

Jolly Vs. State of Kerala

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Court : Kerala

Decided On : Jan-31-2003

Reported in : 2003(2)KLT192

Judge : Jawahar Lal Gupta, C.J.,; G. Sivarajan and; K.K. Denesan, JJ.

Acts : Kerala Education Rules, 1959 - Rule 6B

Appeal No. : O.P. Nos. 4161 and 16569 of 1994 and connected cases

Appellant : Jolly

Respondent : State of Kerala

Advocate for Def. : Lal George, Government Pleader,; Thottathil B. Radhakrishnan,;

Advocate for Pet/Ap. : V.P. Seemandini,; V. Bhargavi,; Deepu Thankam,;

Judgement :

Jawahar Lal Gupta, C .J.

The conflict of judicial opinion on the true meaning and import of Rule 6B, Chap. XXIII of Kerala Education Rules, 1959, appears to have necessitated the reference of these cases to a Full Bench.

2. Rule 6B(1) as amended on March 6, 1979 inter alia provides as under:

'6B(1). Notwithstanding anything contained in any other rules in this Chapter no posts of specialist teacher or craft teacher shall be created in any upper primary school or upper primary sections of high schools for a period of 6 years from the school year 1969-70:

Provided that the posts sanctioned before 1969-70 against which specialist teachers and craft teachers are appointed and approved and such teachers who are qualified according to the rules then in force may however continue as such.'

3. The contention on behalf of the petitioners in these cases is that even though Clause (1) had placed an embargo on the creation of posts of specialist teachers in the upper primary schools, yet by virtue of the proviso the posts sanctioned before the year 1969-70 against which the appointments had already been made and approved were to continue. On the other hand, the claim on behalf of the respondents is that the proviso gives protection to the teachers who were occupying the posts at the relevant time. Their services could not be terminated. However, on their vacating the post on account of retirement or otherwise, the posts of specialist teachers were not intended to continue. Thus, the short question is - Does the proviso protect only the persons who were in position at the relevant time or even the posts, which existed at that time? Learned counsel for the petitioners have referred to the facts in O.P. No. 21578 of 1998. These may be broadly noticed.

4. Smt. M.C. Cicily Amma was working as a Physical Education Teacher in the M.M.C. High School, Kurichi, Sachivothamapuram in Kottayam District. She retired on March 31, 1995. Vide order dated June 5, 1995, the Manager of the school appointed the petitioner against the resultant vacancy. On July 22, 1995, the District Educational Officer issued an order fixing the strength of the staff for the academic year 1995-96. He abolished the post of Physical Education Teacher. Aggrieved by the order, the Manager of the School filed an appeal before the Deputy Director - the 3rd respondent. This appeal was allowed vide order dated December 22, 1995. A copy of this order is on the record as Ext.P-1. Resultantly, the District Educational Officer approved the petitioner's appointment for the period from June 5, 1995 to July 14, 1996. She was paid the salary of the post for the

relevant period. However, while determining the strength of the staff for the year 1996-97, the 4th respondent abolished the post of the Physical Education Teacher. The 5th respondent again challenged the order dated July 15, 1996 passed by the 4th respondent. It appears that the Deputy Director did not entertain the appeal. Resultantly, the 5th respondent challenged the order before the Director. Vide order dated May 18, 1998, the revision petition filed by the 5th respondent was rejected. A copy of this order is on record as Ext.P-2. This position continued for the subsequent years as well. Aggrieved by the action, the petitioner represented to the Government and requested that direction for the sanction of the post of Physical Education Teacher from the year 1996-97 be issued. A copy of the representation is at Ext.P-3. The petitioner's request was rejected by the State Government wide order dated September 8, 1998. A copy of this order is at Ext.P-4. Aggrieved by the action, the petitioner has approached this Court through the present petition. She alleges that the orders dated May 8, 1998 and September 8, 1998, copies of which have been produced as Exts.P-2 and P-4, are illegal. These are contrary to the rules and the instructions issued by the State Government from time to time.

5. A statement has been filed on behalf of the 3rd respondent. It has been inter alia averred that the post of Physical Education Teacher was not sanctioned in the school from the year 1996-97 onwards as the number of periods 'available in the school for Physical Education is only four. The minimum number of periods prescribed with 2nd proviso to Rule 6(A) Chap.XXIII is five'. Since there was no sanction of posts to accommodate the petitioner from the year 1996-97 onwards even her salary could not be released. The grounds for challenging the action of the respondents have been controverted.

6. The petitioner has filed an affidavit to controvert the averments in the written statement. It has been stated that the 5th respondent is running a high school with an upper primary section. Even though there are 'only 4 periods for Physical Education in the High School Section of the school from 1994-95 onwards.... the petitioner has been taking Physical Education classes in the primary section also'. In the primary section there are 8 periods per week. She has in fact been taking 12 periods per week. Thus, the contention as raised on the basis of Rule 6(4) cannot

be sustained.

7. Learned counsel for the parties have been heard. On behalf of the petitioners in these cases Smt. Seemandini contended that the action of the respondents is not in conformity with the provisions of the rules. In particular, it was submitted that as per the proviso to Rule 6B of Chap.XXIII of the Kerala Education Rules, all the posts, which were in existence in the year 1969-70, have to continue. She further contended that under the provisions of Rule 4(4) of Chap. VIII it is incumbent on every school to have a teacher in Physical Education. This was also the import of the order dated October 14, 1988 by which the Government had issued directions for the restructuring of the posts of Physical Education Teachers in the High Schools. A copy of this order is on record as Ext.P-7. Still further, vide letter dated April 6, 1992, a copy of which has been produced as Ext.P-9, the Government had laid down a revised syllabus for implementation. Accordingly, a post of Physical Education Teacher had to be provided in the school. Lastly, it was contended that petitioners in these cases have not been paid their salary even for the period they have been performing the duties of the posts held by them.

8. On behalf of the respondents it was contended by Mr. Lal George, learned Sr. Government Pleader that the action of the respondents was in conformity with the rules. The position was clarified vide Government Order dated August 22, 1989. By this order the provisions of the rules and position regarding the vacancies was specifically clarified. Thus, no post of Physical Education Teacher was to be continued in the upper primary schools. He further submitted that the salary could not be paid as the posts did not exist and the appointments had not been approved.

9. In view of the above, the questions that arise for consideration are:

(1) Is the action of the respondents in not sanctioning the posts and refusing to approve the appointment of the petitioners as Physical Education Teachers illegal?

(2) Are the petitioners entitled to the salary of the posts on which they have worked?

Regarding (1) :

10. Ms. Seemandini contended that the rules provide for the course of instruction, timetable and all matters connected with the school education. With reference to the rules, she submitted that the posts, which were in existence in the year 1969-70, have to continue. Thus, the appointment of the petitioners against the posts, which had become available on the expiry of the tenure of the original incumbents is legal and valid. With reference to the provisions in Rule 6B she contended that the proviso protected not only the persons occupying the posts in the year 1969-70 but also the posts. Thus, the persons appointed to these posts after the original incumbent had vacated have a right to continue in service. She referred to various decisions in support of her contention.

11. It would be apt to notice the relevant statutory provisions. The Legislature had promulgated the Kerala Education Act, 1958. It had received the assent of the President on February 19, 1959. It was published on February 24, 1959. The Act was enacted 'to provide for the better organization and development of educational institutions in the State providing a varied and comprehensive educational service throughout the State'. The Act takes within its ambit all the 'aided' schools. In Section 12, it has been provided that the conditions of service of teachers in aided schools, including conditions relating to pay, pension, provident fund, insurance and age of retirement shall be such as may be prescribed by the Government. It has been further laid down that no teacher of an aided school 'shall be dismissed, removed or reduced in rank by the Manager without the previous sanction of the officer authorized by the Government in this behalf....'. In Section 36 power to make rules has been conferred on the State Government.

12. In exercise of the power under Section 36 the State Government has framed the Kerala Education Rules, 1959. These were initially published in the Government Gazette dated May 27, 1959. The Rules have been periodically amended. The Rules are contained in Chaps.I to XXXI. These govern and regulate almost every conceivable aspect of the school administration. For the purposes of the present case a reference to the following provisions would suffice. Chap.II provides for classification of schools. It has been inter alia laid down that the

schools providing education from Std. I to Std. VII 'shall be collectively known as the Primary Grade and shall be sub-divided into two sections'. The schools providing education from Std. I to IV are classified as lower primary and from Std. V to Std. VII as upper primary. Those with provision for higher classes are described as High and Secondary Schools. Chap. VIII deals with organization of instruction in the schools. It has been inter alia laid down that the 'courses of instruction and training in the various types of schools shall be in accordance with the curriculum of studies issued by the Director with the sanction of Government'. In Rule 4 (Chap. VIII) a provision for preparation of timetable by the Headmaster of the school in consultation with the staff council has been made. Learned counsel for the petitioner placed particular reliance on the provisions of Rule 4(4). It provides as under:

'4 (4). Physical Education (Physical drill, Gymnastic, small area games, athletics and organized games) is compulsory and every school should make adequate provision for it in the time-table. It should be seen that every pupil is having regular and systematic exercise in the open air.'

Similarly in R.9, provisions for imparting 'moral instructions' has been made. In Rule 10 the importance of extra-curricular activities as an integral part of education has been emphasized. The provisions have certainly a salutary purpose to serve. It is an effort at providing education beyond the four walls of the classroom.

13. Chap. XXIII relates to the fixation of strength of teachers in the departmental and aided schools. In R. 1 the principles for fixing the 'strength of teaching staff of lower primary schools' have been laid down. Rule 2 provides for the appointment of specialist teachers in lower primary Schools in the subjects of music and sewing etc. It may, however be mentioned that the number of specialist teachers who may be appointed has to be fixed by the Director every year. Why? The provision is not without meaning or purpose. The rule gives an option to the authority at the end of each academic year. Similarly, in Rule 3 provision for fixation of 'strength of the teaching staff in upper primary and secondary schools' has been made. It has to be done 'on the basis of the number of recognized class divisions and periods of work'. Under the heading of specialist teachers the posts of Physical Education

Teachers and Drawing Teachers have also been mentioned. It has been indicated that both subjects can be allotted to one teacher. This is again an indication of an option. In respect of the High Schools the provision is contained in Rule 4. In Rule 6 the provision for teacher in upper primary schools having all or any of the standards V to VII has been made.

14. Reliance was placed by the learned Counsel on the provision contained in Clause 4. It reads as under:

'6(4) . Notwithstanding anything contained in R.7, in High School section of every complete High School there shall be:

(a) One full-time post of Physical Education Teacher and one full-time post of Drawing Teacher irrespective of the number of periods of work per week in each of the concerned subject.

(b) One full-time post of Music Teacher irrespective of the number of periods of work per week for Music.

(c) One full-time post of Sewing Teacher if there is no Craft Teacher provided that there are not less than 200 girls in High School classes:

Provided that the existing part-time post of Physical Education, Drawing, Music, Sewing or Needle work shall not be converted into full-time posts unless the incumbents holding the posts are fully qualified to hold the full-time posts:

Provided further that no full-time post of specialist teacher under any category mentioned above shall be sanctioned, if the number of periods of work per week in the concerned subject is less than 5.'

15. A perusal of the provision shows that in the high school section of the schools, the specialist teachers have to be provided. However, the prescribed workload is a condition precedent. Otherwise, a full-time post of specialist teacher cannot be sanctioned. Thus, the appointment is contingent upon the availability of students and the requisite periods of work.

16. Learned Counsel for the petitioners placed reliance on the provisions of Rule 6B. This rule as originally enacted is provided as under:

'6B. Notwithstanding anything contained in any other rule in this chapter no posts of specialist teacher or Craft instructor shall be created in any upper primary schools or upper primary sections of high schools for a period of 5 years from the school year 1969-70.'

17. This rule was subsequently amended on various occasions. At present it reads as under:

'6B. (1). Notwithstanding anything contained in any other rule in this chapter no posts of specialist teacher or Craft Teacher shall be created in any upper primary school or upper primary sections of high schools for a period of 6 years from the school year 1969-70:

Provided that the posts sanctioned before 1969-70 against which specialist teachers and Craft Teachers are appointed and approved and such teachers who are qualified according to the rules then in force may however continue as such.

(2) Notwithstanding anything contained in any other rules in this chapter, no post of specialist teacher or Craft Teacher shall be created in any upper primary school or upper primary section of high school except as specified herein:

(a) One post of specialist teacher namely Music Teacher or Physical Education Teacher or Drawing Teacher or Sewing Teacher as decided by the District Educational Officer concerned during staff fixation in the case of departmental schools and as required by the manager in the case of aided schools will be sanctioned in each upper primary school or upper primary section of a high school having an effective strength of 500 pupils and above in the complete upper primary sections on the 6th working day of each academic year.

(b) No post of specialist teacher shall be sanctioned in any category under Clause (a) if a specialist teacher is already working in the upper primary school or upper primary section of the high school.

(c) A post of Sewing Teacher shall be sanctioned only subject to the following conditions also:

(i) that there are not less than 200 girl pupils in the complete upper primary section, and

(ii) that there is no post of Craft Teacher under Needle Work in the upper primary school or upper primary section of high schools.'

18. It is in the light of the above provisions in the rules that the contention as raised by the learned Counsel has to be considered. In this context the short question that arises for consideration is - Does the proviso to Rule 6B(1) protect the incumbents of the posts sanctioned before 1969-70 or even the posts so as to entitle the subsequent appointees to continue in service?

19. It is undoubtedly true that in Chap. VIII, the importance of Physical Education has been emphasised. It has been inter alia provided in Rule 4(4) that Physical Education (physical drill, gymnastic, small area games, athletics and organised games) is compulsory and every school should make adequate provision for it in the timetable. It has also been stipulated that the schools must ensure that 'every pupil is having regular and systematic exercise in the open air'. Truly the importance of physical fitness in the case of children cannot be over emphasised. It is essential. Only a healthy child can be a good student and hope to be a healthy young man. Similar is the position in respect of moral instruction and extra curricular activities. These are also essential for a harmonious development of the child's personality. Similarly, in the case of girls especially, sewing is important. So also music. Yet, what deserves notice is that the provision for staff necessarily depends upon the availability of adequate funds. Unless the finances permit, the teachers cannot be engaged and paid. This is a hard reality. It is in view of this fact that elaborate provisions for annual fixation of strength of teachers appear to have been made. These are contained in Chap. XXIII. Rule 2 of Chap. XXIII that deals with the appointment of specialist teachers in lower primary schools stipulates that the number shall be fixed 'subject to availability of funds'. On March 6, 1979 Clause 3 was added to Rule 2 to provide as under:

'2(3). Notwithstanding anything contained in the above rules, no post of specialist teacher shall be created in any lower primary school or lower primary sections of upper primary or high schools;

Provided that posts already sanctioned against which specialist teachers are appointed and approved may continue as such.'

20. A perusal of the above provision shows that notwithstanding the provision for creation of posts of specialist teachers a blanket ban was placed on the creation of fresh posts by Clause (3) which was introduced on March 6, 1979. In the proviso a provision for the continuance of the posts which had been sanctioned and against which specialist teachers had not only been appointed but also approved by the competent authority was made.

21. It is in the above background that the provision contained in Rule 6B has to be considered. It appears that the provision was initially introduced vide notification, dated June 10, 1969. The original provision has been noticed above. A perusal thereof shows that initially Clauses (1) and (2) did not exist. It was only provided that posts of specialist teachers shall not be created for a period of 5 years from the year 1969-70. The obvious reason for the promulgation of the rule in the year 1969 was the financial stringency. It was only in the year 1974 that the period of six years was substituted for five years. Thereafter it was in the year 1979 that the main rule was numbered as Clause (1). Clause 2 was added. Even these provisions were subsequently modified.

22. The provision begins with a non-obstante clause. It is despite the importance of various subjects taught by specialist teachers including those in the subject of Physical Education that a total embargo on the creation of posts of specialist teachers in upper primary schools was imposed. This embargo was initially for a period of 5 years. Subsequently it was made for six years. Thus, from the year 1969-70 to the year 1975-76 a complete embargo on the creation of posts of specialist teachers in upper primary schools or upper primary sections of high school was imposed.

23. What was to happen to the posts, which existed prior to June 10, 1969? A provision was made in the proviso. Such posts against which the specialist teachers had been appointed and whose appointment had been approved were permitted to continue. The question is - Was this protection to the incumbents only or even in respect of the posts? To answer this question, it has to be remembered that rules provided for the fixation of strength every year. To illustrate: It may be mentioned that in Rule 2, norms for fixing the number of specialist teachers in lower primary schools have been laid down. Besides providing that the creation shall depend upon the availability of funds, the number of students and the periods has also been laid down as the relevant criteria. Still further, it has been provided in Rule 2 (2) that 'the number of specialist teachers who may be appointed in a District shall be fixed by the Director and intimated to the District Educational Officer every year'. Thus, it is clear that under the scheme of the rules the number of teachers is reviewed and revised every year. It depends upon the number of students who join the class during a particular academic year. Still further, the workload, which depends upon the number of students in each class, is also taken into consideration. For example, under Rule 6D, while providing for the appointment of language teachers it has been laid down that if the number of periods per week is between 4 and 15, only a post of part-time teacher can be sanctioned. If the number of periods is 15 and above but below 29, one full time teacher can be appointed. The obvious object is to avoid wasteful expense. This being the scheme of the rules, it is clear that there is nothing like permanent posts in every cadre as is generally understood in service jurisprudence. Except the post of Headmaster, every post in the school is subject to an annual revision. Resultantly, it is reasonable to conclude that if at the time of revision of staff strength in the year 1970-71 it was found that the number of students interested in music, sewing or craft was not sufficient, the Director would have sanctioned no posts for those subjects. In view of this position, under the rules, neither the posts which existed prior to 1969-70 nor the incumbents thereof would have been entitled to continue in service.

24. Learned counsel for the petitioners contended that under Rule 6(4) it is imperative that there shall be one full time post of Physical Education Teacher in every high school section of an institution. Thus, no school with a high school

section could be without the post of a teacher in Physical Education. This contention cannot be sustained in view of the second proviso which provides that no full time posts of specialist teacher 'shall be sanctioned, if the number of period of work per week in the concerned subject is less than 5'. Thus, there is no mandatory rule providing for the provision of the post of a specialist teacher including that of one in the subject of Physical Education in every school. The provision is contingent upon the availability of students. The workload has always to be kept in view.

25. Ms. Seemanthini placed strong reliance on the decision of their Lordships of the Supreme Court in *K. Govinda Pillal and Anr. v. State of Kerala and Ors.* (C.A. No. 10409/1995). While dealing with the provisions of R.2(3) their Lordships were pleased to observe as under:

'On a plain reading of Rule 2(3) it will be noticed that it starts with non-obstante clause and proceeds to say that no post of Specialist teacher shall be created. The bar is, therefore, against 'creation' of a post and not 'filling up' of an existing post. The proviso further proceeds to clarify that the posts already sanctioned against which specialist teachers are appointed and approved, may continue as such. That would mean that even posts already sanctioned but not filled would not continue. It, thus, determined the total number of posts which were to continue and set up two conditions, namely, (i) that it must be a post already sanctioned and (ii) at the relevant point of time it should be occupied by a specialist teacher. If those two conditions are satisfied the embargo against creation of post in Rule 2(3) would not apply to those number of posts already sanctioned and occupied. Thus, the strength of posts to continue to exist was determined on the basis of the two requirements being satisfied.

The next question is whether such a post in existence at the relevant point of time ceases to exist on the incumbent occupying it vacating office. It must be remembered that the embargo does not extend to filling up of existing sanctioned posts. The embargo is against creation of a post with the proviso making an exception in regard to already sanctioned and occupied posts. Once the two conditions were at the relevant point of time satisfied the duration for which the

post was sanctioned would continue even if the incumbent vacates office before the date on which the sanctioned post expires. The answer would depend on whether there are any Government Orders to the effect that once an incumbent vacates the office the post shall cease to exist or any order of like nature. That is a matter which the High Court would be required to consider which has not been considered and material is not placed on record. We may incidentally mention that in a Hand Book on Kerala Education Act, 1958 by C.V. Vasudevan there is a note at page 233 which reads as under:

'On the retirement of protected teachers, the posts held by them ceased to exist and the instructions and circulars issued by the D.P.I, in this regard are valid. New appointments cannot be made to those posts O.P. No. 286 of 1975.'

It would appear from this note that Government may have issued circulars to the effect that on the retirement of a sanctioned post vacating office the post shall cease to exist. If that is so, the stand of the Government in refusing to grant approval would be valid. In the absence of material on record, we are not in a position to express any opinion in that behalf. It would be even otherwise open to the Government to abolish the post on the expiry of the duration for which it is created but the real problem would be where the incumbent vacates office while the duration of the post has not ceased and a new appointment is made in place of the retiring incumbent,'

Relying on the above observations Ms. Seesnanthini contended that the posts, which existed prior to the year 1969-70, have to continue.

26. We are unable to accept this contention. Their Lordships have undoubtedly held that 'the embargo does not extend to filling up of existing posts'. It was also observed 'If these two conditions are satisfied the embargo against creation of post in Rule 2(3) would not apply to those number of posts already sanctioned and occupied'. However, a closer examination of the Judgment shows that in so far as the continuance of the posts is concerned, their Lordships had categorically observed that 'The answer would depend on whether there are any Government Orders to the effect that once an incumbent vacates the office the post shall cease to exist or any order of like nature'. This fact has to be ascertained.

27. A perusal of the observations as noticed above shows that their Lordships had categorically held that even when the conditions stipulated in the rule were satisfied the post had to continue only for the duration for which it was sanctioned. Still further, the whole thing was subject to 'any Government Orders to the effect that once an incumbent vacates the office the post shall cease to exist or any order of like nature'. So, the basic issue that needs to be answered is - Did the Government issue any orders to the effect that the post shall cease to exist after the existing incumbent vacates it? It was specifically observed by their Lordships that 'once the two conditions were at the relevant point of time satisfied the duration for which the post was sanctioned would continue even if the incumbent vacates office before the date on which the sanctioned post expires'. Thus, it is clear that the posts were to remain in existence only till the expiry of the sanction. Not thereafter.

28. Mr. Lal George, learned Sr, Government Pleader submitted that the Government had passed an order dated August 22, 1989. By this order, the factual position had been clarified. The posts of specialist teachers in lower primary and upper primary schools which were being continued under the proviso to Rules 2 and 6B were terminated with the vacation of the post by the specialist teachers on account of the retirement, resignation and other similar reasons. Faced with the situation Ms. Seemanthini contended that after the remand of the case by their Lordships of the Supreme Courts Division Bench of this Court had considered the matter. The Judgment is reported in K. Govinda Pillai and another v. State of Kerala (1999 (2) KLJ 41). In view of this decision, the petitioners are entitled to the relief prayed for by them. What is the position in Pillai 's case?

29. The claim of the petitioners, Govinda Pillai and another, was certainly allowed by the Division Bench. However, as rightly submitted by Mr, George, learned Sr. Government Pleader, the Division Bench had refused to lake note of the order dated August 22, 1989. By this order, the factual position had been clarified. The posts of specialist teachers in lower primary and upper primary schools, which were being continued under the proviso to Rules 2 and 6B, were ordered to be terminated with the vacation of the post by the specialist teachers on account of retirement, resignation and for other similar reasons. Besides that what also

deserves notice is that under Rule 12 Chap. XXIII the staff strength has to be fixed once in every year 'after finalizing the number of divisions based on the effective strength of the class (as on the 6th working day) from the reopening date in June'. It is, thus, clear that the intention of the Government while framing the rule as also while issuing periodic orders of fixation of strength was clearly to allow the posts to continue till the expiry of the term for which the incumbent had to continue. Thereafter the posts were to automatically stand abolished. This intention was clearly expressed in the circular by the Government,

30. The issue that arises is - What did the Government decide vide letter dated August 22, 1989? We have examined the document. After noticing the provisions of the rules a reference was made to the policy decision that 'no post of specialist teachers should be created in lower primary and upper primary schools from 1969-70'. Various orders issued by the Government from time to time and the provisions of the rules were noticed. In paragraph 4 the factum of representations having been submitted by individual teachers, service organisations and members of Legislative Assembly was also noticed. The decision was then taken. It is embodied in paragraph 6 (t) and (ii). It reads as under:

(i) In view of the Government decision dated 27th January 1989, the position is that the posts of specialist teachers in lower primary and upper primary schools which were being continued under the proviso to Rules 2(2) and 6B(1) of Chap.XXIII will terminate with the vacation of the posts by the specialists teachers by retirement, resignation. death and like reasons. No request for approval of fresh appointments against such post will be entertained or allowed by Government or by any educational authority. All the requests received or appeal or revision etc. pending with the educational authorities should be dealt with and disposed of accordingly,

(ii) The Government consider that the interim instructions issued to the Departmental Officers as per letters No.49524/j1/88/G.Edn., dated 17th December, 1988 read as sixth paper and pointed out by the Director of Public Instruction will not continue to be in force. The letters and Circular read as sixth and seventh paper above are therefore formally cancelled.

31. A perusal of the above clearly shows that the Government had taken a conscious decision in January 1989 that the posts of specialist teacher in lower primary and upper primary schools 'will terminate with the vacation of posts by the specialist teachers by retirement, resignation, death and like reasons'. To put the matter beyond any shadow of doubt it was categorically ordered that 'no request for approval of fresh appointment against such posts will be entertained or allowed by Government or by any educational agency'. Thus, it is clear that the Government had taken a categorical decision for the abolition of the posts. This was clearly an order within the dictum of law as contained in the Judgment of their Lordships of the Supreme Court in Govinda Pillai's case.

32. Ms. Seemanthini had referred to the orders dated October 14, 1988 and December 17, 1988. So far as the order dated October 14, 1988 is concerned, it only provided that the 'post of Physical Education Teachers (which) existed during 1987-88 in the high schools and the upper primary schools/upper primary sections of high schools, both Government and aided, will continue during 1988-89 also'. This letter is of no consequence. So far as the letter dated December 17, 1988 is concerned, the Government while passing the order dated August 22, 1989 considered it. Thus, the petitioners can derive no advantage from both the letters as referred to above.

33. Still further, a perusal of the decision of the Division Bench of this Court in Govinda Pillai's case shows that on behalf of the State Government it was pointed out that vide circular dated, August 22, 1989 the Government had decided 'to do away with the posts themselves'. It appears that the letter dated August 22, 1989 had been produced as Ext.P-12 on the Paper Book of the case. The contention raised on behalf of the State Government was rejected with the observation that 'when the Supreme Court made the order of remand after setting aside the interpretation placed by this Court on proviso to Rule 2(3) of Chap.XXIII of the Kerala Education Rules the order Ext.P-12 was available before that Court'. With respect, we are unable to sustain this view. A perusal of the order passed by their Lordships of the Supreme Court clearly shows that the case was remanded to enable the High Court to examine it in the light of the orders of the Government. Their Lordships had not made any direction that the order dated August 22, 1989

shall not be taken into consideration by the High Court. Thus, the rationale of the decision of the Division Bench in Govinda Pillai's case cannot be accepted.

34. In fact it appears that different Benches of this Court have consistently taken the view that the protection is to the incumbent of the post of specialist teachers and not to the post. Reference in this behalf can be made to the decision reported in *Saroja v. Assistant Educational Officer, Pattambi and Ors.* (ILR 1987 (2) Kerala 10). This view was reiterated by a Division Bench of this Court in *Krishnankutty v. Commissioner and Secretary to Government* (1988 (1) KLT 913). There was no conflict between R.2(3) and Rule 6B. A harmonious construction will give life and meaning to both the provisions. It was observed that:-

'There is no conflict between Rules 2(3) and Rule 6B. A harmonious construction will give life and meaning to both the provisions. Even if there is any conflict between the two provisions, Rule 6B will have to prevail in view of the non-obstante clause. The protection under Rule 2(3) is only to continue a sanctioned post when there is a teacher appointed and approved for the post. The post does not continue when the teacher leaves the post. Similarly under the proviso to Rule 6B, the protection is to the teachers who were holding the posts of specialist teachers sanctioned before 1969-70 and not to the posts which they were occupying.'

35. The above view was further reiterated in *Mary Thomas v. State of Kerala* (1991 (2) KLT 129) and *Joji v. Joint Director of Public Instruction* (2001 (2) KLT 393), In the last case the Division Bench had held that the provision 'postulates only continuance of a teacher and not continuance of the post If a teacher is appointed to a post which (was) sanctioned prior to 6th September 1970 and that appointment was approved such teachers who have qualified according to the rules then in force may continue as such'.

36. Certain other decisions were also referred to. However, it is not necessary to examine all the decisions in view of the fact that their Lordships of the Supreme Court had categorically taken the view that 'the answer would depend on whether there are any Government orders to the effect that once an incumbent vacates the office the post shall cease to exist or... .of like nature'. We find that the order dated

August 22, 1989 was the specific order covering the issue. It may be added that a compilation containing various documents was produced. However, learned counsel for the petitioners had not referred to any document to show that the order of August 1989 had been superseded. Thus, it does not appear to be necessary to refer to any of the other documents especially when counsel for the parties had not placed any reliance on them.

37. Ms. Seemanthini pointed out that vide letter dated April 6, 2000, sanction had been accorded for 54 posts of Physical Education Teachers. We have examined this order. It reads as under:

'As per Rule 6B, Chap. XXIII, K.E.R. only one post of specialist teacher (viz, Music or Physical Education Teacher or Drawing) can be sanctioned in a U.P. Section or U.P. Section of High School, having an effective strength of 500 pupils in U.P. Section.

2. It has come to the notice of the Government that there are only 54 such Physical Education Teachers who have been appointed by the Managements from time to time, and who are still continuing in service but could not have been paid salary for the reason that their appointments have not been approved by the Educational Officers on the ground that there is no provision in the existing rules for a second specialist teacher post in the U.P. Section.

3. After considering the circumstance of the case, Government ate pleased to regularise the appointments of these 54 posts of Physical Education Teachers on purely compassionate grounds, with the specific condition that this will not be treated as so general permission and under any circumstance, no fresh case will be considered. This will not be a precedent. The Director of Public Instruction may verify individual cases and ascertain their eligibility, before approving these appointments.

(By order of Governor)

K. JAYA KUMAR,

Secretary So Government.

38. A perusal of the above order shows that it does not in any way cancel or withdraw the earlier decision of August, 1989. It was passed in the case of specific persons by way of compassion. Nothing more was said. It does not embody a general order for the creation of posts of specialist teachers. However, it may be added that in case the petitioners have any claim of similarity with the aforementioned 54 persons, they would be entitled to represent to the Government for the grant of a similar concession. The representation, if submitted within two months, shall be considered and decided by the competent authority within 3 months of its receipt.

39. Resultantly, it is held that in view of the order dated August 22, 1989 the posts of specialist teachers could not have been continued after the original incumbent had vacated the office on account of retirement or any other similar reason. The first question is accordingly answered.

Regarding (2) :

Are the petitioners entitled to the salary of the posts of which they have worked?

40. It was contended on behalf of the petitioners that they have not been paid salary since 1988. The factual position was not disputed. However, on behalf of respondents it was pointed out that the posts had not been sanctioned after 1989. If the Managements have continued with the incumbents in position, the responsibility to pay the salaries rests on them.

41. In case the teachers have continued on the posts, the action in not paying them salary is wholly arbitrary and unfair. A person who performs his duties is entitled to the payment of his salary. The dispute between the school and the State cannot result in denial of salary to the teacher. The payment, if not already made, the needful should be done without delay. However, it looks difficult to believe that the teachers would continue to teach for more than 14 years without getting their wages. In this situation, it appears fair to direct the competent authority to ascertain the factual position from the employees and the employers. In case it is found that the payment has not been made, the Government shall pay for the duration for which the incumbent had actually worked without getting the

wages. However, it is clarified that it shall be entitled to recover, if permissible under law, from the Managements that had appointed the teachers or illegally allowed the incumbents to continue in position. It shall not, however, confer on the incumbents of the posts a right to claim continuance in service or of the posts held by them. The second question is accordingly answered in the above terms.

42. In view of the above, it is held that:

(i) In view of the order dated August 22, 1989 there was no warrant for the continuance of the posts of Physical Education Teachers, after these were vacated by the specialists teacher on account of retirement, resignation, death and like reasons. Thus; per se the impugned order copies of which have been produced as Exts.P-2 and P-4 in O.P. No. 21578 of 1998 are not liable to be set aside. However, it may be added that in case the petitioners have any claim of similarity with the aforementioned 54 persons, they would be entitled to represent to the Government for the grant of a similar concession. The representation, if any, is submitted by the petitioners within two months, shall be considered and decided by the competent authority within 3 months of its receipt.

(ii) The decision of the Division Bench of this Court in Govinda Pillai's case does not embody the correct enunciation of law.

(iii) The teachers who are found to have performed their duties are entitled to the salary for the relevant period subject to the condition that the Government may recover it from the Managements. This, by itself, would not, however, entitle the petitioners to claim the continuance of the posts or their service. The final decision in this behalf shall depend upon the order on their representations.

The Writ Petitions are disposed of in the above terms. In the circumstances, we make no order as to costs.