHAPURAM, PIN-695 033. ADDL.R4 TO R6 AREIMPLEADED: R4. SUDHEER M., ASSISTANT ENGINEER, KERALA WATER AUTHORITY, SEWERAGE PROJECT SECTION, PLAMOOD, THIRUVANANTHAPURAM. R5. SANTHOSH KUMAR.S., ASSISTANT ENGINEER, KERALA WATER AUTHORITY, (LAAK DETECTION & SERVEILLANCE SQUAD) P.H. CIRCLE, THIRUVANANTHAPURAM WP(C).No. 19058 of 2012 (F) R6. RIJU V. ASSISTANT ENGINEER, KERALA WATER AUTHORITY WATER SUPPLY SECTION, PAYYANNUR, KANNUR DISTRICT. ADDL.R4 TO R6 ARE IMPLEADED AS PER ORDER DT 11/10/2012 IN IA 13634/2012. R1 BY ADV. GOVERNMENT PLEADER SRI.T.R. RAJESH R2 & 3 BY ADV. SRI.MILLU DANDAPANI, SC, KERALA WATER AUTHORITY ADDL.R4-R6 BY ADVS. SRI.C.P.SUDHAKARA PRASAD (SR.) SRI.S.RAMESH SRI.NAVEEN.T SMT.POOJA SURENDRAN THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 16/11/2012 ALONG WITH WP(C) 25195/2012, THE COURT ON 31-12-2012 DELIVERED THE FOLLOWING: BP WP(C).No. 19058 of 2012 (F) APPENDIX PETITIONER(S) EXHIBITS : EXT.P1 : TRUE COPY OF THE CIRCULAR NO.KWA/JB/SY.CELL/10987/2008, DTD.16.2.2009 OF THE CHIEF ENGINEER (HRD & GENERAL) OF KERALA WATER AUTHORITY. EXT.P1(a): TRUE COPY OF THE RELEVANT EXTRACT OF THE APPENDED SENIORITY LIST OF ASSISTANT ENGINEERS (DEGREE HOLDERS). EXT.P2 : TRUE COPY OF THE SPECIAL RULES FOR KERALA PUBLIC HEALTH ENGINEERING SERVICE. EXT.P3 : TRUE COPY OF THE JUDGMENT DTD.1.2.2012 IN WPC NO.30602/2011-A OF THIS HON'BLE COURT. EXT.P4 : TRUE COPY OF THE JUDGMENT DTD.15.3.2012 IN WA NO.497/2012 OF A DIVISION BENCH OF THIS HON'BLE COURT. EXT.P5 : TRUE COPY OF THE GO(MS)NO.51/2012/WRD DTD.24.7.2012. EXT.P6 : TRUE COPY OF THE JUDGMENT IN WPC NO.6295/2007-Y OF THIS HON'BLE COURT. RESPONDENTS' EXHIBITS : EXT. R4(a): COPY OF THE CIRCULAR DT 5/6/1984 ISSUED BY THE KERALA WATER & WASTE WATER AUTHORITY. EXT.R4(b): COPY OF THE ORDER, G.O.DATED 3 10/1994 ISSUED BY THE GOVERNMENT. EXT.R4(c): COPY OF THE CIRCULAR DT 26/9/2012 OF THE CHIEF ENGINEER, KERALA WATER AUTHORITY. EXT.R4(d): COPY OF THE

SENIORITY LIST OF ASST. ENGINEERS (DEGREE QUOTA) PUBLISED AS PER EXT.R4(c). EXT.R4(e): COPY OF THE ORDER DT 11/2/2011 ISSUED BY THE KEALA STATE ELECTRICITY BOARD //TRUE COPY// P.A.TO JUDGE BP P.R. RAMACHANDRA MENON, J.

---------- W.P.(C). Nos. 19058 & 25195 of 2012 ---------- Dated this the 31st day of December, 2012 JUDGMENT It is settled law, that Statutory Rules cannot be amended by way of Executive Orders. But if the Rules applicable to one particular service/establishment stand adopted in respect of another service/establishment, will it still retain the status as "Statutory Rules" or should it be treated as only Executive/Administrative orders which can be amended by way of subsequent Executive/Administrative orders without necessitating amendment of original rules? This is the basic question to be considered in these cases.

2. The challenge raised by the petitioners is in respect of G.O.(MS)No.51/2012/WRD dated 24.07.2012 produced as Ext.P5 in W.P.(C).No. 19058/2012 and P4 in W.P.(C).No. 25195/2012, whereby it has been stipulated that, while effecting promotion to the post of Assistant Executive Engineer from the Feeder Category of Assistant Engineer, in tune with the prescribed ratio of 3:1, senior Degree holders shall not be overtaken by the junior W.P.C. Nos. 19058 & 25195 of 2012 -2- Diploma holders in respect of the quota earmarked for the Diploma holders. The crux of the contention is that, the Government Order is mainly beyond the rule making power of the Government and further, it seeks to modify the existing Statutory Rules, which is not legally possible without amendment of the Rules, in view of various binding judicial precedents, including the law declared by the Full Bench of this Court reported in Sugathan v. Shahul Hameed (2006 (4) KLT 54).

3. Parties and the proceedings are referred to, as given in W.P(C).No.25195/2012, unless otherwise mentioned separately.

4. The petitioners are contestants for promotion to the posts of Assistant Executive Engineer in the respondent Kerala Water Authority, under the 'Diploma quota'. The respondent 'Water Authority' was formed way back in the year 1984 (originally, it

was the Kerala Water and Waste Water Authority; which name was subsequently changed as Kerala Water Supply and Sewerage Authority in 1986 and thereafter as the Kerala Water Authority). The appointments of officers and staff are to be made as provided under Section 8 of the Act; Sub Section 3 W.P.C. Nos. 19058 & 25195 of 2012 -3- of which says that, except as provided in the said Section, appointment and service of officers and staff shall be governed by the Rules made by the Government from time to time. Fact remains that, no Rules have been framed by the Government in this regard.

5. As early as on 5.6.1984, a Circular bearing No. KW&WWA.297/84 was issued by the erstwhile Kerala Water and Waste Water Authority (copy of which has been produced along with the counter affidavit of the 3rd respondent as Ext.R3(a)), whereby the Water Authority decided that, till such time specific Rules regarding the salaries, allowances and other conditions of service of various officers and employees of the Authority were formed, the Rules mentioned therein shall apply mutatis mutandis to the employees and officers of the Authority. Kerala State Public Health Engineering Special Rules are specifically included in the said set of Rules adopted by the Authority.

6. The dispute is in respect of promotion to the post of 'Assistant Executive Engineer' from the cadre of Assistant Engineer. The post of Assistant Engineer is to be filled up either W.P.C. Nos. 19058 & 25195 of 2012 -4- by direct recruitment from persons having Degree or by way of promotion of employees having such other qualifications as prescribed and placed in the feeder category, whose promotion post is that of Assistant Executive Engineer (formerly named as Assistant Engineers under the relevant Rules). The method of recruitment, qualifications etc., are provided under Ext.P1 Rules, which stipulates that, promotion to the post of 'Assistant Executive Engineer' shall be effected from both the eligible Degree/Diploma holders in the ratio of 3:1. It is in view of the said stipulation providing a specific ratio, that, separate seniority lists are mandated by the Water Authority in respect of the cadre of Assistant Executive Engineers. By virtue of the operation of the adopted Rules as above, it so happened that quite a lot of Diploma holders (who were promoted as Assistant Engineers) got a march over the senior Degree holders, to be elevated as 'Assistant Executive Engineers'

in the quota earmarked for them. Naturally, there was a heart burn for the senior Degree holders in so far as, the colleagues who were working as Assistant Engineers having much lesser service in the feeder category of W.P.C. Nos. 19058 & 25195 of 2012 -5- Assistant Engineer and having lesser level of qualification (some of whom were working even under the Degree holders while holding the lower post in the ladder, before being promoted as Assistant Engineers) came to be promoted and appointed as Assistant Executive Engineers, thus bringing them above the senior Degree holders, on a fine morning.

7. The anomalous situation was brought to the notice of Water Authority and also the Government, by the aggrieved parties, at different points of time. It was also brought to the notice of the Government that, similar anomalous situation resulted because of blindly following the ratio in some other departments, was caused to be redressed by issuance of appropriate Executive/Administrative orders and that the same was upheld by this Court in Public Works Engineers Association v. P.T. Philipose and others (ILR 199.(1) Kerala 217).

8. As mentioned above, the anomalous situation was taken note of by the Government in the erstwhile PWD department, when it was bifurcated into 'Roads and Buildings' and 'Irrigation' W.P.C. Nos. 19058 & 25195 of 2012 -6- Departments years back. By virtue of the option given, most of the Degree holders opted to the Roads and Buildings Division, which made them to wait in the queue for quite long, while their juniors who were Diploma holders got promoted to the next higher category. After considering the anomaly, the Government, by way of an Executive order, i.e., G.O(P) No. 36/94/PW&T (almost in similar terms as in the case of the impugned order herein) dated 3.10.1994, stipulated that, junior Diploma holders cannot have a promotion before promoting the senior Degree holders in the quota. The said G.O was subjected to challenge before this Court by the aggrieved parties, mainly contending that, the G.O transgressed into the Rules virtually amending the same, which was not legally sustainable. The matter finally came up for consideration before a Division Bench of this Court and as per the decision reported in Public Works Engineers Association v. P.T. Philipose and others (ILR 199.(1) Kerala 217)., it was held that there was no such transgression in to the field of Rules and that the G.O only intended to fill up the gap in respect of

which nothing was mentioned under the W.P.C. Nos. 19058 & 25195 of 2012 -7- Rules. In so far as there was no attempt to alter the quota stipulated under the Rules, the way in which it was to be given effect to, could very well be stipulated by the Government and thus sustained the G.O and it has become final. Similar course was pursued to rectify the anomaly, by issuing necessary orders in the 'Irrigation Department' and so also in the 'Kerala State Electricity Board'.

9. While so, the 2nd respondent Water Authority resolved to request the Government to issue an order similar to or extending the provisions of G.O(P) No. 36/94/PW&T dated 3.10.1994 to the Kerala Water Authority as well, for rectifying the anomaly. When the matter taken up by the Water Authority before the Government was pending, some Degree holders approached this Court by filing W.P.(C).No. 30699/2003, seeking to direct the Government to issue the orders as proposed by the respondent Water Authority. Pursuant to the judgment dated 17.10.2003, the matter was considered by the Government and the proposal was rejected as per Ext.P2 communication dated 31.05.2004, referring to the judgment of the Division Bench in W.P.C. Nos. 19058 & 25195 of 2012 -8- W.A.No.762/2003 and subsequent dismissal of the SLP preferred therefrom, by virtue of which, the G.O(P) No. 36/94/PW&T dated 3.10.1994 had become irrelevant.

10. Years thereafter, some other Degree holders approached this Court by filing WP.(C).No. 30602/2011, seeking to apply the provisions of the G.O(P) No. 36/94/PW&T dated 3.10.1994, for promotion to the cadre of Assistant Executive Engineers in the Kerala Water Authority as well. The said writ petition was dismissed by this Court as per Ext.P3 judgment dated 1.2.2012, holding that the petitioners were not entitled to get the benefit, unless the relevant Special Rules were amended, also observing that, it will be open for the Government to rectify the anomalies, if any, by effecting appropriate amendment to the Special Rules. Challenge raised against the said verdict, by way of Writ Appeal, did not turn to be fruitful, as the appeal was dismissed as per judgment dated 15.3.2012 in W.A.No.497/2012 (copy of which has been produced as Ext.P4 in W.P.(C).No. 19058/2012). The issue was brought to the notice of the Government by the aggrieved parties, particularly, by way of a W.P.C. Nos. 19058 & 25195 of 2012 -9- representation preferred by the Assistant Executive Engineers' Association

functioning in the respondent Water Authority. The Government examined the matter in detail and after detailed discussion with the Water Authority and considering exactly similar circumstances which were caused to be resolved in PWD, KSEB, Irrigation Department etc., arrived at a finding that the request of the Association was genuine and the anomaly should be rectified.

11. It was accordingly, that the Kerala Public Service Commission was consulted for advice, for issuance of orders by way of 'Executive orders', in view of the fact that, framing of Special Rules (which was under consideration of the Government, having already issued the Draft Rules) incorporating necessary remedial clause would take more time, to have it finalized. Based on the consent given by the PSC, the Government issued Ext.P4 G.O. dated 24.7.2012, mainly stipulating that an Assistant Engineer who possesses Diploma will not be eligible for promotion in the category of Assistant Executive Engineer over a graduate Engineer having longer service in the category of W.P.C. Nos. 19058 & 25195 of 2012 -10- Assistant Engineer, unless the latter is otherwise declared ineligible for promotion to the post of Assistant Executive Engineer. This G.O is under challenge in both these writ petitions.

12. The 3rd respondent in W.P.(C).No. 25195/2012, joining hands with two other persons, have chosen to get impleaded in W.P.(C).No.19058/2012 as additional respondents 4 to 6 therein. The said respondents have filed a detailed counter affidavit in both the cases, producing copies of various documents sought to be relied on by them. When the matter came up for consideration before this Court, it was submitted on behalf of both the sides that, there was no much dispute with regard to the factual position and that the only issue to be considered was a 'legal question', as to whether the impugned G.O was correct or sustainable in law; i.e., whether the stipulation as contained in the impugned G.O could have been brought about by way of an Executive Order, instead of amending Ext.P1 Rules. As agreed by the parties, the writ petitions were taken up for final hearing and heard accordingly. W.P.C. Nos. 19058 & 25195 of 2012 -11- 13. Mr.K.R.B. Kaimal, the learned senior counsel appearing for the petitioner in W.P.(C).No. 25195/2012 and Mr. S.P. Aravindakshan Pillay appearing for the petitioner in the other case, sought to highlight the unsustainablility of the impugned orders in the light of the

relevant provisions of law and the binding judicial precedents. The impugned order was sought to be sustained by Mr. C.P. Sudhakara Prasad, the learned Senior Counsel appearing on behalf of the contesting respondents, mainly pointing out that, issuance of Executive Orders for filling up the gap in the Rules, by way of remedial measures, has been held as sustainable, by a Division Bench of this Court in Public Works Engineers Association v. P.T. Philipose and others (ILR 199.(1) Kerala

217) and further that, the judgment rendered by the Full Bench of this Court in 2006 (4) KLT 5.(cited supra) is no more in existence, having already been set aside by the Supreme Court. The submission made by the learned Senior Counsel was supported by Mr. Benny Gervacis, the learned Counsel appearing for the Kerala Water Authority and also by Mr.T.R. Rajesh, the learned Government Pleader W.P.C. Nos. 19058 & 25195 of 2012 -12- appearing for the State.

14. With regard to the source of power for having issued the impugned G.O., the submission made by the learned counsel for the petitioners is that, admittedly no Rules have been framed by the Government under Rule 64 to govern the field of appointment and conditions of service of officers and staff, as dealt with under Section 8 of the Water Supply and Sewerage Act, 1986. Section 19 of the Act refers to the transfer of employees to the Water Authority in respect of whom the service conditions are stipulated to be governed on the same set of provisions under the Act/Rules which were applicable to them when they were employed by the 'Public Health Department' of the Government. This however does not have any application to the case in hand, as all the petitioners herein came to be appointed to the service of the Kerala Water Authority directly and not by way of transfer. It is stated that the Kerala State Public Health Engineering Special Rules and Kerala Public Health Engineering Subordinate Service Rules stand adopted by the Kerala Water Authority and as such, the terms and conditions are W.P.C. Nos. 19058 & 25195 of 2012 -13- to be strictly in tune the relevant provisions of Special Rules which cannot be altered by any Executive orders. The learned counsel further submits that, the only other provision available under the 'Act' is Section 55, which refers to the powers of the Government to give directions. It is stated that the power of the Government to give directions is only on questions of

'policy' and not on matters in relation to the condition of service of employees.

15. Reliance is sought to be placed on similar provisions as contained in Section 78 A of the Electricity Supply Act 1948, which came to be decided by a Full Bench of this Court as reported in A.M. Mani v. Kerala State Electricity Board (1967 KLT 885), whereby it was held that the expression "functions" in Section 78 A of the Act can only have relation to the primary and essential functions of the Board, which cannot stretched to reach the field of governing the service conditions of the employees. But the circumstance leading to the said case stand more on a different footing and the question examined therein as discernible from paragraph '5' and '7' was, more with regard to whether the W.P.C. Nos. 19058 & 25195 of 2012 -14- Electricity Board's decision was substantially influenced by the Government's directive and if so, to be vitiated, since "functions" referred to under Section 78 A must be understood in such an manner that the amplitude of power to issue directions is a limited one in relation to the primary functions of the Board concerned with generation, distribution and utilization of the electricity, development of water power etc. In the instant case, it is to be noted that the petitioners themselves concede in paragraph '5' of W.P.(C).No. 25195/2012 that the 2nd respondent Water Authority itself had resolved as early as in the year 2002 to request the Government to issue an order akin to G.O(P) No. 36/94/PW&T dated 3.10.1994, to be made applicable to Kerala Water Authority as well, in the matter of promotion from Degree and Diploma Assistant Engineers in the ratio of 3:1. The functions of the Water Authority are separately enumerated under Section 14, wherein Clause 'VII' deals with the assessment of Recruitments of Manpower and Training in relation to Water Supply and Sewerages Services in the State. Anyhow, detailed discussion in this regard may not be necessary, for W.P.C. Nos. 19058 & 25195 of 2012 -15- several reasons as detailed in the following paragraphs.

16. True, it has been held by a Division Bench of this Court in Kerala Irrigation Engineers Association v. State of Kerala (2003 (3) KLT

325) that, when the Rule postulates the post to be filled up from three different posts prescribing a ratio, separate channel for promotion based on separate

seniority list is very much contemplated. As such, there cannot be any common seniority with regard to the position in the Feeder Category and the seniority has to be maintained, confining the same to the concerned channel. The SLPs preferred there from i.e., SLPs 19150 and 19151 of 2003 were dismissed on 27.10.2003. While rendering the said verdict, the earlier verdict passed by another Division Bench of this Court in Public Works Engineers Association v. P.T. Philipose and others (ILR 199.(1) Kerala

217) was also brought to the notice of the Bench and it was dealt with in paragraphs 28 and 29. The Bench observed that the earlier Division Bench in the concerned case had clearly held that the Executive Order (G.O(P) No. 36/94/PW&T dated 3.10.1994) did not amend the Rules and it was only on account W.P.C. Nos. 19058 & 25195 of 2012 -16- of special circumstance in the PWD (Buildings and Roads) that the Government had issued a special order; which was not the position involved in the case dealt with in Kerala Irrigation Engineers Association v. State of Kerala (2003 (3) KLT 325). The only dictum therein is that, no Executive order can be issued contrary to the Statutory Rules; with regard to which, there cannot be any dispute and the question involved herein is whether the impugned G.O has amended any existing Rules and further, whether the existing Rules/norms could be regarded as Statutory Rules to have the dictum applied.

17. In the case considered by the Full Bench Sugathan v. Shahul Hameed (2006 (4) KLT 54), the concerned Executive order stipulated that, while applying the ratio of 3:1, the Senior Excise Guard, the minimum educational qualification of pass in SSLC or its equivalent shall not be superseded by a Junior Excise Guard who did not possess qualification of pass in SSLC; correctness and sustainability of which was under challenge. The Bench observed that the Government Order does have the effect of amending the Special Rules and that the Special Rules cannot W.P.C. Nos. 19058 & 25195 of 2012 -17- be amended by any Executive order. The Bench also observed that, the very prescription of ratio envisages the by-passing of the normal rule of seniority for effecting promotion. An almost similar grievance was considered by a Division Bench of this Court in W.A.Nos. 2936 and 2960 of 2007 and 540/2008, in respect of the promotion to the post of Assistant

Executive Engineers in the KSEB and adoption of the G.O.(P) No.36/94/PW&T dated 3.10.1994 issued in respect of the PWD by the KSEB as per the relevant Board order. The Bench observed that, persons with inferior qualifications and lesser service are getting promoted to higher posts and are acting as superiors to the colleagues who are senior in the Feeder Category and having higher qualification as well and hence interference was declined, also after taking note of the decision rendered by the Full Bench in Sugathan v. Shahul Hameed (2006 (4) KLT

54) as borne by Ext.R3(e) judgment produced along with the counter affidavit of 3rd respondent. It is brought to the notice of this Court from the part of the 3rd respondent that the decision rendered by the Full Bench was subjected to challenge by filing W.P.C. Nos. 19058 & 25195 of 2012 -18- SLP before the Supreme Court and during the pendency of the SLP, the Government retrospectively amended the relevant Rules (Excise and Subordinate Service Rules, 1974), whereby the desired objective (as earlier provided by the G.O which was set aside by the Full Bench) was brought about with retrospective effect and accordingly, the Civil Appeals were allowed as borne by Ext.R3(d) judgment dated 11.12.2009. It is also revealed from Ext.R3(d) that the Apex Court, while allowing the Civil Appeals specifically held that, the judgment passed by the Full Bench of this Court could not be sustained in the above circumstance and accordingly, it was set aside, leaving it open for the aggrieved parties to challenge the amendment to the Special Rules, if so advised. As it stands so, the decision in Sugathan v. Shahul Hameed (2006 (4) KLT

54) has vanished from the stage and the remaining one is that of the Division Bench of this Court in Public Works Engineers Association v. P.T. Philipose and others (ILR 199.(1) Kerala

217) (sustaining the G.O(P) No. 36/94/PW&T dated 3.10.1994). W.P.C. Nos. 19058 & 25195 of 2012 -19- 18. As pointed out from the part of the 3rd respondent, it is quite possible to bring about change in service conditions by passing a mere resolution, in the absence of any Rules or Regulations in that behalf, as held by the Apex Court in Shamkant Narayan Deshpande v.

Maharashtra Industrial Development Corporation and another (AIR 199.(SC) 1173). Similarly, as pointed out by the learned Government Pleader, a Constitution Bench of the Supreme Court has held in Ahmedabad Manufacturing and Calico Printing Co. Ltd, Ahmedabad etc., v. State of Gujarat and others (AIR 196.(SC) 1910) that, it cannot be said that, till statutory Rules governing promotion to Selection Grade are framed, the Government cannot issue administrative instructions regarding the principles to be followed. The position was reiterated by a three member Bench in Union of India v. H.R. Patankar and Others (1984 (Supp) SCC

359) as well, holding that, administrative instructions can be issued to govern the seniority and promotion, to set right any lacuna in the existing Rules. It is in the said circumstance, that the decision rendered by the W.P.C. Nos. 19058 & 25195 of 2012 -20- Division Bench of this Court in Public Works Engineers Association v. P.T. Philipose and others (ILR 199.(1) Kerala

217) has to be considered, whereby it has been categorically held that G.O(P) No. 36/94/PW&T dated 3.10.1994 does not bring about any amendment to the existing Rules, but for filling up the gap within the permissible limits. Exactly similar course was subsequently pursued in respect of other services as well, such as, Irrigation Department, Electricity Board etc., and the very same objective is sought to be achieved in the present case as well, by virtue of Ext.P5/P4 G.O dated 24.7.2012 respectively in the concerned cases.

19. While considering the plea of the petitioners with reference to the binding judicial precedents that, Statutory Rules cannot be amended by Executive orders, the basic issue to be considered is whether such a circumstance does exist in the present case. Admittedly, no Rules have been framed by the Government governing the service conditions of officers and employees of the Kerala Water Authority invoking the rule making power under Section 67 of Water Supply and Sewerage W.P.C. Nos. 19058 & 25195 of 2012 -21- Act, 1986. What has been done is, adoption of the relevant Rules as per Ext.R3(a) Circular dated 5.6.1984. By virtue of the specific reference by way of incorporation under Section 19 of the Act, in respect of the transferred employees who came to the service of Water

Authority, it could be said that, the same set of rules continue to govern them and hence statutory in character. But in respect of others, whether the 'adopted Rules' continue to have the same status and characteristics as of Statutory Rule, is the question to be considered. This issue involving the service conditions under the respondent Water Authority itself came to be considered by the Apex Court in a decision reported in Jacob v. Kerala Water authority (1990 (2) KLT 673). Paragraph '14' of the said judgment explains the position in the following terms: "The second batch of workers comprise those who were appointed between 1st April, 1984 and 4th August, 1986 by the Authority itself. Under Sec.8 (1) of the Act the power to appoint the Secretary and other officers and staff W.P.C. Nos. 19058 & 25195 of 2012 -22- members vests in the Authority. Only when a post above the rank of an Executive Engineer is to be created that the sanction of the State Government becomes necessary under the proviso. Sub-section (2) to which sub-section (1) is subject expects the Authority to seek the previous sanction of the Government if it desires to employ a servant of the Central or State Government on deputation and not otherwise. It is, therefore, clear beyond any manner of doubt that the power to appoint the staff-members with whom we are concerned, solely vests in the Authority. Since the Act is brought into force w.e.f. 1st March, 1984 the question of regularisation of the services of staff-members appointed after that date must be examined with reference to the power found in S.8(1) of the Act. However, the contention of the Authority W.P.C. Nos. 19058 & 25195 of 2012 -23- is based on R.9(a)(i) of the Rules, which it claims to have adopted under Resolution No.8 dated 25th April, 1984. The Authority contends that by the thrust of this rule the appointments were limited to 180 days only and since the said rules had statutory flavour the Authority was bound to act in accordance therewith. we have extracted the relevant part of this rule earlier. Since these rules were framed in exercise of power conferred by the proviso to Art. 309 of the Constitution they are undoubtedly statutory in character but Mr. Poti was right in his contention that they do not retain that character in their application to the staff- members of the Authority since they have been adopted by the Authority under a resolution. These rules would undoubtedly be statutory in character in their application to the members of the Kerala W.P.C. Nos. 19058 & 25195 of 2012 -24- Subordinate Services for whom they were enacted but when any other authority adopts them

by a resolution for regulating the services of its staff, the rules do not continue to remain statutory in their application to the staff of that Authority. They are like any other administrative rules which do not have statutory force. It was not contended, as indeed it could not be, that these rules derive statutory force from S.64 or 65 of the Act. S.64 confers the rule making power on the State while S.65 empowers the Authority to make regulations with the previous approval of the Government. It is nobody's case that these rules were adopted after obtaining the previous approval of the Government. If that be so, we must accept Mr. Poti's submission that these rules in their application to the staff- members of the Authority appointed after W.P.C. Nos. 19058 & 25195 of 2012 -25- 1st April, 1984 have no statutory flavour or force." 20. From the above, it is seen that, the relevant Rules adopted by the Water Authority, would undoubtedly be statutory in character in its application, to the members of the concerned service for whom they were enacted. But when any other authority adopts them by a resolution for regulating the services of its staff, the Rules do not continue to remain statutory in their application to the staff of that authority. As such, Ext.P1 Rules (Kerala State Public Health Engineering Special Rules) which prescribed the ratio and such other particulars for promotion to the post of Assistant Executive Engineer are liable to be treated in the same manner as Executive orders/Administrative orders; in so far as they have been adopted by the Kerala Water Authority. Since the Rules are silent as to how the ratio is to be worked out and in what manner the posts have to be filled up without disturbing the ratio, it is open for the Government to provide by way of appropriate measures passing necessary orders in this regard. As such, the challenge raised against the impugned W.P.C. Nos. 19058 & 25195 of 2012 -26- order is liable to be repealed and it is ordered accordingly.

21. Coming to the rights and liberties of the eligible Degree and Diploma holders, there is no dispute that the post of Assistant Executive Engineerings have to be filled up by following the ratio of 3:1. It is stipulated under clause/paragraph 3(i) of Ext.P4 G.O that Assistant Engineers who possess Diploma will not be eligible for promotion in the category of Assistant Executive Engineer, over a Graduate Engineer having longer service in the category of Assistant Engineer, unless the Degree holder is otherwise declared ineligible for promotion to the post of Assistant Executive Engineer. The very same G.O stipulates under

clause/paragraph 3(ii), that if there is a shortfall in the prescribed ratio, the MD, Kerala Water Authority will take action to rectify the same, at the time of every subsequent promotion to the cadre of Assistant Executive Engineer by reviewing whether there are eligible candidates for promotion from the quota other than Degree holders to maintain the ratio. How this stipulation is workable to maintain the ratio is not discernible therefrom. W.P.C. Nos. 19058 & 25195 of 2012 -27- 22. While sustaining the stipulation similar to clause/paragraph 3(i) of Ext.P4 as contained in G.O(P) No. 36/94/PW&T dated 3.10.1994, by the Division Bench of this Court in Public Works Engineers Association v. P.T. Philipose and others (ILR 199.(1) Kerala 217), the Bench observed that there was no infringement to the 'Quota Rule' as explained in the counter affidavit. It was accordingly observed that, in so far as the quota was not distributed or varied, it could not be said that the G.O intended to vary the existing Rules. Coming back to the case in hand, it is to be noted that, the mode of recruitment to the post of Assistant Engineer (Feeder Category) is either by way of direct recruitment of Degree holders or by promotion of the existing employees having such other prescribed qualifications. As a natural consequence, the Degree holders coming to the common pool of Assistant Engineers will mostly be of young blood, while the other category by way of promotion may be reaching the pool after years' long service and hence of much advanced in age. The quota earmarked for the Degree holders is nearly 75%, while for W.P.C. Nos. 19058 & 25195 of 2012 -28- promotion it is only 25%. As such, when a shortfall is located in the prescribed ratio, how the MD of the Water Authority can rectify the same at the time of every subsequent promotion, is a matter of mystery. Since the chance for a Diploma holder (coming in the quota of promotion) to be of younger in age in relation to the Degree holder is comparatively less or remote, by the time the senior Degree holders in the common pool are elevated, most of the Diploma holders who are standing in the queue may get retired, attaining the age of superannuation. This cycle may get repeated in the subsequent promotion exercises as well.

23. In spite of the specific queries raised by this Court, neither the learned Government Pleader, nor the learned Standing Counsel for the Water Authority or even the contesting respondents were not in a position to offer any plausible explanation in the above regard. It is quite possible to keep the posts unfilled, if

amendment to the recruitment rules is on the way, so as to have the posts filled up based on the Rules proposed to be brought about. This is the law declared by the W.P.C. Nos. 19058 & 25195 of 2012 -29- Supreme Court in Dr. K. Ramulu and Another v. Dr. S. Suryaprakash Rao and Others (1997 (3) SCC 59). But then, if the posts are to be kept vacant on the basis of a conscious decision, in anticipation of the change in Rules, it has to be made applicable to all which in turn may adversely affect the organizational interest, for want of sufficient officers to man the posts. In the said circumstance, while holding that the impugned G.O. is not liable to be intercepted with regard to the authority to have issued the same, this Court finds that, proper remedial measures to maintain the ratio of 3:1 are also necessarily to be stipulated by the Government itself. If this is left out without clarity, only the Degree holders will get promoted and the Diploma holders may have to wait indefinitely and get lost at last.

24. It is brought to the notice of this Court that, Ext.P4 G.O does not have any retrospective effect. There is a case for the 3rd respondent that the vacancies cannot be segregated and reliance is sought to be placed on a decision rendered in Deepak Agarwal and Another v. State of Uttar Pradesh and Others (2011 (6) SCC

725) (paragraph 26). The said decision was W.P.C. Nos. 19058 & 25195 of 2012 -30- rendered in relation to the amendment of the relevant provisions of the UP Government Servants (Criterion for Recruitment by Promotion) Rules 1994. The circumstance under which the observation was made in paragraph '26' stands entirely on a different footing and it cannot be pressed into service of the present case as such. This Court has already held, placing reliance on the decision rendered by the Division Bench of this Court in Public Works Engineers Association v. P.T. Philipose and others (ILR 199.(1) Kerala 217), that the relevant G.O has not provided any amendment to the existing Rules. It only fills up the gap, as to the way in which the promotion is to be exercised between the Degree holders and Diploma holders, applying the ratio. This obviously does not have any retrospective effect and as such, this Court is of the firm view that the vacancies which arose prior to the date of issuance of said G.O shall be filled up as it was being done earlier and it shall have effect only in respect of the vacancies arisen

from the date of issuance of the said G.O. It is ordered accordingly.

25. In the said circumstances, challenge against the W.P.C. Nos. 19058 & 25195 of 2012 -31- impugned G.O is repelled. However, this Court finds it fit and proper to direct the 1st respondent/State to pass necessary orders ensuring maintenance of the ratio of 3:1 facilitating occupation of the requisite No: of posts by the Diploma holders as well, applying the ratio to the cadre strength. Appropriate orders in this regard shall be passed in accordance with law, at the earliest, at any rate within 'three months' from the date of receipt of a copy of this judgment. It is made clear that, no post/vacancy coming within the quota earmarked for the Diploma holders shall be caused to be filled up even temporarily, by accommodating any Degree holder. Both the writ petitions are disposed of. P.R. RAMACHANDRA MENON, JUDGE. Kp/-

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