

Pushparaj Vs. Manoharan

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Court : Kerala

Decided On : May-24-2006

Reported in : 2006(2)KLT951

Judge : V.K. Bali, C.J.,; J.B. Koshy and; S. Siri Jagan, JJ.

Acts : Kerala Education Rules, 1959 - Rules 3, 11, 34, 37, 44, 44(1), 44A and 45;
Madras Educational Rules

Appeal No. : W.A. No. 1256 of 2004

Appellant : Pushparaj

Respondent : Manoharan

Advocate for Def. : Kaleeswaram Raj, Adv. and C.K. Abdul Rahim, Government
Pleader

Advocate for Pet/Ap. : E.V. Nayanor, Adv.

Disposition : Appeal dismissed

Judgement :

S. Siri Jagan, J.

1. This Writ Appeal comes up for hearing before this Full Bench since a Division Bench was of the opinion that the Full Bench decision of this Court in Sasidharan

Nair v. State of Kerala 2003 (1) KLT 998, which overruled the Division Bench decision in Manager, A.U.P. School v. State of Kerala 1988 (1) KLT 402, requires reconsideration at the hands of a larger Bench.

2. The bone of contention in this case, between the appellant and the 1st respondent, is the post of Headmaster of an aided U.P. School on promotion under Rule 45 of Chapter XIV-A of the Kerala Education Rules (KER), The 1st respondent is a matriculate with T.T.C and the senior most teacher of the school. After having entered service as an Assistant Teacher in another aided L.P. School on 2-6-1975, he joined the present school on 10-8-1977 after obtaining transfer in terms of Rule 11, Chapter XIV A of the KER, as the junior most teacher of the present school on 10-8-1977. The appellant commenced service in the present school on 8-2-1988. But, he is a graduate with B. Ed.

3. On 1-6-1999, the post of Headmaster of the school became vacant. Rule 44(1) of KER stipulates that the appointment of Headmasters shall ordinarily be according to seniority from the seniority list prepared and maintained under Clauses (a) and (b) as the case may be of Rule 34. As per Rule 45 of Chapter XIV A of the KER, the post of Headmaster is to be filled up from among the qualified teachers on the staff of the school or schools under the Educational Agency. However, a graduate teacher of the school with B. Ed or other equivalent qualification with 5 years teaching experience has to be preferred if he has got a service equal to half of the period of service of the senior-most undergraduate teacher. If the service of the 1st respondent is reckoned only from the date he joined the present school, the appellant had half of the period of service of the 1st respondent and had to be preferred over the 1st respondent. Assuming that to be the correct legal position, the 6th respondent-Manager promoted the appellant as Headmaster. The 1st respondent, contending that for the purpose of deciding whether the appellant had half of the period of service of the 1st respondent, the earlier service of the 1st respondent in the other school from which he was transferred to the present school also has to be reckoned, approached the statutory authorities challenging the promotion of the appellant. Being unsuccessful, he approached this Court with the Original Petition, the judgment in which is impugned in this Writ Appeal. A learned Single Judge, relying on the

finding of the Full Bench in Sasidharan Nair's case, holding that a teacher on his transfer from one school to another under a different management does not lose the benefit of the service rendered by him in the previous school for the purpose of determining his eligibility for promotion to the post of Headmaster, upheld the claim of the 1st respondent for promotion as Headmaster in preference to the appellant. Aggrieved by the same, the appellant filed this Writ Appeal. The Division Bench which considered the appeal was of the opinion that since Sasidharan Nair's case was one dealing with promotion to the post of Headmaster in High Schools under Rule 44A of Chapter XIV A of the KER, the overruling of the Division Bench decision in AUP School's case, which specifically dealt with Rule 45 was without adverting to the difference in the language used in Rules 44A and 45, and therefore needs reconsideration.

4. We have heard learned Counsel on both sides in extenso. Before proceeding to the merits of the Writ Appeal, we have to first deal with a preliminary legal issue raised by the counsel for the 1st respondent as to whether a Division Bench was legally right in doubting the correctness of a Full Bench decision, regarding which also elaborate arguments were advanced by both sides. However, we need not delve deep into the same since the issue is covered by more than one decision of the Constitution Bench of the Supreme Court, namely that of Pradip Chandra Parija v. Pramod Chandra Patnaik reported in : [2002]254ITR99(SC) and Union of India and Anr. v. Hansoli Devi and Ors. reported in : [2002]SUPP2SCR324 , which themselves were decided following earlier Constitution Bench decisions.

5. Interestingly, both sides rely on these very same decisions, to support their respective cases. The learned Counsel for the appellant, while admitting that a Division Bench could not have referred the matter to be heard by a Larger Bench than a Full Bench, relying on paragraphs 3 and 5 of the decision in Pradip Chandra Parija's case, argued that the Division Bench was justified in making the reference since the words 'larger bench' in the reference order have to be construed as meaning a bench larger than the Division Bench only. On the other hand, the learned Counsel for the 1st respondent argued that even assuming it to be so, this is not a case where the judgment in Sasidharan Nair's case can be regarded as 'so very incorrect that in no circumstances can it be followed' (which is

the test laid down by the Supreme Court) so as to give authority to the Division Bench to doubt the correctness of the decision to refer the matter to even a Full Bench.

6. Paragraphs 3 and 5 of Pradip Chandra Parija's case read thus:

3. We may point out, at the outset, that in *Bharat Petroleum Corporation Ltd. v. Mumbai Shramik Sangha* : (2001)11LLJ248SC a Bench of five Judges considered a somewhat similar question. Now learned Judges in that case doubted the correctness of the scope attributed to a certain provision in an earlier Constitution Bench judgment and, accordingly, referred the matter before them directly to a Constitution Bench. The Constitution Bench that then heard the matter took the view that the decision of a Constitution Bench binds a Bench of two learned Judges and that judicial discipline obliges them to follow it, regardless of their doubts about its correctness. At the most, the Bench of two learned Judges could have ordered that the matter be heard by a Bench of three learned Judges.

xxx xxx xxx5. The learned Attorney-General submitted that a Constitution Bench judgment of this Court was binding on smaller Benches and a judgment of three learned Judges was binding on Benches of two learned Judges - a proposition that learned Counsel for the appellants did not dispute. The learned Attorney-General drew our attention to the judgment of a Constitution Bench in *Sub-Committee of Judicial Accountability v. Union of India* : AIR 1992 SC63 where it has been said that 'no co-ordinate Bench of this Court can even comment upon, let alone sit in judgment over, the decision exercised or judgment rendered in a cause or matter before another co-ordinate Bench' (SCC p. 98, para 5). The learned Attorney-General submitted that the appropriate course for the Bench of two learned Judges to have adopted, if it felt so strongly that the judgment in *Nityananda Kar* (1991 Supp (21 SCC 516) was incorrect, was to make a reference to a Bench of three learned Judges. That Bench of three learned judges, if it also took the same of *Nityananda Kar*, could have referred the case to a Bench of five learned Judges.

(emphasis supplied)

The learned Counsel for the appellant relies on the underlined sentences to reinforce his contention that the reference is valid. Since in Hansoli Devi's case in verbatim identical words the decision Pradip Chandra Parija 's case was followed, the learned Counsel relies on that decision also in support of his contention.

7. For the purpose of this case, we would assume that by the words 'larger bench', the Division Bench actually meant a bench larger than a bench of two Judges, although an interpretation otherwise is also possible going by the tenor of the reference order. Even then, the reference has to be in conformity with the principles laid down in paragraph 6 of the judgment in Pradip Chandra Parija's case, which runs as follows:

6. In the present case the Bench of two learned Judges has, in terms, doubted the correctness of a decision of a Bench of three learned Judges. They have, therefore, referred the matter directly to a Bench of five Judges. In our view, judicial discipline and propriety demands that a Bench of two learned Judges should follow a decision of a Bench of three learned Judges. But if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a Bench of three learned Judges setting out, as has been done here, the reasons why it could not agree with the earlier judgment. If, then, the Bench of three learned Judges also comes to the conclusion that the earlier judgment of a Bench of three learned Judges is incorrect, reference to a Bench of five learned Judges is justified.

(emphasis supplied)

This was reiterated in paragraph 2 of Hansoli Devi's case in the following words:

2. According to the learned Judges, the three-Judge Bench decision of this Court in Jose Antonio Cruz Dos R. Rodriguez v. Land Acquisition Collector : AIR 2001 SC2184 requires reconsideration. At the outset, it may be stated that the Constitution Bench in Pradip Chandra Parija v. Pramod Chandra Patnaik : [2002]254ITR99(SC) held that judicial discipline and propriety demands that a Bench of two learned Judges should follow a decision of Bench of three learned

Judges. But if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is, to refer the matter before it to a Bench of three learned Judges setting out the reasons why it could not agree with the earlier judgment and then the Bench of three learned Judges also comes to the conclusion that the earlier judgment of a Bench of three learned Judges is incorrect, then a reference could be made to a Bench of five learned Judges. In view of the aforesaid Constitution Bench decision, the very reference itself made by the two learned Judges was improper and we would have sent the matter to a Bench of three learned Judges for consideration. But since the questions involved are pending in many cases in different High Courts and certain doubts have arisen with regard to the interpretation to the provisions of Section 28-A of the Act, we thought it appropriate to answer the two questions referred....

8. Although we are not quite satisfied that the decision in Sasidharan Nair's case is 'so very incorrect that in no circumstances can it be followed' so as to enable the Division Bench to doubt the correctness of the same and refer it to a Full Bench, we have thought it appropriate to decide the question now referred because of the fact that the interpretation of Rule 45 was not directly in issue in Sasidharan Nair's case and therefore a clarification in that regard is necessary for future reference, which course was adopted by the Supreme Court in Hansoli Devi's case also.

9. For convenience, we shall extract Rules 44(1), 44A and 45 which run thus:

44(1) The appointment of Headmasters shall ordinarily be according to seniority from the seniority list prepared and maintained under Clauses (a) and (b) as the case may be of Rule 34. The manager will appoint the Headmaster subject to the Rules laid down in the matter. A teacher if he is aggrieved by such appointment will have the right of appeal to the Department.

Note:- Whenever the Manager intends to appoint a person as Headmaster other than the senior claimant, the Manager shall obtain a written consent from such senior claimant renouncing his claim permanently. Such consent shall have the approval of the Educational Officer concerned. XXX XXX XXX44A. (1) Subject to the provisions contained in Sub-rule (1) of Rule 44, the minimum service

qualification for appointment as Headmaster in Aided Complete High Schools/Training schools shall be twelve years of continuous graduate service with a pass in the test in Kerala Education Act and the Kerala Education Rules and a pass in account Test (Lower) conducted by Kerala Public Service Commission.

Provided that Headmasters of High and Training Schools, who were actually holding the said post on the eleventh day of June, 1974 shall stand exempted from passing the Account Test (Lower).

Provided further that Teachers who have attained the age of 50 years shall stand exempted permanently from acquiring the test qualification specified in Sub-rule (1).

Explanation:- For the purpose of this rule, 'Graduate Service' means all service of a teacher as High School Assistant, training School Assistant, Headmaster of an incomplete High School, Headmaster of a complete Upper Primary School/Middle school or Headmaster of a training School after acquisition of Collegiate training such as B.T, L.T. or B. Ed. But in the case of such teachers appointed prior to 15-10-1957 their untrained service after graduation shall also be reckoned as 'Graduate Service', provided that their appointments were not in accordance with the Madras Educational Rules.

Note:- A period of 8 years from 6-11-1968 is given to Headmasters or Aided Complete High and Training Schools for passing the test in the Act and Rules. All appointments to the posts of Headmasters of Aided Complete High and Training Schools during the period of 8 years from 6-11-1968 shall be provisional. If such persons do not secure the test qualification within the specified period they will be reverted.

xxx xxx xxx45. Subject to Rule 44, when the post of Headmaster of complete U.P. School is vacant or when an incomplete U.P. School becomes a complete U.P. School, the post shall be filled up from among the qualified teachers on the staff of the School or Schools under the Educational Agency. If there is a graduate teacher with B.Ed, or other equivalent qualification and who has got at least five years experience in teaching after acquisition of B.Ed. Degree he may be

appointed as Headmaster provided he has got a service equal to half of the period of service of the senior most under graduate teacher. If graduate teachers with the aforesaid qualification and service are not available in the School or Schools under the same Educational Agency, the senior most primary School Teacher with S.S.L.C. or equivalent and T.T.C. issued by the Board of Public Examination Kerala or T.C.H. issued by the Karnataka Secondary Educational Examination Board, Bangalore or a pass in Pre-degree Examination with pedagogy as an elective subject conducted by the University of Kerala or any other equivalent training qualification prescribed for appointment as primary School Assistant may be appointed.

Note:- The language/specialist teachers, according to their seniority in the combined seniority list of teachers shall also be appointed as Headmaster of U.P. School or schools under an Educational Agency provided the teacher possesses the prescribed qualifications for promotion as Headmaster of U.P. School on the date of occurrence of vacancy.

10. Since reference is made before us to Rules 34 and 37 also, we shall extract the same also for the sake of convenience:

34. Every Management shall prepare and maintain in Form 11A a staff list otherwise called the seniority list of teachers as specified below:

(a) In the case of High Schools, a combined seniority list of teachers specified in Clauses (ii) and (iiA) of Rules 3, Chapter XXIII shall be prepared.

(b) In the case of Upper Primary School and Lower Primary school a combined seniority list of teachers if any, specified in Clauses (iii), (iv) and (V) of Rule 3 Chapter XXIII shall be prepared.

xxx xxx xxx37. (1) Seniority of a teacher in any grade in any unit shall be decided with reference to the length of continuous service in that grade in that unit provided he is duly qualified for the post.

(2) In the case of teachers in the same grade in the same unit whose date of commencement of continuous service is the same, seniority shall be decided with

reference to the date of first appointment. If the date of first appointment is also the same, seniority shall be decided with reference to age, the older being the senior.

11. The contentions of the learned Counsel for the appellant are two fold. First is that the stipulation in Rule 45 with regard to comparative service between a graduate teacher and non-graduate teacher is one essentially relating to seniority between them and therefore in view of the fact that a reading of Rules 11, 13 and 37 together would reveal that seniority shall be reckoned with reference to continuous service in the same school, the service referred to in Rule 45 shall only be the service in the same school and therefore the service of the 1st respondent in another school shall not be taken into account for deciding whether the appellant had half of the period of service of the 1st respondent. Secondly, learned Counsel submits that Sasidharan Nair's case is distinguishable since in Rule 44A there is a specific explanation clarifying that the term 'graduate service' therein would mean 'all service of a teacher as High School Assistant Training School Assistant Headmaster of an incomplete High School, Headmaster of a complete Upper Primary School/Middle School or Headmaster of a training school after acquisition of Collegiate training such as B.T., L.T., or B.Ed.', which is absent in Rule 45. The argument is that since such an explanation is absent in Rule 45, it should be presumed that the Rule making authority consciously wanted to confine the service mentioned therein only to the service rendered in the same school where promotion was to be effected unlike in the case of Rule 44A. Counsel submits that the decision in Manager, A.U.P. School's case, which specifically dealt with Rule 45 was wrongly overruled, especially since to decide Sasidharan's case, it was not necessary to consider Rule 45 at all.

12. First, let us see how the Full Bench approached the issue in Sasidharan Nair's case. In that case, the issue certainly related to promotion as Headmaster in a High School in accordance with Rule 44A of the K.E.R. The factual dispute which needed resolution was whether for the purpose of computing 12 years of continuous graduate service mentioned in Rule 44A, the service in another school could have been taken into account. Although the question posed was whether or not a teacher loses the benefit of past service on transfer from one school to another, the situation was the converse of the present case, in the limited sense

that there the service in another school was sought to be added to the service of the graduate teacher and in the present case the same is sought to be added to the service of the under-graduate teacher. After referring to the facts the issue to be decided in that case was formulated by the Full Bench, in paragraph 8 as follows:

8. The short issue that arises for consideration is as to whether or not a teacher loses the benefit of past service on transfer from one school to another, which is under a different Management

In that case also, arguments were advanced on the basis of Rules 11, 13 and 37, in addition to Rule 44(1). The Bench after extracting Rules 37, 44 and 44A in extenso and noticing the explanation to Rule 44A also stated thus in paragraph 10:

10. A perusal of Rule 37 shows that the seniority of a teacher in a school is determined with reference to the length of continuous service in that school. Under Rule 44, the appointment to the post of Headmaster has to be 'ordinarily' made according to seniority in the rank of the High School Assistant. Rule 44A on which the basic controversy hinges lays down the condition of eligibility for promotion to the post of Headmaster. It inter alia provides that for appointment to the post of Headmaster, (1) the High School Assistant should have a minimum service of 12 years; (2) this should be continuous; (3) it should be as a graduate High School Assistant and (4) the candidate should have passed the prescribed test. On a perusal of the rule, it is clear that the service has to be continuous but it need not be in one unit or the same school. This position becomes further clear from the fact in the Explanation to Rule 44A 'Graduate Service' has been defined to mean 'all service of a teacher as High School Assistant.' It is not confined to one school only. Thus, on a plain construction of the rule, it appears that the service rendered by a teacher in different school can be combined for determining his eligibility for promotion to the post of Headmaster. However, the essential precondition is that it must be after acquisition of prescribed qualification. Still further, it has to be continuous. However, it is not necessary that the service should be in the same school.

Thereafter, in paragraphs 11 and 13, the Bench noted the arguments of the respondents' counsel in that case. Paragraphs 11 and 13 read thus:

11. Learned Counsel for the respondents have pointed out that the provisions of Rule 44A are subject to those contained in Rule 44(1). Thus the rule of seniority has to be read into the conditions of eligibility. Is it so?

xxx xxx xxx13. Learned Counsel for the respondents have contended that in the seniority list prepared under Rule 37, the benefit of past service is not given to a teacher. Resultantly he is not even entitled to count the past service even for the purpose of determination of eligibility for promotion.

13. From a reading of the above paragraphs in the said judgment it is clear that in that case the decision of the Court was on a general question as to whether or not a teacher (whether of High School or of U.P. School or L.P. School) loses the benefit of past service on transfer from one school to another which is under a different management for the purposes of promotion and not with particular reference to promotion to the post of Headmaster of a High School in accordance with Rule 44A alone. The two arguments of the counsel for the respondents with reference to Rule 44(1) (which applies to promotions to posts of Headmaster of High School and U.P. School alike) was considered in paragraph 12 as follows:

12. A perusal of Rule 44(1), as already noticed, shows that 'ordinarily' the post of Headmaster has to be filled up according to the seniority of High School Assistants. Not always. Still further, in a case where the senior person is not eligible, neither Rule 44 nor Rule 44A debars the manager from considering and promoting a junior person. In fact, the appointment has to be made by the Manager in accordance with the rules. While doing so, he cannot lose sight of the condition of eligibility mentioned in Rule 44A. In fact, if Rule 44 and Rule 44A are harmoniously construed, it appears that the names of persons for promotion to the post of Headmaster shall be considered in the order of seniority and the senior most High School Assistant who fulfils the conditions of eligibility shall be promoted.

Thereafter, referring to the contention based on Rule 37, which rule applies to High School and U.P. School alike, the Bench held in paragraph 14 thus:

14. The contention cannot be accepted. Firstly, it deserves notice that the seniority determined under Rule 37 does not make the person eligible for promotion. It only embodies the order in which the names are to be considered. While considering the names, the Manager can promote only such person who fulfils the qualification. Secondly, the rules do not contemplate that the benefit of past services shall be completely wiped out on transfer. For example, under Rule 13 a specific provision has been made by which the pay of a teacher who is transferred from one school to another is duly protected. It has been clearly provided that a teacher who is transferred shall continue to receive the pay that he was drawing in the school from which he has been transferred. This condition has been laid down despite the provision that the 'rank in the new school will be fixed next below the junior most teacher in that particular grade in that school....' Thus, it is clear that the rule permits a junior person in the seniority list to draw a higher pay than persons senior to him. Just as the benefit of service is not lost for the purpose of pay, it is also not wiped out for the purpose of promotion. Resultantly, on a harmonious construction of the rules, we find that the only loss that a teacher suffers on transfer from one school to another under a different management is that he is placed at the bottom of the list of teachers in the pay scale of the post held by him. In other words, his pay, scale of pay and qualifying service are not affected.

Beyond any reasonable doubt, these findings were rendered as a general proposition of law applicable to all fact situations of like nature and was not confined to cases arising out of Rule 44A alone.

14. The learned Counsel for the appellant heavily relies on the decision of the Division Bench in A.U.P. School's case as also another decision of a learned single Judge in *Alexander v. State of Kerala* reported in 1996 (1) KLT 602, which, although decided later in time, came to the same conclusion as in A. U.P School's case without noticing/referring to that case, to contend that since Sasldharan Nair's case, was dealing only with promotion under Rule 44A, the reasoning in

those cases which specifically deal with promotion under Rule 45, should be adopted and Sasidharan Nair 's case should be taken to be applicable to promotions under Rule 44A only. Counsel submitted that since those decisions specifically related to interpretation of Rule 45 itself, the same lay down the correct law on the subject. The full Bench dealt with the decision in A. U.P. School's case and also decision in W.A. No. 214 of 1998, which also came to the conclusion, and held in paragraphs 15 to 17 as follows:

15. Counsel for the respondents referred to the decision of a Division Bench of this Court in *Manager, A.U.P. School v. State of Kerala* 1988 (1) KLT 402. In this case, it was held that a teacher on transfer under Rule 11 of Chapter XIV-A, of the Rules cannot count the service rendered by him before his transfer for the purpose of earning eligibility for being appointed as Headmaster under Rule 45 in the transferred school. In fact, the view taken by the Division Bench in the latter case of *CM. Molly* (vide W.A. No. 214 of 1998) is on the same lines. The rationale of both these decisions is that if the benefit of previous service is given to a teacher for the purpose of promotion, it would cause heart burning to the persons who are senior to him in the new school.

16. It is undoubtedly correct, as observed by the Bench, that the benefit of service in the previous school is not given in the matter of seniority. However, on this basis it cannot be said that the service is completely wiped out. This is so, because, as already noticed, the benefit is granted even for the purpose of pay. Thus, despite being junior, a teacher who has been transferred from another school is given the advantage of previous service and is allowed to draw a higher pay. Still further, if the view taken by the Division Bench were to be upheld, Rule 44A of Chapter XIV-A shall have to be re-framed to provide that the twelve years of service 'should be in the same school'. It is a well-settled rule of interpretation that if the language of a provision is clear and unambiguous, the court shall not add words thereto. Thus, the plain words of the Rule have to be seen. There being no gap in the Rule, no words can be added.

17. Still more, in today's competitive world, the matters of seniority and promotion, are highly contentious. There is always heartburning when one is promoted

instead of another. But that cannot be a ground for preferring an ineligible person to the one who is eligible. In the present case, it is admitted position that the sixth respondent did not fulfil the prescribed condition of experience on the date of the occurrence of the vacancy or on the date on which the District Educational Officer had accorded approval vide order dated June 30, 1997 vide Ext.P2. As against this, the appellant had completed service of more than 16 years on the crucial date. The dissatisfaction and heart burning is greater when an ineligible person is preferred to an eligible person. Thus, the feeling cannot be the basis for excluding the eligible. Regretfully, though respectfully, we are unable to follow the view taken by their Lordships.

15. The above paragraph from the judgment are eloquent enough to repel all the contentions of the learned Counsel for the appellant with absolute certainty. In this connection, it has to be noted that in paragraph 15, the Full Bench had noted Rule 45 and therefore the only conclusion possible is that the Full Bench consciously laid down the law in that case as a general proposition of law applicable both to Rule 44A and 45.

16. We are of the opinion that even otherwise the question of seniority is totally irrelevant even in the context of Rule 45, for deciding the question as to whether the past service in another school can be reckoned to decide whether the graduate teacher has half of the period of service of the senior-most undergraduate teacher. Admittedly, the 1st respondent is senior to the appellant in the same school even without taking into account the past service of the 1st respondent in the other school. Further, if a graduate teacher is expected to have only half of the service of the non-graduate teacher for being preferred for promotion, the non-graduate teacher has to be necessarily senior to the graduate teacher. Therefore, the principles for reckoning seniority in the same school with reference to Rules 11, 13 and 37 cannot be imported into Rule 45 also for deciding whether the graduate teacher has half the period of service of the senior-most under-graduate teacher. As such, the stipulation in Rule 45, under discussion, is essentially one of qualification for eligibility for consideration to the post of Headmaster meaning thereby that graduate service equivalent to half of the service of the undergraduate teacher is considered as one of the eligibility

conditions of the graduate teacher for getting preference over the senior undergraduate teacher. Since the stipulation is an eligibility condition, there cannot be any doubt that for deciding the eligibility condition, as in the case of Rule 44A, in Rule 45 also service in another school of both teachers also can be reckoned to decide such eligibility.

17. We are in complete agreement with the finding of the Full Bench in Sasidharan Nair's case that the rationale behind the rule is not one for avoiding heart burning to the persons who are senior to the graduate teacher, but is one for laying down an eligibility condition in addition to the 5 years' experience in teaching after acquisition of B.Ed. Therefore, in fact as rightly pointed out by the earlier Full Bench, dissatisfaction and heart burning are on the other side when an ineligible person as per the Rule itself is preferred overlooking the under-graduate teacher.

18. The facts that in Rule 44A there is an explanation explaining the meaning of the term 'graduate service' and such an explanation is absent in Rule 45 do not make the position any the different. Even without the explanation in Rule 44A, as a general rule, the past service in another school is liable to be reckoned for the purpose of both Rule 44A and Rule 45 since the service mentioned in both Rules are eligibility conditions for promotion without any relevance to seniority and therefore the service in another school can be excluded only for reckoning seniority and not for any other purpose including fixing the eligibility conditions for promotion. The view of the Division Bench, which referred the case to the Full Bench, that 'five years experience in teaching after acquisition of B.Ed.' alone is the eligibility condition in Rule 45, does not appear to be correct. The other condition that for preferring the graduate teacher, he should have half of the service of the senior-most undergraduate teacher is also an eligibility condition for promotion, in addition to the five years experience stipulated.

19. We are also of the opinion that the stipulation in question essentially relates to the comparative competence of the two classes of persons considered for promotion. The stipulation essentially postulates that graduate service is considered superior in quality to service as an under-graduate teacher only if the graduate teacher puts in service equal to half of the service of the under-graduate

teacher. When the reference is to comparative quality of the two services, then certainly past service of the undergraduate teacher even in another school has essentially to be reckoned for deciding whether the graduate teacher has got service equal to half of the service of the undergraduate teacher. The object of the provision is to decide as to who of the two is more suitable to hold the post of Headmaster for deciding which the service of the undergraduate teacher in the previous school would certainly be relevant. It goes without saying that if the graduate teacher had experience in any previous school, that also would be relevant for the purpose.

20. Therefore, we have no hesitation to hold that the ratio of the decision in Sasidharan Nair's case, even though the fact situation in that case required resolution of a dispute in the context of Rule 44A, was rightly extended to promotions under Rule 45 also, as a general proposition of law that, for the purposes of promotion as Headmaster of an aided school, whether of High School or U.P. School or L.P. School, a teacher does not lose the benefit of past service on transfer from one school to another, which is under a different management, for deciding the eligibility conditions prescribed, since the Rule itself does not expressly state that such service shall be in the same school itself. As such, the decision does not need reconsideration as contended by the counsel for the appellant and as opined by the Division Bench in the reference order.

21. While at it, we may also say that once the stipulation in Rule 45 is construed as an eligibility condition for promotion, as held by the Full Bench itself, the decisions of the Supreme Court in *Union of India v. C.N. Ponnappan* : AIR 1996 SC761 , paragraphs 3 and 4 of which are extracted in paragraph 18 of Sasidharan Nair's case, and *Scientific Officer to Raksha Mantri v. V.M. Joseph* : [1998]1SCR177 squarely apply to the present case also. We may extract paragraph 6 of the latter case also with advantage:

6. From the facts set out above, it will be seen that promotion was denied to the respondent on the post of Senior Storekeeper on the ground that he had completed 3 years of regular service as Storekeeper on 7-6-1980 and, therefore, he could not be promoted earlier than 1980. In coming to this conclusion, the

appellants excluded the period of service rendered by the respondent in the Central Ordnance Depot, Pune, as a Storekeeper for the period from 27-4-1971 to 6-6-1977. The appellants contended that, since the respondent had been transferred on compassionate grounds on his own request to the post of Storekeeper at Cochin and was placed at the bottom of the seniority list, the period of 3 years of regular service can be treated to commence only from the date on which he was transferred to Cochin. This is obviously fallacious inasmuch as the respondent had already acquired the status of a permanent employee at Pune where he had rendered more than 3 years of service as a Storekeeper. Even if an employee is transferred at his own request, from one place to another on the same post, the period of service rendered by him at the earlier place where he held a permanent post and had acquired permanent status, cannot be excluded from consideration for determining his eligibility for promotion, though he may have been placed at the bottom of the seniority list at the transferred place. Eligibility for promotion cannot be confused with seniority as they are two different and distinct factors.

22. Further, as held by the Full Bench in Sasidharan Nair's case, in this case also even in equity the 1st respondent is entitled to succeed. Going by their age given in the affidavits filed before this Court, the 1st respondent is aged 53 years now and the appellant is aged only 39 years. The 1st respondent would retire in 2 years' time and thereafter the appellant would have a very long tenure of almost 16 years as Headmaster of the school.

23. Therefore, we hold that the Full Bench decision in Sasidharan Nair's case was rightly decided and ratio of that decision applies equally to promotions under Rule 45 also. We also hold that the decisions of the Division Benches in *Manager, A.U.P. School v. State of Kerala 1988 (1) KLT 402* and *W.A.No. 214 of 1098* were rightly overruled. Consequently, the decision of the learned Single Judge in *Alexander v. State of Kerala 1996 (1) KLT 602* also stands overruled.

24. For the sake of clarity, we add to the statements of law contained in paragraph 22 of Sasidharan Nair's case, the following:

The words 'provided he has got a service equal to half of the period of service of the senior most undergraduate teacher' appearing in Rule 45 refers to eligibility conditions of both teachers for promotion as Headmaster in the same manner as the words 'minimum service qualification for appointment as Headmaster in Aided Complete High Schools/Training Schools shall be twelve years of continuous graduate service' appearing in Rule 44A and the words 'at least five years experience in teaching after acquisition of B.Ed.' appearing in Rule 45 and a teacher, graduate or undergraduate, on his transfer from one school to another under a different management does not lose the benefit of the service rendered by him in the previous school for the purpose of determining eligibility for promotion to the post of Headmaster both under Rule 44A and 45.

25. Accordingly, the Writ Appeal is dismissed, but without any order as to costs, with the following further directions:

The 6th respondent is directed to cancel the promotion given to the appellant and promote the 1st respondent as the Headmaster of his School instead of the appellant with effect from 1-6-1999 and forward the appointment order to the 5th respondent for approval, within two weeks from the date of receipt of a copy of this judgment. The 5th respondent is directed to approve the appointment of the 1st respondent as Headmaster of the school within two weeks from the date of receipt of the appointment order from the 6th respondent for approval. If the appellant has performed the duties as Headmaster of the School and the Government has already paid salary to the appellant as Headmaster, he shall not be asked to refund any amount consequent on the cancellation of his promotion, as per directions in this judgment for the period up to 16-7-2003, ie. the date of the judgment impugned in this appeal. However, he shall be liable to refund the salary, if any, received from 17-7-2003 onwards. This shall be recovered from his future salary in easy instalments. While fixing the pay and allowances of the 1st respondent in the rank of Headmaster, the service from 1-6-1999 shall also be taken into account. However, arrears of salary shall be admissible only from 17-7-2003. In other words, his pay etc., shall be notionally fixed on the basis that he had been promoted with effect from 1 -6-1999 but with benefit of arrears of salary on such fixation only with effect from 17-7-2003. For all other purposes, his service as

Headmaster shall be counted from 1-6-1999.

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