

State of Kerala and Another Vs. M.M.Thomas and Others

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Court : Kerala

Decided On : Feb-18-2015

Judge : Honourable the Ag.Chief Justice Mr.Ashok Bhushan

Appellant : State of Kerala and Another

Respondent : M.M.Thomas and Others

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE THE AG.CHIEF JUSTICE MR.ASHOK BHUSHAN & THE HONOURABLE MR.JUSTICE A.M.SHAFIQUE WEDNESDAY, THE 18TH DAY OF FEBRUARY 2015 29TH MAGHA, 1936 WA.No. 1422 of 2011 ()
----- AGAINST THE

JUDGMENT

IN WP(C).NO.12615/2004 DATED 19.05-2010.
APPELLANTS/RESPONDENTS 1 & 2 IN WP(C).:
----- 1. STATE OF KERALA,
REPRESENTED BY THE SECRETARY TO GOVERNMENT, HIGHER
EDUCATION DEPARTMENT, GOVERNMENT
SECRETARIAT, THIRUVANANTHAPURAM.

2. THE DIRECTOR OF COLLEGIATE EDUCATION, THIRUVANANTHAPURAM.
BY SR. GOVT.PLEADER SRI.JOE KALLIATH. RESPONDENTS/PETITIONERS &

----- 1.

1. M.M.THOMAS, AGED56YEARS, S/O.MAMMEN THOMAS, LECTURER, (SELECTION GRADE) (RETIRED), BISHOP MOOR COLLEGE, MAVELIKKARA, RESIDING AT MELEYIL HOUSE, POOVATHOOR P.O., KOLPPURAM VILLAGE, THIRUVALLA TALUK, PATHANAMTHITTA DISTRICT-689 645.

2. GEORGE JACOB, AGED57YEARS, S/O.T.V. CHACKO, LECTURER (SELECTION GRADE) (RETIRED), BISHOP MOOR COLLEGE, RESIDING AT DILKUSH BHAVAN, KODUKULANJI P.O.,ALA VILLAGE, CHENGANNOOR TALUK, ALAPPUZHA DISTRICT-689 508.

3. THOMAS MATHEW, AGED60YEARS, S/O.P.G.MATHEW, LECTURER (SELECTION GRADE) (RETIRED), BISHOP MOOR COLLEGE, MAVELIKKARA, RESIDING AT KALLUMALA P.O., THAZHAKKARA VILLAGE, MAVELIKKARA TALUK, ALAPPUZHA DISTRICT-690 513.

4. JACOB V.JOHN, AGED58YEARS, S/O.C. JOHN, LECTURER (SELECTION GRADE) (RETIRED), BISHOP MOOR COLLEGE, MAVELIKKARA, RESIDING AT VILAYIL VAKAKKATHIL, KOTTARKAVU, MAVELIKKARA P.O., ALAPPUZHA DISTRICT-690 513. WA.No. 1422 of 2011 5. T.C. VARGHESE, AGED57YEARS, S/O.T.G. CHACKO, LECTURER (SELECTION GRADE) (RETIRED), CHRISTIAN COLLEGE, CHENGANNUR, RESIDING AT THOTTATHIL HOUSE, CHENGANNUR P.O., CHENGANNUR TALUK, ALAPPUZHA DISTRICT-690 513.

6. THE MANAGER, BISHOP MOORE COLLEGE, MAVELIKKARA-690 101.

7. THE MANAGER, CHRISTIAN COLLEGE, CHENGANNUR-689 121. R1 TO R5 BY SRI.KRB.KAIMAL, SENIOR ADVOCATE. ADV. SRI.A.V.THOMAS. R6 & R7 BY SRI.BABU VARGHESE, SENIOR ADVOCATE. THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON1802-2015, ALONG WITH W.A. NO.1453 OF 2011 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: rs. WA.No. 1422 of 2011 APPENDIX PETITIONER'S ANNEXURES:- ANNEXURE A1 COPY OF THE

JUDGMENT

IN W.A. NO.97/2009 DATED 29.01/2009. ANNEXURE A2 COPY OF THE

JUDGMENT

IN W.A. NO.1238/2007 DATED 09.07/2007. RESPONDENT'S ANNEXURES:- NIL.
//TRUE COPY// P.S.TO JUDGE rs. "C.R" T.R.RAMACHANDRAN NAIR,
A.V.RAMAKRISHNA PILLAI & P.V ASHA, JJJ.

----- Writ Appeal Nos.1422, 1494, 1498, 1515,
1609, 1719 & 1868 of 2011, 1794 and 1859 of 2013

----- Dated this the 21st day of January, 2015

ORDER

Asha, J.

These cases have come up for consideration before the Full Bench on being referred by the Division Bench by its order dated 7.9.2007 seeing that there is a conflict between the judgment rendered by a Division Bench in Dr.Krishna Pillai v. State of Kerala [1988 (2) KLT106 and the judgment of another Division Bench of this Court in W.A12872005. We heard the learned Senior Government Pleader for the appellants and the learned counsel appearing for the respondents in all these cases.

2. The issue relates to the period spent on leave without allowance for the purpose of employment abroad by the Private College Teachers affiliated to the Universities in the State of Kerala, ie., whether the period during which they were on leave W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 2 without allowance and during which they were employed abroad, are liable to be reckoned for the purpose of (1) pension (2) for grant of benefit of placement under the University Grants Commission (U.G.C) Scheme.

3. All these Writ Appeals are filed by the State of Kerala. The respondents are retired teachers of private aided colleges affiliated to University of Kerala who had rejoined the respective colleges, after availing leave without allowance for the purpose of employment abroad, for a period of about 5 years and more, and retired from service. The Exhibits referred to herein are those available in W.A.

1422/2011 and produced in the Writ Petition 12615/2004. The period of leave availed by each of the respondents in the 11 cases are as follows:

Sl.No.	Case No.	Name of petitioner	Period of leave	Date of Retirement	re-joining
1	W.A.No.1422/2011	M.M.Thomas	01.05.1977 to 30.04.1982	29.4.1982	31.03.2003
	(WPC.12615/2014)	George James	15.09.1975 to 14.09.1976	31.03.2002	
		Thomas Mathew	15.09.1977 to 14.09.1980	30.06.1999	
		Jacob V John	08.04.1978 to 07.04.1983	08/04/83	
		T.C.Varghese	17.10.1978 to 16.10.1981	31.3.2002	
			17.10.1981 to 16.10.1983	01/06/83	W.A
	Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013				
3	Sl.No. Case No.	Name of petitioner	Period of leave	Date of Retirement	re-joining
	W.A.No.1494/2011	Dr.M.I.Andrews	14.3.1978 to 13.03.1981	14.03.1983	
	31.03.1998	2	(WPC.38378/2003)	14.03.1981 to 13.03.1983	W.A.No.1498/2011
	K.Yeshodharan	06.06.1973 to 24.06.1973	30.10.1984	31.03.2001	3
	(WPC.17769/2003)	01.06.1983 to 29.10.1984	4	W.A.No.1609/2011	M.K.John
	06.08.1976 to 05.08.1981	15.09.1981	1999-2000	(WPC.8257/2004)	K.S.Churian
	26.08.1981 to 25.08.1986	10/06/85	1998-1999	P.Thomas Lukose	22.12.1976 to
	21.12.1981	2003	L.Koshy	27.10.1981 to 26.10.1986	1999-2000
	V.Joseph John	23.09.1981 to 22.09.1986	1999-2000	T.Babukutty	04.08.1981 to 19.06.1984
	31.03.1996	G.Leelamma	01.08.1981 to 16.10.1984	31.03.2001	T.S.Johnson
	01.02.1981 to 31.03.1986	31.03.2002	5	W.A.No.1868/2011	K.J.Varghese
	29.01.1982 to 28.10.1987	17.11.1986	(WPC No.26983/2003)	Abraham K Koshy	23.12.1981 to 22.12.1983
	23.12.1983 to 22.12.1985	04/11/84	6	W.A	No.1719/2011
	V.Somanatha Pillai	19.10.1978 to 18.10.1983	16.10.1984	31.03.2002	(WPC) 37864/2003
	Extended for 5 years leave	T.K.Gopalakrishna	09.11.1981 to 10.11.1984	31.10.1984	31.03.1995
	Pillai Susan	B.Zachariah	06.08.1981 to 07.08.1986	24.10.1984	31.03.2000
	7	W.A.No.1515/2011	Thomas Paul	23.11.1982 to 22.11.1985	05/06/85
	31.03.2008	(WPC No.39327/2003)	P.Varghese Vaidyan	23.11.1982 to 22.11.1983	Extended by 2 years
	02/04/85	K.M.Varghese	06.06.1982 to 07.08.1983	30.04.1984	30.04.2005
	Extended by 2 years	8	W.A.No.1794/2013	Abraham George	17.08.1981 to 16.08.1982
	WPC No.4249/2004	Extended upto 23.10.1984	07/11/85	George Thomas	P2608.1981 to 25.08.1982
	14.08.1985	Extended upto 25.08.1985	9	W.A.No.1859/2013	

K.C.Abraham 15.01.1982 to 14.11.1986 07/11/85 (WPC No.4249/2014)
P.G.Thomas 26.08.1981 to 25.08.1986 18.07.1986 Lilly Mathew 26.08.1981 to 25.08.1986 18.07.1986 W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 4 4. Thus it can be seen that all the respondents in W.A Nos. 1422/11, 1494/11 and 1498/11 went on leave prior to 1979 and between 1973 and 1978. They rejoined duty between 1980 and 1984. The 2nd and 4th respondents in W.A.1498/11, all the respondents in W.A.No.1609/11, respondents 1 and 2 in W.A.No,1868/11, respondents in W.A.Nos.1719/11, 1515/11 and 1859/13 went on leave in 1981 and thereafter. The respondents 2 and 4 to 8 in W.A. 1609/2011 availed leave between 1981 and 1986. Out of them respondents 2, 4, 5 and 8 continued on leave till various dates in 1986. Similarly, both the respondents in W.A. 1868/2011, 3rd respondent in W.A. 1719/2011 and all the respondents in W.A. 1859/2011 also continued till 1986 and 1987. The case of the respondents was that all of them were granted leave by the respective managements and they rejoined duty on expiry of the leave thus granted. For the purpose of pensionary benefits, the period during which they had availed the leave without allowance were not reckoned. The W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 5 U.G.C scheme was introduced in the State of Kerala granting higher scale of pay to the teachers in Colleges in the State and placement as Senior Scale and Selection Grade Lecturers on completion of 8 years and 16 years respectively. The Government of Kerala extended the benefits to the teachers of affiliated Colleges in Kerala w.e.f 1.1.1986 as per G.O(P) No.79/90/H.Edn. Dt.27.3.1990. In Annexure 1 to the UGC Scheme, para.5.1 provided that every Lecturer in the colleges who have completed 8 years of service after regular appointment were to be placed in a senior scale in the scale of pay of Rs. 3000-5000/- on condition that they should have participated in two refresher courses/summer institutes and should have consistently satisfactory performance appraisal reports. Under explanation to this para. it is provided that all Lecturers who have completed 8 years of service on 1.1.1986 would be placed through a process of screening/selection in the scale of Rs.3000- 5000/-.

5. Para.5.03 provided that every Lecturer in the Senior Scale W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 6 shall

be eligible for promotion to the post of Reader if she/he has completed 8 years of service in the Senior Scale or if the total service of the Lecturer is not less than 16 years on condition that he should have obtained a Ph.D. Degree or an equivalent published work; made some mark in the areas of scholarship and research; participated in two refresher courses/summer institutes each of approximately 4 weeks duration and consistently good performance appraisal report. The scheme was introduced at a time when all the respondents had rejoined duty after the leave without allowance period. All of them were granted the benefits under the scheme, without reckoning the period during which they were on leave without allowance for employment abroad. All the teachers except the respondents in W.A Nos.1794/13 and 1859/13 retired from service on various dates between 1994 and 2008 as shown above in the table. After retirement, they raised claims seeking to refix their pension reckoning the period during which they were on leave without allowance and serving in other countries, for the purpose of pension. Similarly they also raised claims to reckon the said period towards placement as Senior Scale Lecturers and W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 7 Selection Grade Lecturers. They approached this Court in Writ Petitions, claiming that they were entitled to get placement as well as pension reckoning the period during which they were on leave without allowance and were employed abroad. The Government rejected their claims on the ground that the period under leave without allowance for the purpose of employment abroad cannot be reckoned for any service benefits including pension or placement. It was also their case that the leave without allowance for the purpose of employment is governed by the Government Order issued on 29.4.1970 and appendix XIIA of Kerala Service Rules. In the Government Order G.O(P) 274/70/Fin dt.29.4.1970 there is a specific stipulation that leave without allowance granted will not be counted for pension. Similarly, under Appendix XIIA of KSR also it is specifically stipulated that the said period will not be counted for any purpose. It was also their contention that all the respondents had availed the benefits without any objection as to their placement, well before their retirement and the claims regarding placement were raised after several years after the placement as well as their retirement. It was also contended that the period W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 8 during

which these teachers served in a different country, cannot be reckoned for the purpose of pension or placement.

6. According to the respondents, the conditions of service of teachers in private colleges are governed by the Kerala University First Statutes 1979. Statute 25 of Chapter 2 of Kerala University (Conditions of Service of Teachers and Members of Non-teaching Staff) First Statutes, 1979 governs the procedure regarding their leave. As per these provisions, Principal is the authority to grant Casual leave and the manager of the educational agency is the authority to grant all other types of leave. All the respondents went abroad for employment on the strength of the orders issued by the respective managements granting them leave without allowance. It is also their case that the orders issued by the respective managements did not stipulate any condition and as far as no condition is imposed while granting them leave, the period of leave availed by them cannot be excluded for any purpose including pension or placement under the UGC. The learned Single Judge allowed their Writ Petitions.

7. The respondents relied on the judgment of a Division W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 9 Bench of this Court in W.A.No.1287/ 05. They have also relied on the judgment of a Single Judge of this Court in O.P.1773/93, which was upheld by a Division Bench of this Court in W.A No.1399/95.

8. In this context it is necessary to consider the various provisions relating to the service conditions of private college teachers. It is relevant to note that the teachers of private colleges were completely under the control of the educational agencies till the year 1972 and all the service benefits like pay and allowances, gratuity and other terminal benefits were to be granted by the managements. The only external control over them was by the respective Universities to which the colleges were affiliated. In the year 1972, direct payment system was introduced for the teachers under those educational agencies which executed an agreement with Government, agreeing to certain terms and conditions with regard to appointment of staff, admission of students and collection of fee and certain other matters relating to the conduct and management of the affairs of the institutions. It

was from 1.9.1972 onwards that the Government started disbursement of salary in respect of the W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 10 teachers in private colleges that too in the case of only those colleges which executed agreement with the Government.

9. Chapter VIII of the Kerala University Act 1974 (hereinafter referred to as 'the Act') deals with the private colleges and affiliation of colleges. As per Statute 57(1A) appointments to the lowest grade of teacher in each department shall be made by the educational agency by direct recruitment on merit. Under clause 8 thereof every appointment shall be made by a written order of the manager in the form prescribed by the Statutes, with copy to the University and under Clause 9 every such appointment shall be reported to the University for approval. Section 60 provides for conditions of service of teachers of private colleges and clause 1 thereof provides that conditions of service of teachers of private colleges, whether appointed before or after the commencement of this Act, including conditions relating to pay, pension, provident fund, gratuity, insurance and age of retirement shall be such as may be prescribed by the Statutes. Under Section 82(3) it is provided that the Statutes, Ordinances, Regulations, Rules, bye-laws and orders in force immediately before the commencement of this W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 11 Act shall, in so far as they are not inconsistent with the provisions of this Act, continue to be in force until they are replaced by the Statutes, Ordinances, Regulations, rules, bye- laws or orders framed under the Act. The Kerala University Act, 1974 had come into force w.e.f 27.7.1974. At the time of the enactment of the University Act the conditions of services of teachers in private colleges were governed by Kerala University First Statutes, 1972 (hereinafter referred to as '1st Statute 1972'). Chapter XLIX thereof provided for the conditions of service of teachers in private colleges. Under statute 6 thereof it was provided that all teachers shall be full time teachers of the colleges in which they are employed. They shall devote their entire time to the work of the college and shall not without written permission of the Principal, engage themselves in any work of a remunerative kind. Clause 2 of Statute 8 provided that a teacher shall not apply for an appointment under any other authority except through the Principal.

10. Provisions relating to leave in respect of the college teachers were provided in Statutes 17 to 51. Statute 17 reads as follows: W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 12 "Grant of leave:-(a) casual leave may be granted by the Principal; (b) other kinds of leave shall be granted by the management on the recommendation of the Principal." Statute 19 provided for the various kinds of leave as follows:

"1. Permanent teachers shall be eligible for the following kinds of leave: (a) Casual leave, (b) Earned leave (c) Half Pay leave, (d) Commuted leave (e) Maternity leave (f) Extra ordinary leave (g) Study leave.

"11. Statute 20 provided that casual leave shall not be granted for a larger period than 6 days at a time or for more than fifteen days in an academic year. Under clause (e) thereof it was provided that a teacher shall be entitled to full salary during his absence on casual leave. Statute 25 provided that Extra ordinary leave without allowances may be granted when no other leave under the Statutes is admissible, provided that the total period of such leave shall not exceed 5 years. Statute 51 provided that a leave account shall be maintained for each W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 13 teacher in every private college.

12. Ch.LI provided for the Provident Fund of teachers of private colleges. The University was to constitute a fund known as "Provident Fund of Teachers of Private Colleges" which shall be open to all teachers in permanent employ of private colleges under the University. The contribution towards provident fund was to be made by the management against 50% of the pay of each teacher and an equal contribution by the University. As per Statute 6, the rate of subscription was Rs.0.06 per rupee of the pay or salary of the teacher, and the management shall recover the subscription from the pay bills of teachers. Under Statute 10, the teachers on leave were to subscribe at the rate prescribed in Statute 6 on their leave allowance.

13. Chapter LII provided for retirement benefits for teachers of private colleges. Statute 2 thereof provides that there shall be a scheme of Provident Fund-cum-Insurance-cum- gratuity for teachers in private colleges as provided under Statutes

3 to 5. As per Statute 3, the provident fund shall be constituted by the University for the benefit of teachers in accordance with the provisions contained in Chapter LI. Under W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 14 Statute 4, every permanent teacher shall insure his life for a minimum sum as provided therein within a period of one year from the date of confirmation in service for a period ending not earlier than the date of his completion of the age of 55 years. The minimum sum of insurance for the category of Lecturers was provided as Rs.5,000/-. Statute 5 provided for gratuity. Under clause 4 of Statute 5 it provided that a teacher who has completed 5 years of qualifying service was eligible for gratuity equal to one half of his monthly emolument for each completed year of qualifying service subject to a maximum of 15 times the emoluments, when he retires from service, either on superannuation or otherwise. 'Qualifying service' was defined in this Chapter under Statute 1 (e) as follows: "Qualifying service' means the entire service from the date of appointment in a private college and includes the days passed on earned leave, study leave, maternity leave and half pay leave when it does not exceed 120 days in one spell." 14. Thus it can be seen that a period of more than 4 months on half pay leave was not liable to be reckoned towards qualifying service. Thus it is pertinent to note that period covered by extra ordinary leave without allowance cannot be W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 15 reckoned towards qualifying service in this Chapter of the First Statutes, 1972.

15. As can be seen from the table, specifying the leave availed by the respondent teachers, most of them were granted leave after 1972 and before the commencement of the Kerala University First Statutes, 1979 and the First Statutes in respect of pension, provident fund, gratuity, insurance and age of retirement of teachers in private colleges, 1976 published in the Kerala Gazette extra ordinary dt.1.4.1976 i.e at a time when the period covered by Extra Ordinary leave/leave on loss of pay availed by them was not liable to be reckoned towards qualifying service and hence for the purpose of any of the retirement benefits.

16. Subsequent to the introduction of the direct payment system after execution of agreements by the managements with the Government, based on orders issued in G.O(MS) 185/72/Edn. Dt.30.8.72, First Statutes in respect of pension, provident

fund, gratuity, insurance and age of retirement of teachers in Private Colleges came into force on 1.4.1976, on publication of the same in the Kerala Gazette extra ordinary dated 01.04.1976. Under W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 16 Statute 4, the teachers who entered service prior to 1.4.1958 and who had completed 55 years on the date of commencement of the Statutes could opt for the old Statutes (statute which prevailed as on the date of coming into force of Statutes) and were permitted to submit option either to continue in service till the age of 60 and to be governed by the old Statutes and to have the retirement benefits in the case, in accordance with the provisions in the 1972 Statutes. Under Statute 5 thereof, the teachers who retire at the age of 55 shall be entitled to receive the same pensionary benefits as are allowed to similar category of teachers in Government colleges including the family pension and Death cum Retirement Gratuity applicable to Government servants and all the conditions for grant of these benefits to Govt. servants as laid down in Part III of the Kerala Service Rules (as amended from time to time) shall mutatis mutandis apply to such teachers. The Director of Collegiate Education is the pension sanctioning authority in respect of private college teachers, and he shall furnish certificates relating to the service records, attendance register, acquittance rolls, pay bills etc. to be admitted, certificates relating to emoluments drawn and W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 17 service reckoned for the purpose of pension, gratuity/family pension and furnish this certificate to the Accountant General after verification of the entire records like attendance register, acquittance rolls, pay bills etc. Statute 17 thereof provides for qualifying service and that continuous service alone shall be reckoned for computing length of service for the purpose of calculation of pension and gratuity. Clause 2 thereof provides that time passed on leave of any kind shall be allowed to count as qualifying service to the extent provided under Rule 26 of Part III KSR.

17. The conditions of service of teachers in private colleges are governed by the Kerala University (Conditions of Service of Teachers and Members of Non-Teaching Staff) First Statutes, 1979, (hereinafter referred to as '1st Statute 1979') which came into force on 19.9.79, in supersession of all the statutes on the subject in respect of conditions of service other than pension, provident fund, gratuity,

insurance and age of retirement of teachers of private colleges. Statute 2(d) defines the 'direct payment system' to mean the scheme introduced by the Government for the direct payment of salary to the teaching W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 18 and non-teaching staff of private colleges under the educational agencies which have agreed for Government control in the matter of appointment of the teaching and non-teaching staff, in the admission of students and which have executed an agreement with the Government for that purpose. "Service" is defined in clause (h) thereof to mean continuous service rendered in a college affiliated to any University in the State or any service rendered in a college affiliated to the University of Travancore or the Madras University by a person who is at the commencement of these Statutes, working in any college affiliated to any of the Universities in this State. Statute 17 provides that all teachers shall be full-time teachers and shall devote their entire time to the work of the college and shall not engage themselves in any other work of a remunerative nature. Statute 18 provides that a teacher shall not apply for an appointment under any other authority except through Principal. Statute 18(4) provides that in the case of teachers in private colleges which have entered into a voluntary agreement with the Government for direct payment of salary to their staff by the Government, such application shall be forwarded by the W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 19 Principal to the Zonal Deputy Director of Collegiate Education concerned who shall forward it in turn to his next superior authority with his remarks. Therefore it can be seen that the Manager or the educational agency is not conferred with the absolute authority to grant permission to a teacher to apply for or accept any other employment.

18. Provisions relating to leave are provided in Statutes 25 to 29, 35 and 40 of the 1st Statute 1979. Statute 25 provides as follows: "Grant of leave: (1) The Principal shall be the authority to grant casual leave. (2) Other kind of leave shall be granted by the Educational Agency on the recommendation of the Principal." 19. Clause 3 to Statute 25 provides that the leave sanctioned by the Educational Agency shall be entered in the Service Book of the teacher concerned as and when sanctioned. It is also provided that the Zonal Deputy Director of Collegiate Education shall

verify the correctness of the entries made in the Service Book. Statute 29 provides that a leave account shall be maintained for each teacher in every private College. Statute 35 relates to the procedure for study leave which reads as follows: W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 20

"5. Procedure for making application for study leave and grant of such leave:-

(1) Applications for study leave shall be submitted to the Educational Agency through the Principal with details of the course or courses of study and the examination or examinations which the teacher proposes to undergo during the period of study leave.

(2) Where it is not possible for the teacher to give full details of the course or courses of study and examination or examinations in his original application, or if, after leaving India he is to make any change in the programme which has been approved in India, he shall submit the particulars as soon as possible to the Educational Agency. In such cases he shall not, unless prepared to do so at his own risk, commence the course of study or incur any expense in connection therewith until he receives the approval of the Educational Agency.

(3) In the case of colleges coming under the Direct Payment Scheme, the Educational Agency shall not grant any study leave without the prior concurrence of the Government.

(4) The provisions contained in the Kerala Service Rules for the time being in force shall, so far as may be, apply to the grant of study leave.

(5) On completion of a course of study, a certificate in the proper form together with certificate of examinations passed or special courses of study undertaken indicating the dates of commencement and termination of the course with remarks, if any, of the authority in charge of the course of study, shall be forwarded to the management."

20. It is pertinent to note that there is no other provision in the First Statutes, 1979, relating to leave other than those provided under Statutes 25 to 29 and 35 as stated above and W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 &

1859 of 2013 21 Statute 40 which deals with grant of Special Casual Leave admissible to the office bearers of recognized associations of college teachers to attend for discussions by Government. In other words, the various kinds of leave admissible to the teachers or the number of leave admissible under each type of leave or the circumstances under which it can be availed or the procedure for availing such leave are not provided in the First Statutes, as was provided in statutes 17 to 51 of 1st Statute 1972. At the same time, Statute 39 provides that

"1. Subject to the provisions of the Kerala University Act, 1974 and the Statutes issued thereunder, the rules contained in Parts I and II of the Kerala Service Rules for the time being in force, except those mentioned below, shall so far as may be, apply to the teachers of private Colleges. (2) All orders, Government decisions, rulings and notifications issued by the Government with reference to any provision in Parts I and II of the Kerala Service Rules which are applicable to the teachers of private colleges, shall also so far as may be, apply to them, subject to such modification as the context may require. Part I, K.S.R (Fourth Edition) Sub-rule (ii) of rule I, rules 2,3,4,5,6,8, para 2 of the Ruling under rule 11, Note under sub-clause (c) of clause (16A), (24) and (31) of rule 12, 20, 21, 22, para (2) under clause (d) of Government Decision No. 1 under rule 23, Note I under rule 26, first proviso to sub-rule (2) of rule 33, rule 34,39,40,44 and Appendix IV, 45, 49, 50, Note to clause (f) of rule 51,53, Notes 3A and 4 of rule 55, 60, 60A, 62. clause (a) of rule 63. Note to rule 71, clauses (a) W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 22 and (b) of Note 2 under rule 72, first, second and fourth provisos and the explanation to rule 75 and Notes 1,3,5.6 and 7 under rule 75, Government Decisions 1 and 2 under rule 77, Notes 2 and 6 to rule 81,91,91 A, clauses (a) to (c) and (g) of rule 103, 107 to 110-A, Note to rule 112, Note 5 to rule 117,120, Government Decision under rule 125, exception(3) to rule 127, 135, Government Decision under rule 139, rule 157 to 159. xxxx" 21. It can also be seen that in the case of teachers under the Colleges in which direct payment system is applicable, the 1st Statute 1979 insists for approval of Govt, in matters relating to appointments under any authority or for communication with University, as provided in Statute 18. Prior permission is required for deputation of teachers of such colleges to foreign service as provided in Statute 30, for grant of study leave under Statute 35, as

shown above. The provision regarding foreign service in Statute 30 reads as follows:

"0. Foreign Service:- (1) It shall be competent for the Educational Agency to depute a teacher to foreign service as laid down in Chapter XI of Part I of the Kerala Service Rules for a period not exceeding five years. In the case of those private colleges coming under the Direct Payment Scheme, the prior permission of the Government shall be obtained. (2) The provisions relating to foreign service in the Kerala Service Rules shall apply to the teachers deputed to foreign service, except to the extent provided for in these Statutes." W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 23 22. In this context it is necessary to have a look at the provisions in Part I, Kerala Service Rules (hereinafter referred to as 'KSR'), relating to leave and at the provisions relating to pension in Part III of KSR. Chapter XI of Part I KSR consisting of Rules 61 to 124 deals with leave. Rule 64 reads as follows:

"4. The Government may issue orders specifying the authority by whom leave, other than study leave and leave without allowances exceeding a period of four months at a time, may be granted." 23. Therefore Statute 25 of Chapter 2 of the 1st Statute 1979, can be understood only as a provision corresponding to Rule 64 of Part I K.S.R. That being so, it cannot be said that the Private College Teachers are governed by Statute 25 alone in respect of any matter relating to leave or that the Manager or educational agency can grant any type of leave, other than casual leave, not provided for in the 1st Statute 1979 or in KSR. The competency to sanction leave can be only with respect to the type of leave and duration of leave admissible as per rules. The other provisions relating to leave ie. the nature of leave, types of leave, procedure relating to the same etc. are provided only in Part I K.S.R and going by Statute 39, the provisions which are not specifically excluded in Part I K.S.R and the orders W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 24 and notification issued thereunder are applicable to the private college teachers. Section III of Chapter IX of KSR comprising Rules 77 to 88 provides for grant of leave. Rule 77 provides for different types of leave available ie, (i) ordinary leave which includes earned leave, half pay leave, commuted leave, leave not due and without allowance; (ii) special leave which

includes disability leave, study leave, maternity leave and hospital leave; (iii) earned leave; (iv) half pay leave; (v) earned leave due; (vi) half pay leave due; (vii) commuted leave, etc. Rule 88 deals with leave without allowance, which can be granted to an officer in regular employment in special circumstances when no other leave is by rule admissible or when other leave is admissible but the officer concerned applies in writing for the leave without allowance. On a reading of the provisions in Chapter IX of KSR, it can be seen that there was no provision for granting leave or availing leave for taking up other employment either within India or abroad provided in KSR till the incorporation of Appendix XIIA in the year 1986. At the same time Rule 69 therein prohibits an officer on leave from taking any service or from accepting any employment without obtaining the previous sanction of the W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 25 authority empowered to fill up the post held by him. Government of Kerala decided to grant such permission, for the first time in 1970, and issued orders as per G.O(P) 274/70/F dt.29.4.1970, to grant leave without allowance to Govt. employees for taking up other employment within or outside India on specific condition that the same will not be counted for pension and will be recorded so in the Service Book and that in the case of appointment to selection post it will be made only after the performance is assessed and his case considered by D.P.C on his return from leave and in the case of officers who were already included in the select list at the time of granting leave, appointment will be ordered on his return from leave, only subject to availability of vacancy. In the case of non-selection posts, it was provided that appointment would be made during the period of leave and the officer allowed to continue on leave, subject to other conditions being satisfied.

24. At the time when the order was issued on 29.4.1970 the teachers of Private Colleges were under the complete control of the managements. In other words, it was only after the direct payment system was introduced in August, 1972 that those W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 26 teachers came under the control of the Government. It was only by the enactment of the statutes 1979, that provisions in KSR were made applicable to them, as provided in Statute 39. However from 1979 onwards the provisions in part I and part II of KSR as well as the orders issued thereunder, which are

applicable to the college teachers are, those in respect of matters which are not specifically provided for in the Statutes and those not specifically excluded under Statute 39. As Statute 25 provides only for the authorities who are competent to grant casual leave and other types of leave, all other provisions relating to leave in KSR and in the orders issued by Govt. under those provisions, are applicable to the Private College teachers. In this context it is also pertinent to note that the Private College teachers were not eligible for any type of leave other than what was provided in the Kerala Service Rules. Therefore, the provisions contained in Statute 25 which provides that the educational agency is the authority competent to sanction all types of leave other than casual leave, have to be understood to mean that the educational agency was competent to sanction only those types of leave which were admissible to the teachers W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 27 at the relevant time. Being a Govt. order issued under the provisions of KSR, relating to Leave without allowance, we are of the view that the order dated 29-4-1970, for granting LWA with permission for taking up employment abroad, were applicable to the teachers of the Private Colleges, which entered into agreement with Govt., for direct payment system, in terms of Statute 39, at least from 19.9.1979, when the 1st statute came into force. Appendix XII A was introduced on 17.12.1986, with effect from 16.12.1983. This also does not exclude Private College Teachers from its purview, even though it says that it does not apply for appointment in aided schools and colleges. Therefore in the case of those who went abroad on LWA based on the orders of the Management even in the absence of any provision for the same or authority for the same, the restrictions on service benefits including pension, stipulated in the Govt order dated 29-4-1970 have to be enforced, The absence of stipulation of such conditions while granting them leave or non-recording of the same in the service book, cannot in any way enable them to enjoy the service benefits including pension, when the very grant of leave itself to them was without authority W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 28 and illegal.

25. Respondents in these cases have gone abroad and taken up employment there, as can be seen from the averments in the Writ Petition, on the basis of the orders issued by the respective educational agencies granting them extra ordinary

leave/leave on loss of pay etc. In some of the Writ Petitions some of the orders granting them leave are produced. In some orders the leave is sanctioned in accordance with the rules laid down by the college governing council. Those rules of the governing council are not made available in any of these cases. But it is a fact that the orders sanctioning them leave have been issued at a time when there was no specific provision relating to grant of leave for the purpose of employment abroad and at the same time there were specific provisions which provided that any application for appointment under any other agency have to be routed to the Deputy Director of Collegiate Education through the Principal, who shall forward it to the higher authorities. As found earlier, it was only by way of the Government order issued on 29.4.1970 that the Government, for the first time, decided to permit Government employees to take up other employment in W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 29 countries outside India by granting them leave without allowance. While deciding to grant such permission, Government also decided to impose certain conditions so that Government need not bear any financial commitment towards the service to be rendered by the respective employees in other countries either by way of pay and allowances or by way of pension, reckoning the period during which they are under leave without allowance. Similar restrictions were imposed in granting promotion and other service benefits also. In 1983, some more stringent conditions were imposed by issuing another order. Thereafter in 1986, the provisions for leave without allowance for the purpose of employment abroad were incorporated in Part I KSR by way of Appendix XIA thereto, by G.O.(P) 953/86/Fin. Dt.27.12.86 w.e.f 16.12.83. In Rule 4 of this Appendix it was specifically provided that the officers shall lose all service benefits like pension, gratuity, increment etc. and also promotion chances as may arise with reference to their seniority in the posts from which they proceeded on leave and that they shall also lose seniority in the higher grade/grades with reference to their juniors who might get promoted to such grade/grades W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 30 before they rejoin duty. In the cases before us the contention of the Writ Petitioners is that the restrictions, which were originally provided in the order issued by the Govt. on 29.4.70 and the subsequent orders and also in the Rules in

Appendix XIIA regarding the loss of service benefits during the period of leave without allowance, were made applicable to them only by way of G.O(MS) 137/85/H.Edn. 14.6.1985, which is produced as Ext.P11 along with the Writ Petition filed by the respondents in W.A.1422/2011. The judgment of the Division Bench in W.A.No.1287/2005 also proceeds on the basis that the restrictions on service benefits were imposed on the Private College Teachers only on the issuance of Ext.P11 order on 14.6.85. In this context it is necessary to have a look at the introductory paragraph of the order Ext.P11 dt.14.6.85, which is as follows: "Read:

1. Govt. Lr.No.9269/D2/82/H.Edn. dt.13.6.83 2. G.O.(P) 780/83/Fin Dt.16.12.83 In the letter read as first paper, Govt. have taken the stand that the scheme for grant of leave without allowances for taking up employment abroad provided for in G.O.(P) 274/70/Fin. Dt.29.04.70 as clarified subsequently is not applicable to private college staff and W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 31 that they can be sanctioned leave without allowances for the purpose only to the extent admissible as per Rule 88, Part I K.S. R subject to the restriction in Rule 24, Part I Kerala Service Rules. Govt. have reviewed the matter in the light of the orders issued in the G.O. read above and they are pleased to order that the Private College staff in the colleges that have opted for the direct payment scheme will also be granted leave without allowances for the purpose of taking up employment abroad or within the country on the following terms and conditions:-" (emphasis supplied) 26. Therefore we find that Government decided to grant permission to the staff of Private Colleges, which opted for the direct payment system also, leave without allowance for the purpose of taking up employment abroad, for the first time as per order dt.14.6.85. This decision is seen to have been taken after reviewing its earlier stand that the scheme for granting leave without allowance for taking up employment provided for in G.O(P) No.274/70/Fin. dt.29.4.70 and the subsequent orders were not applicable to the Private College staff. The earlier stand was that leave without allowance could be sanctioned to them only to the extent admissible under Rule 88 of Part I KSR, subject to the restriction of Rule 24 of Part I KSR. It is true that the restrictions regarding loss of service benefits were imposed, W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 32 while

issuing the order Ext P11 permitting the Private College Teachers also to take up employment abroad by granting them leave without allowances. But the imposition of those restrictions in Ext P11 cannot be interpreted to mean that the private college staff were having permission to work abroad after availing leave without allowance or that leave without allowance could be availed by them for any purpose without any restriction or that the restrictions on pension and other service benefits cannot be imposed in their case, even when they accepted employment abroad, merely on the strength of the orders issued by the management. In this context, it is relevant to have a look at Rule 88 of Part.1 KSR referred to in the Govt. Order Ext.P11, which reads as follows:

"8. Leave without allowances:- (1) Leave without allowances may be granted to any officer in regular employment in special circumstances-- (a) when no other leave is by rule admissible, or (b) when other leave is admissible, but the officer concerned applies in writing for the grant of leave without allowances. Xxxx xxxxx xxxxx" 27. Therefore it can be seen that the leave without allowances provided in Rule 88 is not for the purpose of any W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 33 employment abroad or elsewhere, especially in the light of Rule 69 of Part I KSR. As per Rule 69 of Part I KSR,, an officer on leave may not take any service or accept any employment without obtaining the previous sanction of the authority empowered to fill up the post held by him. Eventhough some of the respondents in these Writ Appeals, have produced the orders granting them leave, the purpose for which the leave was granted or sought is not seen stated therein. At the same time, it is the admitted case of the respondents that they were working abroad after availing leave without allowance. It is also pertinent to note that the educational agency is not the sole authority empowered to fill up the post held by a teacher in a private college, after the introduction of the direct payment system in 1972. Rule 24 provides that an officer shall be removed from service after 5 years' continuous absence from duty, unless Govt. in view of special ircumstances of the case, otherwise determine. Thus the maximum period admissible even under Rule 88 of Part1 KSR for an officer to be absent with or without leave was only 5 years. As mentioned earlier, the teachers in private colleges were not under the sole control of W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 &

1859 of 2013 34 the educational agency under the Higher Education Department since the year 1972. As per Rule 4 under Part II of the Private Affiliated Colleges (Arts and Science Colleges) Staff Direct Payment of Salary Rules, 1972, (issued as per G.O.(P) 221/72/Edn dated 06.10.1972), it is the Director of Collegiate Education, who is to approve the appointments of staff in the Private Colleges under the educational agencies, which executed agreements with the Govt. and the same has to be done in consultation with the University. The Director is competent to examine the workload in each department and the staff position with reference to the staff pattern fixed by the University concerned. The Director of Collegiate Education or the officer authorized by him are the sanctioning authority and controlling officers to countersign the bills for payment of salary, w.e.f 1.9.1972. Under the scheme for direct payment of salary, Govt. is not liable to make any payment in excess of what is available to the teachers in Govt. colleges. It is pertinent to note that it is the Govt. who is the pay master in the case of teachers of private colleges. In the case of the teachers of the Govt. Colleges, Govt. has no liability to pay pension for the period they worked abroad W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 35 on leave without allowance. While issuing orders granting leave, permitting them to accept other employment within the country or abroad Govt. makes it clear, that the period under leave without allowance will not be reckoned for the purpose of pension. The agreement entered into by the educational agencies towards the direct payment system did not envisage any situation when Govt. can be made liable either by way of payment of pay, pension or any other monetary benefits to the teachers under those educational agencies towards the period during which they worked elsewhere. It is to be noted that the educational agencies were not granting any benefit to the teachers for the period on leave without allowance, as can be seen from the 1st Statute 1972. It is to be noted here that, in the case of teachers in the Govt. colleges, they were permitted to take up employment abroad in accordance with the order issued on 29.4.70 and subsequent orders including G.O(MS) 137/85/H.Edn. (Appendix XII A). It is to be noted that the Govt. order dated 29-4-1970 was in force when the University 1st Statute 1979 came into force on 19.09.1979, which made the provisions in KSR and the orders issued thereunder applicable to W.A Nos.1422,1494,1498,1515,1609,1719,1868 of

2011,1794 & 1859 of 2013 36 the teachers. Eventhough provisions in Appendix XIIA were not applicable for appointments to aided colleges, the teachers of Private College were not specifically excluded from the application of those provisions. By virtue of Statute 39, the Govt. order dated 29-4-1970, which is an order issued in terms of provisions in KSR, has to be treated as one which was applicable to them for the period from the date of enforcement of 1st statute 1979.

28. We notice that the statute 25 has been amended in 2005 inserting clause (iii) to the effect that Govt. will be the authority to grant leave in excess of 4 months to the college teachers. According to us that will not in any way indicate that the educational agencies were authorised to permit the teachers of Private Colleges to take up employment abroad and for that purpose they could grant leave and on account of such grant of leave or that the period covered by such leave can be counted for pension or for other financial benfits.

29. It is true Rule 26 Part III KSR provides that all the time passed on leave with or without allowance will be treated as qualifying service for the purpose of pension unless otherwise W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 37 specified. It is relevant to note that ruling under Rule 26 Part III KSR provides that the competent authority to declare a spell of leave as non-qualifying for pension will be the Government and the grounds on which the period of leave will be treated as non- qualifying, will be laid down by general or special orders issued from time to time. In Circular No.117546/SD3/ dt.19.5.77, Govt. have made it clear that the leave without allowance to take up employment in India or any foreign country will not be counted for pension and that specific permission of Government should be taken before taking up any particular employment. In view of Statute 39(2), which makes all orders, Govt. decisions, rulings and notifications issued by Govt, with reference to the provisions in KSR, the conditions stipulated in the circulars issued by Govt, the Govt. order dated 29-4-1970 that the LWA for employment abroad will not count for pension are applicable to the Private College Teachers also, at least from the date on which the 1st Statute 1979 came into force. The Direct payment system was never intended to put the teachers of Private Colleges on a higher pedestle than the teachers of Govt. Colleges. The teachers who were benefitted by orders permitting

them LWA W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 38 for employment abroad, even in the absence of any provision for the same, cannot be put in a more advantageous position or granted any further benefits to reckon the said period, just because no condition was stipulated in the orders issued by the Managers or no action was taken by the Director of Collegiate Education when they were granted leave. They were permitted to take up employment abroad when there was no provision for giving such permission and there was no authority for granting leave for the said purpose.

30. Moreover we find that Rule 26 has to be read along with Rule 10 of Part III KSR. As per Rule 10, the service of an employee does not qualify unless he is appointed, his duties regulated and paid by Govt. or under conditions determined by Govt. In the absence of any condition determined by Govt, the period during which the teacher was not paid by Govt. cannot be reckoned towards pension, especially when the leave without allowance granted by the educational agency was not covered by any of provisions of law.

31. In the judgment in W.A No.1287/2005, the Division Bench was considering the case of a private aided college W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 39 teacher who took leave for a period of 5 years from 23.7.1977 initially, which was extended for a further period from 23.7.1982 and finally rejoined duty and retired on 31.3.1998. The Division Bench found that the original leave was granted by the management as per the First Statutes 1972 framed by the Govt. under Section 76 of the Kerala University Act, 1969. The Division Bench took note of the fact that the Kerala Univeristy Act ,1969 was repealed on enactment of the Keala University Act, 1974. In these circumstances, it is to be noted that the pensionary benefits of teachers of Private Colleges affiliated to the Kerala University are governed by Kerala University First Statutes in respect of Pension, Provident Fund, Gratuity, Insurance and Age of Retirement of Teachers of Private Colleges 1976 framed under Section 83 of the Kerala University Act, 1974. Taking note of the provisions of Statute 5 therein, it was held that the Private College Teachers are eligible for pensionary benefits as laid down in Part III KSR. It was further found that as per Rule 26, the time passed on leave of all kinds with or without allowances will count for pension unless otherwise

specified and that in the absence of any specific orders issued, to exclude any W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 40 part of the service, the entire service rendered by the private college teacher, including the period during which he was under leave was liable to be reckoned towards qualifying service. The Division Bench held that Rule 88 of Part I is not applicable to the Private College Teachers, since they are governed by Statute 25 (2) of the First Statutes, 1979 which empowers the management to sanction leave. The Division Bench also added that the Govt. did not have any case that the leave was granted with or without proper sanction. Further, referring to the G.O(MS) 137/85/H.Edn. 14.6.1985 (the order Ext.P11 herein) the Division Bench held that it was only after the issuance of the order i.e after 14.6.1985, that the Private College Teachers were to lose any benefit on availing leave without allowance and that too in cases where orders granting leave were issued subsequent to 14.6.1985. It was held that since all these spells of leave granted to the petitioner therein was prior to 14.6.1985, the service rendered by the petitioner therein including that covered by the period of leave without allowance for employment abroad, was liable to be reckoned towards pensionary benefits. On the basis of the above findings, the Division Bench upheld the judgment of W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 41 the Single Bench and directed payment of all pensionary benefits reckoning the entire period including that covered by leave without allowance. In view of our finding in respect of the various provisions of the University Statutes read with the provisions in KSR as discussed in para 14 to 30, we are unable to agree with the finding of the Division Bench that Rule 88 of Part I KSR was not applicable to Private College Teachers and what was applicable was only Statute 25 Chapter II of the First Statutes, 1979. We do not also agree with the view that the period of LWA in the case of Private College Teachers for employment abroad, granted before 14.06.1985 can be reckoned towards pension.

32. In the absence of any other provision, as we have found earlier, the Private College Teachers would not have been eligible for any type of leave not covered by the provisions in KSR. Rule 88, is not a provision excluded under Statute 39 and therefore it applies to them as in the case of teachers of Govt. Colleges. There was no provision either in the University Statutes or in K.S.R which provided for

leave without allowance for employment abroad. It is pertinent to note that Statute 18, W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 42 insists that any application for any other appointment shall be routed only through authorities above Deputy Director of Collegiate Education; Prior permission and prior approval from Govt. are insisted for study leave and also for deputation to foreign service under Statute 35 and 30 of 1st statute `1979. . Even though Rule 26 Part III KSR provides that the time passed on leave of all kinds with or without allowances will be counted as qualifying service unless otherwise specified, it cannot be interpreted to mean that any leave without allowance, even if granted without authority and even when it is not provided for under any of the statutes or rules, should be counted towards qualifying service.

33. It is to be noted that the teachers in Government colleges and officers under the Govt. in respect of whom also Govt. is the pay master, are not eligible for pension or any other service benefits towards the period during which they were on leave without allowance for the purpose of employment abroad. It is a fact that leave was granted to them on the basis of the orders stipulating restrictions and in the absence of such orders they were also not permitted to accept employment abroad. W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 43 Directing grant of pensionary benefits for the period during which the Private College Teachers were serving another country on the basis of orders issued by the respective managements, even in the absence of any provision for the same, cannot be permitted, when it is the Govt. who had to make the payments towards pension. It was only by the issuance of the Govt. Order issued on 14.6.1985 that the Govt, for the 1st time decided to issue specific orders to permit the the Private College Teachers to take up other employment abroad and to accord sanction for leave without allowance for that purpose, on certain conditions. That means until 14.6.1985 any grant of leave without allowance by the respective educational agencies, for the purpose of employment abroad was without authority and hence illegal. At any rate, that cannot burden the Govt. by making payments to such teachers. Therefore, the leave without allowance mentioned in Rule 26 of Part III KSR can only be understood as the leave without allowance which is permissible as per rules or orders issued by the Govt. from time to time. The absence of any stipulation or restriction regarding the loss of

benefits on availing leave in the event of the same being taken W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 44 for employment abroad in such circumstances where the leave is granted and availed in the absence of any provision for the same and contrary to the provisions stipulating that no other employment shall be accepted by an officer, cannot be a reason for reckoning the period under the leave without allowance for the purpose of qualifying service for pension. Qualifying service for the purpose of pension can only be that service during which the teacher discharged his duties for which he was paid by Govt, as provided in rule 10 of Part III KSR. In the above circumstances, the findings arrived at in W.A1287of 2005 cannot be said to be correct.

34. In this context, it is relevant to note that the respondents in these writ appeals have relied on a Govt.letter 12259/D2/87/H.Edn. issued on 6/8.5.87 (Ext.P12) issued by the Under Secretary to Govt. in order to assert their claim that leave without allowance granted by the management of private colleges coming under the direct payment Scheme prior to the issuance of G.O(MS) 136/85/H.Edn. dated 14.6.85 can be reckoned as qualifying service for the purpose of pension. It is to be noted that this letter is seen issued by an Under Secretary W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 45 to Govt. on behalf of the Commissioner & Secretary to Govt.

35. In this context we have to examine whether a Govt. order can be clarified by such a letter, in the light of the rules of business. Article 166 of the Constitution of India reads as follows:

"66. Conduct of business of the Government of a State.- (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor. (2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor. (3) The Governor shall make rules for the more convenient transaction of the business of the Government of the

State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion." In terms of Art.166(3), the Governor has framed the Rules of Business of the Government of Kerala. As per Rule.5 Governor shall, on the advice of the Chief Minister, assign one or more departments to the charge of a Minister of the Government, Under R.6 there shall be a Secretary to the Government for each department in the Secretariat, who shall be the official head of W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 46 the Department. As per R.7, Council of Ministers shall be collectively responsible for all executive orders issued in the name of the Governor. Rule 8 provides that subject to the orders of the Chief Minister under R.14, all cases referred to in the Second Schedule shall be brought before the Council in accordance with the provisions of the Rules contained in Part II: It further provides that no case in regard to which the Finance Department is required to be consulted under R.10 shall, save in exceptional circumstances under the directions of the Chief Minister, be Decisions relating to emoluments or other conditions of service of posts and those involving financial implications are to be taken only after consultation with Finance Department. Rule 10 of the Rules of Business reads as follows:

"0. (i). No department shall, without previous consultation with the Finance Department, authorise any orders (other than orders pursuant to any general delegations made by the Finance Department, which, either immediately or by their repercussions, will affect the finances of the State or which, in particular, either:- (a) relate to the number of gradings or cadres of posts or the emoluments or other conditions of service of posts; or (b) involve any grant of land or assignment of revenues or concession, grant, lease or licence of mineral or forest rights or a right to water power or any easement or privilege in respect of such concession except when such alienation, abandonment or reduction is in accordance with ordinary rules or a general scheme approved in W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 47 consultation with Finance Department; or (c) in any way involve any relinquishment of revenue. (ii) Subject to the general provisions of R.8, no proposal, which requires the previous consultation of the Finance Department

under sub-rule (i) but in which the Finance Department has not concurred and the Finance Minister has agreed with the Finance Department may be proceeded with unless a decision to that effect has been taken by the Council of Ministers; (iii) No re-appropriation shall be made by any department other than the Finance Department except in accordance with such general delegations as the Finance Department may have made; (iv) Except in cases where power may have been delegated to departments under rules approved by the Finance Department and in cases where the specific concurrence of the Finance Department has been given, every order of an Administrative Department conveying a sanction to be enforced in audit should be communicated to the Audit Authorities by the Finance Department. In cases where the specific concurrence of the Finance Department has been given, the following shall be added to the address entry of the G.O. Communicating the sanction, namely:- "This order issues with the concurrence of the Finance Department Vide their U.O.Note No..... dated". (v) Nothing in this rule shall be construed as authorising any Department, including the Finance Department, to make re-appropriation from one grant specified in the Appropriation Act to another such grant". (emphasis supplied) As per Rule 11, all orders or instruments made or executed by or on behalf of the Government of the State shall be expressed to be made or executed in the name of the Governor. Under R.12 W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 48 every order or instrument of the Government of the State shall be signed by a Secretary, an Additional Secretary, a Joint Secretary, a Deputy Secretary, an Under Secretary or by such other officer as may be specially empowered in that behalf and such signature shall be deemed to be the proper authentication of such order or instrument. Under Rule 14, all cases referred to in the Second Schedule shall be submitted to the Chief Minister after consideration by the Minister in charge. Under Rule 59, all Departments shall consult the Law Department, in relation to certain matters mentioned therein like general legal principles arising out of any case, institution or withdrawal of any prosecution, etc.

36. In *Sudheer Vs Susheela* [2009(4) KLT29, a Full Bench of this court has analysed various provisions in the Rules of Business in detail, while considering the validity of an order issued by a Secretary to Govt, after hearing before another Secretary to Govt. There it was held that Secretary to Govt. was competent to

issue the order as it was a decision taken in accordance with the provisions contained in the Rules of Business. There the files disclosed that all the formalities were W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 49 observed before issuing the order. In *Sudheer V State of Kerala* [2010(1) KLT25, a Division Bench of this court held that a Govt. letter issued by an Under Secretary will be valid, even if there is no authentication. At the same time it was made clear that it was upto the Govt. to show that what was conveyed in the letter was the decision taken by Govt, with reference to files. Relying on *Chithralekha v. State of Mysore* (AIR 1964 SC1823, *Dattatraya Moreshwar Pangurkar v. State of Bombay* (AIR 1952 SC181, *State of Bombay v. Purushottam Jog Naik* (AIR1952 SC317 and *Ghaio Mall & Sons v. State of Delhi* (AIR 1959 SC65, this court rejected the contention that an executive order, issued in the name of the Governor cannot be modified by a communication issued by a Secretary to Govt. It was held that any earlier decision can be clarified or modified by a subsequent decision and that it was not necessary that the second order should be one issued in the name of the Governor. At the same time the observance of the rules of business was held mandatory, for taking the decision, even if the subsequent decision was issued in the form of a letter of a Government Secretary. In that case the appellant did not have a W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 50 case that there was decision taken as per the Rules of Business.

37. In this context we also notice the judgment *MRF Ltd. v. Manohar Parrikar* [(2010) 11 SCC374 wherein the apex court elaborately examined the contentions with reference to the provisions contained in Article 166 of the Constitution of India and the rules of Business framed by Governor of Goa under Article 166(3), while considering the validity of 2 notifications issued by the Government of Goa on 15-5-1996 and 1-8-1996 in respect of grant of 25% rebate to low tension, high tension and extra high tension industrial consumers of electricity, as a policy of the State Government. One of the issues raised therein was that the assailed notifications were not issued in terms of Articles 154 and 166 of the Constitution of India and that they were issued only at the instance of the Minister of Power at the relevant point of time. The apex court found that the notification dated 15-5-1996 which was stated to be clarificatory, had imposed additional burden on the State's

exchequer by introducing a new class of consumers for grant of rebate retrospectively and it was finalised by the Minister for Power at his level only, without placing the proposal for the decision W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 51 leading to the Notification dated 15-5-1996, before the Council of Ministers or the Chief Minister and thus the same was in violation of the Business Rules and hence the decision was non est. The judgment in Chitralkha's case (supra) was distinguished observing that clause (3) of Art 166 of the Constitution of India was not considered therein. In para 92 of the judgment it found that the Business Rules framed under the provisions of Article 166(3) of the Constitution are mandatory and must be strictly adhered to and any decision by the Government in breach of these Rules would be a nullity in the eye of the law. It was held that a decision to be the decision of the Government must satisfy the requirements of the Business Rules framed by the State Government under the provisions of Article 166(3) of the Constitution of India.

38. In the cases before us the letter Ext.P12 is issued by Sri. Kuruvila Mamman, Under Secretary to Govt. informing that the entire period of leave without allowance availed by teachers of Private Colleges in direct payment system, before 14-6-1985, the date of Ext.P11 order, can be reckoned for the purpose of pension. But there was no such Govt. decision, arrived at, W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 52 following the rules of business. This is evident from the G.O.(Ms) No.50/2001/H.Edn dated 2-4-2001 by which the aforesaid letter Ext.P12 is cancelled stating that pensionary benefits will not be admissible for the period under leave without allowance for the purpose of employment abroad. In this order it is stated that Ext.P12 Govt. letter was issued due to oversight on the part of the then officers, the provision prevailing in a Govt. order cannot be overruled by a Govt. Letter and contrary to the policy of Govt. Therefore, we can safely conclude that the Govt.letter Ext.P12 did not reflect the decision of the Govt. And the same is non-est in the eye of law.

39. While issuing that order, seeing that several cases have been settled in the meanwhile on the basis of Ext.P12 addressed to the Director of Collegiate

Education, it was ordered that the cases which have already been settled on the basis of the Govt. letter need not be reopened. The Division Bench had taken note of this Govt. order also and directed that, since the Govt. letter is cancelled only with prospective effect and the leave availed of by the teacher concerned in that case was sanctioned on a date before the cancellation, he was entitled to W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 53 the entire benefits. In fact the order dated 2-4-2001 was not one for regularising all the period on leave without allowance availed by the teachers till that time. Relevant portion of the order is reproduced below: "After examining the case in consultation with both the Finance and the Law Departments Government found that the issuance of the Government letter read as 3rd paper above was illegal on the ground that the said letter lays down a wrong policy in the face of Government Orders read as 1st and 2nd papers above to the contrary. In the circumstances stated above Government have decided to cancel the Government letter read as 3rd paper above prospectively with effect from the date of this order. However cases which have already been settled based on the Government letter read as 3rd paper above will not be reopened." 40. We are unable to agree with the views of the Division Bench to the effect that a private college teacher who availed leave without allowance and served elsewhere outside the country, is entitled to be granted pensionary benefits reckoning the period during which he was drawing pay elsewhere serving another country, towards qualifying service, even in the absence of any orders permitting them to go abroad or to accept any such employment or to grant leave without allowance for the same, as against the provisions in University 1st Statute 1979. As discussed earlier, there was no provision for the teachers W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 54 permitting them to take up employment abroad and to avail leave on loss of pay for that purpose. But the educational agencies granted them leave even in the absence of any provision for the same. In such circumstances, the absence of any condition in the order granting them leave on loss of pay will not enable the teachers to get the period on such leave reckoned for the purpose of pension, just because the educational agency did not stipulate any condition that the period will not count for pension. But the judgments of this Court proceeded as if the only provision relating to this is, as far as private college

teachers concerned, Statute 25.

41. Now we have to look into the issues considered in Dr.Krishna Pillai v. State of Kerala [1982 KLT106, referred to in the reference order. There, the Division Bench was considering the claim for promotion raised by a Govt. employee, who rejoined duty after availing leave without allowance for employment abroad in terms of the Govt. order dt. 29.4.70. In that case the appellant was working as a Radiologist. He was granted leave permitting to take up employment abroad as per order dt.18.7.80 on the specific condition that the leave without W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 55 allowance sanctioned will not count for increment, pension or any other service benefits. On expiry of the leave the appellant therein rejoined duty on 5.3.1985 and claimed promotion as Chief Radiologist, on the strength of Rule 8 of the Kerala State and Subordinate Service Rules (KS& SSR for short). He claimed that the period of his absence from 18.7.80 to 5.5.85 should be counted as service. When Govt. rejected his claim, he filed original petition. It was dismissed on the ground that the benefit of Rule 8 was not available to him as he had gone abroad for taking up employment after taking leave without allowance. The Division Bench took note of the fact that an amendment was introduced in Rule 8, which specifically excluded the persons who were on leave without allowance from the purview of the rule for the benefits under the same. The claim of the appellant therein was that he had availed leave for the period from 18.7.80 to 5.5.85 before the amendment was introduced in Rule 8, which was given retrospective effect from 16.12.83. The learned Single Judge therein had held that the amended rule will apply to the appellant, who was on leave on 16.12.1983, though the order granting him leave was prior to 16.12.83, and therefore he was W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 56 not entitled to the benefit of Rule 8. As per Rule 8 of KS&SSR, it is provided that the absence of a member of a service from duty in such service, whether on leave, other than leave without allowances for taking up other employment on foreign service or on deputation or for any other reason and whether his lien in a post borne on the cadre of such service is suspended or not, shall not, if he is otherwise fit, render him ineligible in his turn for promotion from a lower to a higher category in such service, in the same manner as if he has not been absent. The

division bench upheld the view of the single judge. It was found that the appellant was absent from duty from the service of the State Govt. as radiologist on securing appointment abroad and such appointment was solely on his application.

42. The division bench further found that the absence of the appellant was not because of the leave that was granted to him but because the appellant wanted to take up employment abroad, in order to enable him to take up employment abroad and hence the absence from duty of the appellant was for securing another appointment. The division bench therein was considering the effect of the leave without allowance availed by W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 57 the appellant therein with reference to his claim for promotion during the period of his absence, in the light of Rule 8. Rule 8 specifically provides that the rule is not applicable to a person who is on leave without allowance for taking up employment abroad. Though the order granting him leave without allowance was issued on a date prior to the amendment of Rule 8, incorporating exclusion of those who were on leave without allowance for taking up employment abroad from its purview.

43. Since the appellant was continuing on leave at the time of introduction of that amendment, the exclusion was held applicable to him also, taking note of the stipulation in the order granting him leave also, wherein it was stated that the period on leave without allowance will not count for any other service benefit.

44. While the Division Bench in W.A12872005 was considering the question of eligibility for pensionary benefits in the case of Private College Teachers who were on employment abroad availing leave without allowances, which was granted without stipulating any condition, the division bench in Dr.Krishna Pillai v. State of Kerala (supra) was considering W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 58 the case of a Govt. servant who availed leave based on an order specifically stipulating that the period under leave without allowance will not be counted for pension or any other service benefits. There his claim was for promotion during the period of his absence, on the strength of Rule 8 of KSSR, wherein the persons who were on leave without allowance were specifically excluded. Therefore, we do not find any conflict between the two

decisions since the issues under consideration were entirely different, except for the fact that the claim raised in both those cases was in respect of period of absence on leave without allowances for the purpose of employment abroad.

45. In the light of our discussions in para 18 to 30, we are of the view that the leave without allowance for the purpose of employment abroad, availed by the Private College Teachers either before 14.6.1985 cannot be reckoned for pension and the findings arrived at by the Division Bench in W.A. 1287/2005 are not correct.

46. The next question to be considered is whether the period on leave without allowance for employment abroad can be reckoned towards placement under the UGC scheme. In these W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 59 cases the College teachers are seeking the benefit of Ext P9 -G. O. (P) No.79/90/H.Edn dated 27.03.1990. The respondents in the Writ Appeals have already enjoyed the benefit of placement under the UGC scheme, which was granted to them without reckoning the period spent on leave without allowance. In these cases they are seeking those benefits reckoning the said period also. According to them the period during which they worked abroad is liable to be reckoned as service since the leave granted to them by the educational agencies do not contain any restrictions; therefore the said period during which they served another country on leave without allowance also can be reckoned for placement in senior scale as well as in selection grade. In support of their claim they have relied on Ext.P13 judgment dated 20.06.1995 of a learned single judge of this court in O. P. 7378/1999, wherein it was held that the entire period whether on leave with or without allowance can be reckoned for placement under the scheme.

47. The respondents have produced letter no. UGC Spl. Cell. II(I) 4061/91/A dt.7.3.1991 - Ext.P10 issued by the Additional Director of Collegiate Education, wherein it is W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 60 informed among other things as follows: "(b) The placement under senior scale shall be on completion of 8 years of service and to the selection scales on completion of 16 years of service excluding the leave without allowance,

if any availed by the teachers." It is pertinent to note that the aforesaid communication from the Additional Director of Collegiate Education is produced as circular in some cases. (The appellants have not made available either the original of the said communication or the files leading to it.) The appellants-the State of Kerala- resisted the claim of the respondent teachers on the strength of Ext.P10 circular, according to which the service rendered by the teachers other than the period during which they were on leave without allowance shall alone be reckoned towards service for the purpose of placement. The respondents are relying on the judgment in O.P. 7378/1993- Ext.P13 in which the said letter/circular is set aside. The petitioner in that Original Petition was a junior Lecturer appointed on 1.6.1966. He was appointed as a Lecturer w.e.f 1.1.1970. When the UGC scales were introduced, he was granted senior grade in the scale of 3000-5000 on completion of 8 years of service and as selection grade in the scale of 3500-7500 on completion of 16 years of W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 61 service. But on account of the circular Ext.P10, the petitioner therein was not granted senior scale on completion of the prescribed period therein. He had proceeded on leave initially on 11.4.1979, for a period of 5 years from 31.3.1979. After availing leave he accepted employment abroad. Thus leave without allowance was granted to him for a period of 5 years from 31.3.1979. It was while the petitioner therein was continuing on leave that, the Govt. issued orders -Ext P11 order- on 14.6.85, providing permission to the teaching staff of private colleges to take up other employment abroad on condition that the said period will not be reckoned for any purpose. Relying on the judgment of the Hon'ble Supreme Court dated 21.2.1990 in Civil Appeal No.1257/90, he claimed that the entire service rendered by him including the period during which he was on leave without allowances should be reckoned for the purpose of placement. Relying on the judgment of the Supreme Court, the learned Single Judge held that even under normal notions any person asking for leave is granted leave and he does not cease to be in service. The learned single Judge found that the Govt. was encouraging those who were interested to go abroad by granting W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 62 leave and that is why the rule provides "except for the purpose of pension, leave without allowance was considered as part of the service and Govt. withdrew the same on

1987." According to the learned Single Judge the change of the situation appeared for public only in 1987 or at the latest from 14.6.85 onwards. Seeing that the leave availed by the petitioner therein was for the period from 31.3.1979 to January, 1985, the learned Single Judge held that the petitioner should be governed by the declaration of law laid down by the Supreme Court. In other words the period from 31.3.1979 to 14.1.85 has to be considered as continuous service for all other purposes. As the petitioner therein was found to have completed 16 years of service on 1.1.1996, the grant of selection grade to him we.f 1.1.986 was held good and the direction of the Addl. Director of Collegiate Education to exclude the service on leave without allowance for the purpose of placement, was held unsupportable, in view of the fact that the petitioner therein had availed of leave much earlier to the issuance of the Govt. order on 14.6.1985. The learned Single Judge relied on the Supreme Court mentioned supra also. In effect, the learned Single Judge found that the 8 years/16 W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 63 years' service for placement under the UGC scheme as Senior Grade and Selection grade Lecturer should include the period of his employment abroad on LWA also. Even though W.A.1311/95 was filed by the Government against the judgment of the learned Single Judge, after much delay, the writ appeal was dismissed by judgment dt.28.11.2001, on the ground of delay also.

48. We find that the learned Single Judge, in Ext P13 judgment, proceeded on the assumption that teachers of Private Colleges were at liberty to seek employment abroad and avail any kind of leave for any purpose. According to the learned Single Judge the restrictions on availing leave without allowance on employment abroad, came into force for the first time on 14-6- 1985 and therefore the restrictions are not applicable to those who availed leave prior to 14.6.1985. In view of our findings on eligibility of teachers of Private Colleges for leave without allowance, supra, we are unable to agree with the learned Single Judge as well as with the Division Bench, which dismissed the appeal filed by the State, at the stage of consideration of delay petition itself.

49. We have already found that there was no provision of W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 64 law

which permitted the teachers of Private Colleges to take up employment elsewhere either within India or abroad and to avail leave without allowance for the said purpose. There was no provision which provided that the period during which they remained absent for such employment will count for any purpose in their service. In this context, it becomes necessary to analyse the circumstances leading to the enactment of the UGC Act and the issuance of the the Govt. orders introducing UGC Scheme to the teachers in the State of Kerala and the provisions therein. The University Grants Commission Act was enacted in the year 1956, in order to make provisions for co-ordination and determination of standards in Universities and for that purpose to establish a University Grants Commission, as is seen from the preamble. The Commission is to act as an expert body to advise the central Govt. on problems connected with the co-ordination of facilities and maintenance of standards in Universities.

50. Government of Kerala introduced UGC Scheme in Kerala, issuing Ext.P9 Govt. order dated 27.03.1990, which begins with the following statement: "In recognition of the importance of University and College Education in developing the W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 65 nation's human and material resources, Government of India appointed the Mehrotra Committee for reviewing the status of higher education in the country". The Committee suggested various measures for improving the quality of higher education in the country and also recommended revision of pay scales of College and University teachers. The University Grants Commission accepted the scheme and recommended it for implementation. The scheme is known as the U.G.C. Scheme, 1986. The Government of India decided to implement the scheme including the revision of scales of pay with effect from 1st January 1986 and have also offered financial assistance to the State Government for adopting the revised scheme under the following terms and conditions:-- (i) The Central Government will provide assistance to the State Government to the extent of 80% of the additional expenditure involved in giving effect to the revision of scales of pay. (ii)The Central assistance to the extent indicated above will be available for the period from 1-1-1986 to 31-3- 1990. (iii) The State Government will meet the remaining 20% of W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 66 the expenditure from their own resources and will not pass on the

liability or any portion thereof to the Universities or the managements of Private Colleges. . (iv) The State Government will take over the entire responsibility for maintaining the revised scales of pay with effect from 1-4-1990. (v) The assistance from Government of India will be restricted to the revision of pay scales of the posts which were in existence as on 1-1-1986. ' 2. xxxx 3. Government of Kerala, after examining the said U.G.C. Scheme as approved by the Government of India in the letter read as first paper above have ordered in the G.O. read as third paper above that the U.G.C. Scheme, including revision of scales of pay, will be implemented in the State, and that detailed orders will be issued separately.

4. Government are now pleased to approve the scheme appended as Annexure I, and order that the same will be implemented in the State with effect from 1-1-1986 for teachers in Universities and Colleges." (emphasis supplied) Therefore it can be seen that the UGC Scheme was introduced in the State of Kerala in the year 1990, w.e.f 1.1.86 , in order to see that the quality of higher education in the country is improved. It is as a measure to derive maximum output from the teachers for improving the standard and quality of education in the country that it recommended revision of pay scales of college and university teachers, as done by Govt. of India, after examining W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 67 the UGC Scheme as approved by Govt. of India, accepting the offer for financial assistance of 80% for the same. The Govt. of Kerala in its order dated 27-3-1990(Ext P9), has ordered that the UGC Scheme including revision of scale of pay will be implemented in the State as per its order issued on 13.3.90. Govt. approved this scheme, as per order G.O(P) No.79/90/H.Edn. dated 27.3.90, as appended as Annexure I thereof and implemented the same in the State w.e.f 1.1.1986. Para.V of the Annexure provides for career advancement.

51. Clause 5.01 and 5.03 are the provisions relating to placement in Senior Scale and Selection Grade Scale. Clause 5.01 reads as follows: "5.01. Every Lecturer will be placed in a Senior Scale of Rs.3000-5000, if he/she has - (a) completed 8 years of service after regular appointment with relaxation as provided in para 4.04 above. (b) Participated in two refresher courses/summer institutes each of approximately 4 weeks duration or engaged in other appropriate continuing

education programmes of comparable quality as may be specified by the UGC and (c) consistently satisfactory performance appraisal reports. Explanation: All Lecturers who have completed 8 years of service on 1.1.86 will be placed through a process of screening/selection in the scale of Rs.3000- 5000." W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 68 Clause 5.03 reads as follows: "5.03. Every Lecturer in the Senior scale will be eligible for promotion to the post of Reader in the scale of pay of Rs.3700-5700 if he/she has - (a) completed 8 years of service in the senior scale provided that the requirement of 8 years will be relaxed if the total service of the Lecturer is not less than 16 years. (b) Obtained a Ph.D degree or an equivalent published work, c) made some mark in the areas of scholarship and research as evidenced by self-assessment, report of referees, quality of publication, contribution to educational renovation, design of new courses and curricula, etc. d) participated in two refresher courses/summer institutes each of approximately 4 weeks duration or engaged in other appropriate continuing education programmes of comparable quality as may be specified by the UGC after placement in the Senior Scale and e) consistently good performance appraisal reports." Clause 5.02, provided that regular and systematic appraisal of performance of teachers should be an essential element in the management of education, which has been taken into account in the design for career development of teachers. The UGC has prepared a pro-forma for performance appraisal of teachers, as given in Appendix III. Clause 6 to 13 deals with probation, superannuation and re-employment, grievance redressal W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 69 mechanism, teaching days, code of professional ethics, pay fixation formula, dearness allowance and other benefits and nomenclature and pay scales. Clause 9 provided that the minimum number of actual teaching days in an academic year in Universities and Colleges, the minimum programme for examination reform in Universities and work-load of teachers shall be in accordance with the guidelines of the UGC as specified in Appendix V. The teachers were to observe the code of professional ethics as provided in Appendix VI. The pay fixation was to be made in accordance with Appendix VII. In clause 13.01, the college teachers were categorised as Junior Lecturers, Lecturers, Lecturers (Senior Grade), Lecturers (Selection

Grade)/Readers and Principals. Clause 13.03 authorised the Director of Collegiate Education to issue suitable instructions to the respective Deputy Directors to fix the pay of college teachers in accordance with Appendix VII.

52. As per Appendix V, the work of load of various activities of a teacher should not be less than 40 hours a week. It also provided that even though the workload has been fixed as 40 hours a week, any good teacher who has a spirit of challenge W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 70 in giving the best to the students would certainly spend much more than 40 hours a week in academic pursuits. After laying down the minimum programs for reforms, the conditions as to the work load and responsibility of teachers, it is provided therein that teachers should spend a certain amount of time every day in the department/college whether or not they have direct teaching duties on certain days and it should be ensured that a teacher is available for the students if they need his help and for consultation or discussion on various matters that come up in the institution. Clause IV of Appendix VI provides that teachers should refrain from undertaking any other employment and commitment including private tuitions and coaching classes which are likely to interfere with their professional responsibilities. It also provides that they should refrain from availing themselves of leave except on unavoidable grounds, keeping in view their particular responsibility for completion of academic schedule. Appendix VII provides for the procedure for fixing the pay under the UGC scheme. Annexure II provides for the scheme of revision of pay scales of teachers in the colleges in Kerala and other measures for maintenance of standards in W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 71 higher education. In this background, we are of the considered view that the placement as Senior Scale Lecturers, Selection Grade Lecturers etc, are intended as incentives towards the duties discharged by the teachers, in order to achieve the ultimate goal of the improvement of quality and standard of education. It can in no circumstance be intended to give away additional benefits to those who worked abroad.

53. In order to find out whether the period spent by the teachers on leave without allowance for employment abroad can be counted for any hike in their pay or any

benefit in their service career, we have to look into certain other provisions also in Part I KSR. According to Rule 23, therein, once an officer ceases to discharge the duties attached to his post, he ceases to draw the pay and allowances. According to Rule 33, duty alone counts for increments. Any period on leave without allowance not supported by medical certificate does not count for increments and does not amount to duty. In this context Rule 12(7), which defines duty is also relevant. Relevant portion of Rules 23 and 33 of Part I KSR are W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 72 reproduced below:

"3. (a) Subject to any exceptions specifically made in these rules, an Officer shall begin to draw the pay and allowances attached to his tenure of a post with effect from the date he assumes the duties of that post, and shall cease to draw them as soon as he ceases to discharge those duties. If the charge is transferred after noon, the transfer does not affect pay and allowances until the next day. [Exception.- An Officer deputed for a course of instruction or training which is ordered to be treated as duty, if promoted to a higher post in the regular line during such course of instruction or training, may draw the pay thereof, without joining it, the benefit of promotion being given from the date his junior assumes charge of the higher post." Xxxx xxxxxx xxxx

"3. The following provisions prescribe the conditions on which service counts for increments in a time-scale:-- (a) All duty in a post on a time-scale counts for increments in that time-scale. (b) (1) Service in another post other than a post carrying less pay referred to in clause (a) of Rule 21, whether in a substantive or officiating capacity, service on deputation and leave except leave without allowances taken otherwise than on Medical Certificate shall count for increments in the time-scale applicable to the post on which the officer holds a lien as well as in the time-scale applicable to the post or posts, if any, on which he would hold a lien had his lien not been suspended. (2) All leave except leave without allowances taken otherwise than on Medical Certificate and service on deputation count for increments in the time-scale applicable to a post in which an officer was officiating at the time he proceeded on leave or deputation and would W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 73 have

continued to officiate but for his proceeding on leave or deputation. Xxxxxx xxxxxx
xxxxxx xxxxxxxxx Explanation.- For the purposes of this rule, the period treated as
duty under sub-clause (ii) of clause (7) of Rule 12 shall be deemed to be duty in a
post if the officer draws pay of that post during such period. Note 2.- In the case of
an officer who, while officiating in a post proceeds on training or to attend a course
of instruction and who is treated as on duty, while under training, the period of
such duty will count for increment in the post in which he was officiating prior to his
being sent for training or instruction if he is allowed the pay of the officiating post
during such period.)" (emphasis supplied) Duty is defined in Rule 12(7), relevant
portion of which reads as follows:

"7. Duty.-- Duty includes-- (i) Service as a probationer or apprentice, provided that
such service is followed by confirmation. (ii) Joining time. (iii) A course of
instruction or training which an Officer undergoes specially ordered by
Government to be treated as duty. Note 1.- A student, stipendiary or otherwise,
who is entitled to be appointed to the service of Government on passing through a
course of training at a University, College or School shall unless in any case it be
otherwise expressly provided in the terms of his appointment, be treated as on
duty during the interval between the satisfactory completion of the course and his
assumption of duties. Note 2. - An Officer required or permitted to attend an
obligatory departmental examination may be treated as on W.A
Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 74 duty
during the day or days of the examination and during the reasonable time required
for the journey, if any, to and from the place of examination. [Explanation:--The
term `obligatory departmental examination' means:-- (i) any test a pass in which is
prescribed for the successful completion of probation or training of an officer,
whether recruited direct or by transfer; (ii) any test a pass in which is prescribed for
the purpose of making an officer eligible for increment or for confirmation in any
post: (iii) any test a pass in which is prescribed for promotion to any higher post
coming in the line of promotion in the Department concerned; (iv) any test a pass
in which is prescribed as a qualification for continuance in the post:
xxxxxxxxxxxxxxxxxxxxxx" The above provisions in KSR apply to the teachers of Private
Colleges also. A teacher cannot be said to be on duty in the College when he is
working abroad, on his own volition. Under Rule 33(2), the period on loss of pay

otherwise than on medical certificate will not count for increments. The meaning of the word 'increment' as per Chambers 21st Century Dictionary is :

1. An increase especially of one point or level in a fixed scale; eg. a regular increase in salary; 2. the amount by which something is increased. As per Thesaurus, it is increase, addition, W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 75 augmentation, rise, growth, percentage increase, pay raise. As per www.dictionary.com, increment means: something added or gained; profit; gain; the act of process of increasing; an amount by which something increases or grows; one of a series of regular additions. Therefore there cannot be any kind of increase in pay with reference to the period covered by LWA for employment abroad.

54. When no increment is admissible for such period under leave without allowance, there is no question of grant of any benefits towards the period during which a teacher served another employer in a foreign country. There can be no addition to his pay towards such period of absence. Therefore the period during which the teachers of Private Colleges did not discharge their duties in the respective Colleges or in other words while they were serving another employer in another country and remained on leave without allowances for that purpose, even in the absence of any provision for the same, which does not count for increments, can in no manner be reckoned towards placement as Senior Grade Lecturer, Selection Grade Lecturer, etc. W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 76 55. Just because the orders implementing UGC Scheme provide for placement on completion of the stipulated number of years of service, or because the orders issued by the educational agencies granting them leave did not contain any restrictions or the consequences, the Private College Teachers cannot be given a further incentive for the period they served a foreign employer on their own will and pleasure, without considering the purpose for which placement is given. The UGC scheme was introduced only in the year 1990. The orders granting leave to the teachers were issued during the period between 1973 and 1983, by the educational agencies, in the absence of any provision for the same. Therefore absence of restrictions therein, cannot in any manner help them

to count the said period for placement.

56. The word 'service' is not defined or explained in the UGC scheme. Provisions regarding UGC scheme do not find a place either in KSR or in University Statutes. Therefore, the words employed in the Scheme have to be interpreted with due regard to the intent and object of the UGC scheme. Otherwise it will only lead to unintended results contrary to the very object of the UGC scheme enuring additional benefits to the Private W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 77 College Teachers like respondents by reckoning the number of years they worked abroad also. On close examination of all these provisions, keeping in mind the purpose behind the UGC Act and the Scheme, will lead us to the conclusion that the 'completion of 8 years of service/completion of 16 years of service' mentioned in the orders relating to placement (Ext P9) can only be interpreted to mean and include only such number of years of service which can be reckoned as duty, which in turn can be reckoned for increments or in other words the period during which he actually discharged duties of teaching in the College or at least in any of the colleges under any of the Universities in India. (We have noticed that the revised UGC scheme 1998, which was implemented in the State through G. O.(P). No.171/99/H.Edn dated 21.12.1999, has included a separate provision-cl.7.1, providing for counting of previous service without break as a Lecturer or equivalent in a University, college, national laboratory, or other scientific organisation eg, CSIR, ICAR, DRDO, UGC, ICSSR, ICHR and as UGCR research scientist, provided the post was in equivalent scale of pay of lecturer; qualifications for the post was not lower than that prescribed by W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 78 UGC for the post of Lecturer, the concerned lecturers possessed the qualifications prescribed by UGC, etc.). Therefore any period during which a teacher was on leave without allowance other than on the strength of medical certificate cannot be reckoned for the purpose of placement as Senior Lecturer or Selection Grade Lecturer under the UGC scheme Ext P9.

57. In this context we have also seen that the Govt. orders providing for time bound grade promotion to the Govt. Employees and teachers, take in only that period of service which counts for increments. Time bound grade promotion is

granted merely on the basis of completion of requisite number of years of service, as a relief to those who are stagnating in the entry post without promotion, on account of sufficient promotional avenues or promotion posts. The element of public/national interest involved is larger in the case of higher education. Therefore the absence of any express provision for exclusion of the period on loss of pay for employment abroad, in Ext P9 or absence of restrictions in the orders issued by the educational agency while granting them leave, cannot enure to the benefit of placement to the teachers like respondents herein W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 79 reckoning the period of their employment under a foreign employer on their own volition.

58. No reasonable person, will in normal circumstances even think of granting an incentive to the teachers for the period they kept themselves away from teaching the students in the colleges, for serving employers in foreign countries and earned money. By reckoning the said period also for placement, it will do violence to the very object of the UGC scheme. It is also relevant to note that the teacher who avails leave for the said purpose from the Govt. College does not get that benefit, even though there was a provision permitting him to avail leave for employment abroad. As per Statute 22 of 1st Statute 1979, the scale of pay of teachers in Private Colleges shall be the same as those in Govt. Colleges. Under Statute 39, the provisions in KSR are made applicable, as detailed supra. There is no provision in the 1st Statute 1979 which enables the teacher of a Private College to get placed in a higher scale of pay, reckoning the period on employment abroad also. By placement as Senior Scale and as Selection Grade Lecturers, the College teachers are getting hike in their pay. When that hike in pay is on condition W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 80 that they should complete 8 years/16 years' service, such service can only mean and include the actual and physical teaching service and at any rate it cannot include the period during which the teacher was not anywhere near the college and was earning from other employers. By such a placement, the higher education in our state will not attain any improvement in its standard or quality.

59. It is also to be seen that Clause 5.01 and 5.03 insist that the teacher should have participated at least in two refresher courses as specified by the UGC and should have consistently satisfactory performance appraisal reports. Consistent satisfactory performances appraisal reports and participation in at least 2 refresher courses are mandatory for the placement. That means a teacher is not automatically placed as senior scale lecturer or selection grade Lecturer, on completion of prescribed number of years. Clause 5.02 provides that regular and systematic appraisal of performance of teachers is an essential element in the management of education and career development of teachers. In order to have consistently satisfactory performance appraisal reports, the teacher should W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 81 be available in the college. Such appraisal reports cannot be expected to be available for the period the teachers worked abroad, so as to be consistently satisfactory. In the appraisal report, the teachers have to provide their academic qualifications with percentage of marks right from High School; research experience and training ; research projects carried out; teaching experience in each level; innovations/contributions in teaching; extension work/community service; participation in corporate life including contribution to college, co-curricular activities, enrichment of campus life, students welfare and discipline, participation in bodies on education and national development, etc. Moreover clause 9.01 in para IX provides for minimum number of teaching days in colleges and for the workload of teachers in accordance with the guidelines of UGC as given in Appendix V. (The appendices to the scheme are not produced along with Ext P9).

60. From a perusal of the entire scheme, it can be seen that the very purpose of introducing the UGC scheme was to attain academic excellence. It nowhere gives any indication that those who went abroad and kept away from the duties of W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 82 teaching in the respective private colleges should be encouraged by giving them placement reckoning their period on employment abroad. Therefore we are unable to agree with the view taken by the learned Single Judge in Ext.P13 judgment to the effect that placement as senior scale and selection grade lecturers is automatic or that the placement should be given reckoning the length of his service which can include the period on leave without allowance for employment

abroad also. We are unable to subscribe to the views of the Division Bench also which dismissed the appeal against the judgment of the Single Bench. We notice that the Supreme Court judgment relied on therein deals with issues which arose in entirely different circumstances and cannot be applied to the factual circumstances like this. We notice tht the Full Bench of this Court in Lukose v. State of Kerala [1995 (2) KLT285(F.B.)] did not accept the arguments relying on the said judgment, while it was considering the impact of leave without allowance availed by a Govt. servant for employment abroad.

61. It is to be noticed that the very introduction of the UGC scheme including the revision of scale of pay is intended to W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 83 improve the quality of education and to provide incentives towards the said purpose. The placement as well as the grant of higher scale of pay are those intended to be given in recognition of the actual teaching work rendered by the teachers making themselves available in the respective colleges, for the benefit of the students throughout. It cannot even be imagined that the teachers who were working elsewhere outside India on their own volition had to be given incentives for their continued absence in the respective colleges when there was no provision for them to avail such leave or accept employment.

62. The learned counsel on either side relied on the following decisions: Unnikrishna Panilkker V Bhasi [2001(1) KLT449, Yesodhari Devi v. State of Kerala [2007 (3) KLT SN78(C.No. 98)], Krishna Warriar v. Devendran [2005 (4) KLT SN51(C.No. 66)], Joseph K. John v. State of Kerala [2005 (4) KLT SN63(C.No. 86)], K.S.R.T.C. v. Noorudeenkutty [2005 (3) KLT504, Sreekala v. State of Kerala [2007 (1) KLT903, George v. Law Secretary [2009 (1) KLT655, Lukose v. State of Kerala [1995 (2) KLT285(F.B.)], Dr. Davis Paul v. W.A Nos.1422,1494,1498,1515,1609,1719,1868 of 2011,1794 & 1859 of 2013 84 State of Kerala [1993 (2) KLJ91, Dr.Krishna Pillai v. State of Kerala [1988 (2) KLT106, Abdul Razack v. State of Kerala [2006(1) KLT818, George v. Law Secretary [2009(1) KLT655, Varghese v. State of Kerala [1988 (1) KLT507 and Paramsivan C.N & Anr. v. Sunrise Plaza Tr. Partner & Ors. [2013(9) SCC460. We find that the issues considered therein were not related to the private college teachers. We

therefore answer the reference holding that the period during which the teachers of Private Colleges were on loss of pay for the purpose of employment abroad cannot be reckoned either for pension or for placement under the UGC scheme.
T.R.RAMACHANDRAN NAIR Judge A.V.RAMAKRISHNA PILLAI Judge
P.V.ASHA Judge rtr/

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