
(1995) 11 OHC CK 0015

In the Orissa High Court

Case No : Original Jurisdiction Case No. 1364 of 1995

Bidyadhar Bhuyan

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 14-11-1995

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227, 39, 41

Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 — Rule 19

Citation : (1995) 2 OLR 655

Hon'ble Judges : S. Chatterji, J;D.M. Patnaik, J

Bench : Division Bench

Advocate : R.K. Mohapatra, U.K. Samal, S.K. Swain, N.K. Sahoo and A.K. Parida, for the Appellant; Additional Government Advocate, for the Respondent

Judgement

S. Chatterji, J.—This writ petition along with hundreds of similar petitions as listed on 19-9-1995 has comprehensively been heard by this Bench. As suggested and agreed by several lawyers (sic) for the respective petitioners in different cases as aforesaid and the learned Addl. Govt. Advocate, this Bench was given to understand that the cases would be argued by three or four prominent counsels appearing for the parties and in order to save time the other counsel will adopt the arguments on behalf of their petitioners. This Court also found the suggestion as practicable and viable and observed that necessary submissions might be made embracing all the points as canvassed on behalf of the petitioners. The learned Addl. Govt. Advocate also agreed to the suggestion.

2. The petitioners thus have mainly challenged the resolution dated 16-12-1934 of the Government of Orissa. School and Mass Education Department as to taking over the management of all non-Government fully aided High Schools by Government service conditions of the employees. For proper appreciation and by way of ready reference, the entire resolution dated 16-12-1994 is quoted herein-below :

No. 38522/SME

VIII SM(M) 3/94

GOVERNMENT OF ORISSA SCHOOL AND MASS EDUCATION DEPARTMENT
RESOLUTION

Bhubaneswar Dated 16-12-1994

Sub:--Taking over the management of all non-Government fully aided High Schools by Government--Service conditions of the employees.

Government had decided in principle on 7-6-1994 to take over the non-Government aided High Schools in receipt of full salary cost. The Managing Committee of these institutions were informed to comply with the terms and conditions of take over as laid down in this Department letter No. 20645 dated 24-6-1994. The non-Government aided High Schools (as per the list enclosed) in receipt of full salary cost, have resolved to hand over the management along with approved teaching and run-teaching staff including assets as on 7-6-1994 and have furnished written consent of each of such staff. Accordingly it has been decided to take over the management of these schools along with approved teaching and non-teaching staff and assets with effect from 7-6-1994. Government would not be liable to clear any liability whatsoever relating to the period prior to and/or as, on and after 7-6-1994 incurred by the Managing Committee.

2. The taken over employees would be treated as Government servants with effect from 7-6-1994 only and their service conditions would be as follows :

2. 1. Seniority :

The seniority of the taken over employees in respective cadres under the State Government will be determined taking into account 7-6-1994 as the date of entry Into Government service and the inter se seniority of the taken over employees prior to 7-6-1994 will be determined in accordance with the guidelines prescribed in this Department letter No. 27236 dated 26-8-1994 subject to decision of competent Court of law where pending on the date of take-over.

2. 2. Fixation of pay and date of increment :

As the teachers are entitled to salary in the scales of pay applicable to their counterparts in the State Government, their pay shall be protected on their coming over to Government service without any change in the date of increment.

2. 3. Pensionary benefits :

Pensionary and other retirement benefits admissible to State Government servants shall be admissible to such employees for the period of their service under Government with effect from 7-6-1994. The remaining aided service shall

be governed by the Orissa Aided Educational Institutions "Employees" Retirement Benefit Rules, 1981.

2. 4. Provident Fund :

Such employees shall subscribe to the State Government Provident Fund and shall be governed by the General Provident Fund (Orissa) Rules.

2. 5. Leave :

Leave benefit as admissible to Government servants shall be admissible to such employees on the basis of service rendered by them with effect from 7-6-1994.

2. 6. House Rent Allowance :

House Rent Allowance as admissible to Government servants shall be admissible to such employees with effect from 7-6-1994 but instead of the entitlement being paid to them shall be invested in shape of National Saving Certificate in the name of concerned individual teachers quarterly till the end of the financial year 1995-96.

2. 7. Age of superannuation :

The employees other than Class-IV employees will retire on completion of 58 years of age. The age of superannuation for Class-IV employees shall be 60 years. The teaching and non-teaching staff other than Class-IV employees who are continuing in service beyond the age of 58 years shall be relieved forthwith. Their continuance beyond 53 years after 7-5-1994 shall not count towards pension and pensionary benefits, but they shall be entitled to salary for the period they have worked beyond 58 years.

3. All service rules applicable to Government servants shall be applicable to the taken over employees.

ORDER :--

Ordered that the Resolution be published in the next issue of Orissa Gazette and copies thereof be extended to all concerned with 500 spare copies to this Department for reference.

By order of the Governor D.N. PADHI Commissioner-cum-Secretary to Government."

3. The grievance of the petitioner in this case is that by the aforesaid resolution No. 38522/SME dated 16-12-1994 issued by the State of Orissa represented through the Commissioner-cum-Secretary to Government, School and Mass Education Department takes away the valuable right of the petitioner to continue in service up to the age of sixty years as per Rule 19 of the Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 (hereinafter referred to as "the 1974 Rules") and other rights relating to leave, pension and gratuity are being

seriously prejudiced. It is placed on record that the aforesaid resolution of the Government runs contrary to the 1974 Rules and is in clear violation of the fundamental rights of the petitioner.

4. It is placed on record that the petitioner in this case being a trained graduate was appointed as Headmaster of Ganesh Durga High School at Sanamanga on 8-8-1959 by the then Secretary of the Managing Committee of the school and his service had been duly approved by the competent authorities. Since then the petitioner was continuing in his post without any hindrance from any quarter. He then joined in Baluria High School on 20-5-1961 and continued there till 7-8-1969 whereafter he again joined in Ganesh Durga High School, Sanamanga. The petitioners' date of birth is 27-2-1937 and he will complete sixty years of age on 26-2-1997 and fifty-eight years of age on 26-2-1995.

5. It is stated that the Additional Secretary to Government of Orissa in the Education Department vide his letter dated 24-6-1994 intimated to the Director that the Government has decided on 7-6-1994 to take over all the non-Government Aided High Schools and it was mentioned therein that the concerned Managing Committees be directed to pass unanimous resolution to hand over management of the schools to Government. Further, the managements were to be asked to obtain written consent of each approved regular teaching and non-teaching staff existing on their rolls as on 7-6-1994 to the effect that his service will abide by the conditions of service applicable to Government servants in all matters including the age of superannuation. After receiving the said letter, the Director of Secondary Education (Schools) sent a copy thereof enclosing a pro forma undertaking form in which the approved staff were to furnish their undertaking.

6. After receiving the undertaking pro forma, the petitioner submitted his undertaking indicating inter alia that he will abide by the conditions of service applicable to Government servants in all matters including superannuation, subject to condition that all his services during non-Government period shall be treated as Government services and he should be governed by the Orissa Pension Rules, 1992. The said undertaking was sent to the Inspector of Schools for forwarding the same to the appropriate quarter.

7. It is further contended that notwithstanding the aforesaid undertaking and without any further response or correspondence. Government of Orissa in the School and Mass Education Department issued the aforesaid resolution bearing No. 38522/SME dated 16-12-1994 resolving that the Government had taken over the non-Government Aided High Schools in receipt of full salary cost along with the approved teaching and non-teaching staff including the assets as on 7-6-1994. There is also mention in the aforesaid resolution that Government would not be liable to clear any liability whatsoever relating to the period prior to and/or as, on and after 7-6-1994 incurred by the managing committee. Further it is mentioned in the resolution that the employees of the schools taken over would be treated as Government servants with effect from 7-6-1994 only and

their services would be governed as fully indicated in the resolution as to seniority, fixation of pay and date of increment, pensionary benefits, provident fund, leave, house rent allowance and age of superannuation. On these different heads, the resolution speaks for itself and the same has already been quoted above,

8. It is brought to the notice of the Court that the petitioner's school is an aided educational institution within the meaning and definition of Section 3 (b) of the Orissa Education Act, 1969. Section 3 (b) envisages inter alia: "Aided educational institution" means a private educational institution which is recognised by and is receiving aid from the State Government and includes an educational institution covered by the list of educational institutions eligible to receive aid as may be drawn by the State Government from time to time under the scheme regulating Government grant-in-aid to educational institutions for payment of teachers' salaries."

9. In order to regulate the recruitment and conditions of service of the teachers and members of the staff of aided educational institutions, rules were framed u/s 27 (1) of the Orissa Education Act. In exercise of this power the State Government after previous publication makes rules for carrying out purposes of the Act. Section 27 (2) of the Act provides that State Government may make rules in respect of all matters expressly required by the Act to be prescribed.

10. Attention of the Court is drawn to Section 10 (1) of the Orissa Education Act which expressly provides for the qualification for appointment of the teachers and other members of the staff and their conditions of service relating to salary, leave, pension, provident fund, age of retirement, disciplinary action and other matters. Thus, according to Sections 27 (1) and 10 of the Orissa Education Act, the Orissa Education (Recruitment and Conditions of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 were framed which came into force with effect from 1-4-1975.

11. Rule 19 of the 1974 Rules is the rule regarding superannuation of employees of aided educational institutions. It is provided therein that every employee shall retire on completion of sixty years of age; provided that the Director, in respect of an institution other than a college and the Government in respect of the college may, on an application by the managing committee or the governing body, as the case may be, sanction re-employment in any case for a period not exceeding two years on any occasion :

Provided further that no such application shall be considered unless it is submitted through the inspector or the Director, as the case may be:

Provided further that in respect of lower grade employees, the President of the Managing Committee or the Governing Body, as the case may be, shall be competent to sanction re-employment for the period mentioned in this rule :

Provided further that in the event of introduction of retirement benefit scheme

for the teachers of aided educational institutions, the Government may review the age of superannuation so as to bring it on par with that of Government servants :

Provided further that unless and until the retirement benefit scheme is introduced, provision of this rule regarding the age of superannuation shall not be given effect to.

12. By drawing attention of the aforesaid rules and the provisions as referred to above, it is contended that a member of the teaching and non-teaching staff of an aided educational institution is to retire at the completion of sixty years of age. Since the petitioner is the Headmaster of an aided educational institution, on completion of sixty years of age he is to retire in February, 1997.

13. In fact, the Additional Secretary to Government of Orissa in the School and Mass Education Department, vide his letter dated 2-6-1994 intimated to the Director of Secondary Education that Government had decided on 7-6-1994 to take over all non-Government fully aided High Schools. In order to implement the Government decision it was directed that the management of the concerned institutions might be informed to pass unanimous resolutions if they so desired to hand over the management of their respective institutions along with the approved teaching and non-teaching staff including all assets as on 7-6-1994 to Government. In para-3 of the said letter it was mentioned that the management might be asked to obtain written consent of each approved regular teaching and non-teaching staff existing on its roll as on 7-6-1994 to the effect that he/she would abide by the conditions of service applicable to Government servants in all matters including the age of superannuation.

14. After receiving the aforesaid letter, the Director of Secondary Education sent copy of the same accompanied by a pro forma undertaking to the non-Government aided High Schools under which the approved staff were called upon to furnish their undertaking. The pro forma undertaking is as follows :

"I, Sri/Smt.....working as.....In..... High School do hereby undertake that I will abide by the conditions of service applicable to Government servants in all matters including the age of superannuation.

Signature in full with designation and date

Signature of Headmaster/Headmistress-cum-Secretary. Managing Committee with date and seal.

Countersignature by the Inspector of Schools with date and seal."

15. After receiving the aforesaid undertaking pro form, the petitioner submitted his undertaking which is as follows :

"I, Sri Bidyadhar Bhuyan, working as Headmaster in Ganesh Durga High School, Sanamanga, do hereby undertake that I will abide by the conditions of service applicable to Government servants in all matters including the superannuation

subject to condition that all my services in non-Government period shall be treated as Government service and governed under Orissa Pension Rules, 1992."

The said undertaking was sent to the Inspector of Schools for upward transmission.

16. The allegation is that without considering the aforesaid undertaking, Government of Orissa in the Department of School and Mass Education passed resolution on 16-12-1994 to the effect that Government had been pleased to take over the non-Government aided High Schools in receipt of full salary cost along with full approved teaching and non-teaching staff including assets as on 7-6-1994. It was mentioned in the said resolution that the taken over employees would be treated as Government servants with effect from 7-6-1994 only. In para 2. 1 of the said resolution it has been mentioned that seniority of the taken over employees in the respective cadres under the State Government would be determined taking into account 7-6-1994 as the date of entry into Government service.

17. There has been consideration as to pension and other retirement benefits as detailed in the aforesaid resolution which has already been quoted above.

18. The petitioner has thus mainly challenged the said resolution Annexure-3 as irregular, illegal, invalid and violative of the rights of the petitioner. The conditions imposed by the resolution regarding taking over from 7-6-1994 and providing benefits from the said date and reducing the age of retirement is irrational, arbitrary and in violation of Articles 14 and 16 of the Constitution of India as alleged. There is a case of discrimination. Persons holding identical posts may not be treated differently in the matter of pay, leave, pension, temporary increment and gratuity. After the aided High Schools are taken over by the State Government as per the aforesaid resolution the teachers of the taken over schools and those in the Government schools are identically placed discharging the same and similar duties. Therefore after 7-6-1994 both the teachers of taken over schools and other Government schools should get equal benefits in the matters of salary, leave, gratuity, pension and temporary increments. Since the cut-off date has been fixed as 7-6-1994, the teachers who have their long past services have been discriminated from the teachers of the Government schools by operation of Clauses 2, 2.1, 2.2, 2.3 and 2.5 of the resolution Annexure-3. The aforesaid clauses are disputed and challenged as liable to be struck down.

19. The writ petition is opposed by the State Government by filing a comprehensive counter affidavit. It is disclosed inter alia that the Teachers Association of Fully Aided non-Government High Schools had been demanding for taking over the schools by Government. This demand was sympathetically considered by Government and a Cabinet decision was taken on 7-6-1994 for taking over 3000 non-Government fully-aided High Schools. Pursuant to the said decision options were invited from 3000 fully-aided educational institutions in respect of taking over their institutions by Government as to their willingness to

hand over management of their respective institutions along with approved teaching and non-teaching staff including all the assets as on 7-6-1994. They were also informed that Government would not take over any liability of the institutions. Those schools and teachers who had not given their consent were not taken over by the Government. By entering into Government service the teachers of the taken over schools accepted the relationship of master and servant between the Government and them respectively and are thus bound to be governed by the Government rules framed under Article 309 of the Constitution of India. They cannot claim a separate status nor can they claim to be placed on par with those in Government institutions on being absorbed in Government service, the institution being taken over by Government. The rules which say that such employees would be placed below the last existing Government servant and shall get his seniority from the date of the institution being taken over, and not from the date of the initial appointment, cannot be held to be discriminatory or arbitrary or hit by Article 16 of the Constitution of India. There is also challenge as to maintainability of the writ application, inasmuch as the teachers of the taken over schools having become Government servants in terms of the Government resolution, High Court loses jurisdiction to entertain the same and decide dispute relating to service conditions of such teachers. The petitioner ought to have gone before the State Administrative Tribunal.

20. It is further stated that the order of taking over is a beneficial act giving better service conditions to the teachers of 2781 schools in the State and only some fraction of the teachers community who are on the verge of retirement have come to this Court challenging the resolution Annexure-3 whereas a large number of teachers are to be benefited and they do not oppose to the various clauses of the resolution. The act of the State is reasonable and legal. It is not arbitrary nor violative of any fundamental right of the teachers. As regards the past services of the teachers. Clause 2.1 of the resolution lays down that inter se seniority of the taken over employees prior to 7-6-1994 would be determined in accordance with the guidelines prescribed by Government letter No. 27236 dated 26-8-1994. The petitioner has not enclosed nor challenged the said guidelines. It cannot be said that the past services of the taken over employees have been totally ignored. So far as pensionary benefits are concerned, it is submitted that their services up to 7-6-1994 are to be counted and guided under the Tripple Benefit Scheme applicable to the employees of the aided schools and the rest of the period would be counted as Government service. Apart from these, the aided employees on being taken over would be getting the benefits such as house-rent allowance, provident fund, leave, etc. The comparative chart given in the writ petition would show that the petitioner and such employees like him after being taken over would get additional benefits, such as, house-rent allowance, surrender of leave, LTC, TA in transit and earned leave, as a consequence of the impugned resolution Annexure-3. All other allegations of the petitioner have been controverted and it is contended that the writ petition is liable to be

dismissed.

21. The learned counsel, viz., Sri R.K. Mohapatra, Dr. M.R. Panda and Sri D.K. Mohapatra, who chose to place their submissions on behalf of the petitioners, since this case has been heard with a large number of other writ applications of similar type in a group, made the following submissions :

(a) The employees of the aided high schools while enjoying the rights conferred by the statutory rules having received force of the statute cannot be denied such rights by issue of any executive order in the form of the resolution Annexure-3. The resolution is thus invalid, irrational and violative of their fundamental rights. In support of the contention, the lawyers for the petitioner have cited the following decisions :

AIR 1971 Ori 170 (Binapani Dei v. State) : B.N. Nagarajan and Others Vs. State of Karnataka and Others, ; AIR 1989 SC 1133 (State of Maharashtra v. Jagannath Achyut Karandikar) and 1972 (1) CWR 81 (Sudhir Kr. Gupta v. State of Orissa).

(b) Where all relevant considerations are the same, persons holding identical posts may not be treated differently in the matter of their pay, leave, pension, temporary increment and gratuity. As the cut-off date has been fixed as 7-6-1994, the teachers who have rendered long past services, though saved by operation of Rule 3 of the Orissa Service Code, have been discriminated from the employees of the Government schools by operation of the conditions laid down in several paragraphs of the impugned resolution. In particular, the clauses in paras 2, 2.1, 2.3 and 2.5 of the impugned resolution Annexure-3 are being challenged as liable to be struck down. In support of their contention, they find force by referring to the decisions reported in--

Takhatray Shivdatrai Mankad Vs. State of Gujarat, (c) The entire past services of the taken over employees should be treated as Government service for the purposes of leave, pension temporary increments, gratuity as otherwise there will be, discrimination between the employees of the Government schools and those of the taken over schools. In view of the cut-off date the employees of the taken over schools cannot complete thirty-three years of service for being eligible to full pension.

(d) The managing committee is the appointing authority of the teachers and staff of the aided High Schools. Most of the employees have given their consent for being taken over on the condition that their entire past service in the aided schools would be counted for all purposes like pay leave pension, temporary increments and gratuity. But the teachers were compelled to give their consent for the take-over particularly since the taking-over was decided by an agreement between the managing committee on one hand and the Government on the other and the employees of the school had no other way but to give their undertaking in order to remain in service under the new employer. Having served the school for a large number of years the employees had crossed the age bar for

recruitment to Government service and by not opting to give the undertaking, they would have to face loss of service which would amount to a major punishment to be inflicted on the employees without following the principles of natural justice as embodied in the 1974 Rules. Attention of the Court has been drawn in particular to para 8 of N.N. Swamy and Others Vs. State of Orissa and Others, , Mazharul Islam Hashmi Vs. State of U.P. and Another, and Chander Sain Vs. State of Haryana and others, .

22. It is highlighted that in the background of contract between unequal persons the relevant terms are required to be examined as to whether regard being had to the materials on record, the "clause or clauses" are unilateral in nature and whether for the benefit of one person, and in particular for the stronger person and to the disadvantage of the weaker side. If such a test is applied to the present case, it appears that tie relevant clause is unreasonable inasmuch as the weaker party, the employees in this case, cannot be bound down by the agreement or undertaking. Attention of the Court is drawn to the decisions reported in AIR 1938 Cal. 143 (In re :M/s. Om Prakash Pariwal) and Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, .

23. A comparative chart has been given to indicate the retirement benefits to a teacher in a Government school and a teacher in aided High Schools as follows :

----- Pension		
Gratuity	Leave	Superannuation

Teacher 50% basic 16 months 15 leave at 58 years in a Govt. pay and days credit of School T.I. with 240 days Commutation Benefit

Teacher 50% basic 7 months No credit 60 years in an pay 15 days of leave aided school -----

24. The calculation of pension will clearly establish the discrimination in getting pension by the teachers identically placed both Government and aided schools. The scale of pay of Headmasters of both types of schools is the same as per Rule 9 of the 1974 Rule being fixed at Rs. 1700-3200/-. On completion of thirty-three years of service they will get pension in the following rates :

----- Govt.				
School -- 50% of basic pay plus temporary increment i.e. 136% of the basic pay = Rs. 1600 x 136% = Rs. 1600 plus Rs. 2176 (T. I.) = Rs. 3776. Aided School --				
50%	of	basic	pay	Rs. 1600

25. It is argued that as per the Orissa Civil Services (Pension) Rules which are applicable to Government servants it is provided in Rule 47 that if an employee shall not complete ten years of qualifying service, he/she shall not be entitled to any pension. The service rendered by the employees of the taken over schools

after 7-6-1994, if they retire between 7-6-1994 and 6-6-2004, will bear no fruit for the purpose of pension and a teacher of the taken over school who was in the scale of pay of Rs. 1700-3200/- in 1994 on completion of thirty-three years of service will get pension at the diminishing rates by computation of different years.

26. Argument is made to show discrepancies, disparities, inconsistencies and irregularities as a consequence of the resolution Annexure-3 which is challenged before this Court. As per Rule 19 of the 1974 Rules, every employee of an aided educational institution shall retire on completion of sixty years of age. The 1974 Rules are subordinate legislation which gives a valuable right to the employees of an aided High School to continue in service till completion of sixty years of age as per Rule 19 and such right cannot be cut-off or taken away by Government by a resolution which has no greater force than an executive order. Since the right of the petitioner is to continue in service till sixty years of age, fixation of his age of retirement at 58 years deprives him of his livelihood and this being a fundamental right under Article 21 of the Constitution of India, the same cannot be taken away. By operation of the 1974 Rules, a vested right has accrued in favour of the petitioner which cannot be taken away by operation of the executive instruction vide Annexure-3. Therefore, the age of superannuation in para 2. 7 of Annexure-3 is unconstitutional and contrary to the statute and is therefore inoperative.

27. It is argued further that the petitioner's right to continue in service till completion of his sixty years of age as per Rule 19 of the 1974 Rules has not been extinguished by any legislation. By operation of Rule 3 of the Orissa Service Code, the age of superannuation prescribed under Rule 19 is saved. The age of superannuation of the petitioner is to be governed by Rule 19 of the 1974 Rules and on this account the impugned resolution Annexure-3 cannot supersede the 1974 Rules. An analogy has been made that the right to life is guaranteed under Article 21 of the Constitution which includes the right to livelihood and the same cannot be made to depend on the whims of individual authorities. The employment is not a bounty from them nor can its survival be at their mercy. The law authorising to impose reasonable restrictions under Article 19(1) must be extended to advance the larger public interest. Under the Constitution, protection against impairment of the guarantee of fundamental right is determined by the nature of right, interest of the aggrieved party and the degree of harm resulting from the State action. The validity of the State action must be adjudged in the light of its operation upon the individuals or groups of individuals in all their dimensions. In support thereof, attention has been focussed to para 259 of the decision reported in *Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others*, .

28. Mr. Swamy, learned Addl. Govt. Advocate, has submitted inter alia that three sets of argument have been advanced on behalf of the petitioners, i.e., by Mr. R.K. Mohapatra, Senior Advocate, Dr. M.R. Panda and Mr. D.K. Mohapatra. It is further submitted that Mr. R. K. Mohapatra has specifically said that the

petitioners have no objection to the private aided schools being taken over by Government and Mr. D.K. Mohapatra has supported the same. However, Dr. M.R. Panda has challenged the entire taking-over as bad in law. To repudiate the common argument by all the learned advocates against the executive instruction. Government seeks to make inroads into the benefits which the petitioners are entitled to get under the 1974 Rules. The reduction of the age of superannuation according to them deprives the petitioners of two years of service and emoluments. They have also challenged that due to this reduction, the take-over substantially affects their pension, etc. There is also reference to the case laws reported in 1972 (1) CWR 81 (supra) and State of Orissa and Another Vs. N.N. Swamy and Others, in support of the case of the petitioners.

29. Mr. Swamy has in the background of the petitioners case, argued inter alia that there was all round demand by the Teachers Association for taking over the schools by Government. This demand was sympathetically considered by Government and a cabinet decision was taken on 7-6-1994. By drawing attention of the Court to the decision of the apex Court reported in B.K. Mohapatra Vs. State of Orissa and Another, it is submitted that the Supreme Court had partly reversed the decision of this Court relating to taking over of the private schools. These private schools belonged to erstwhile Rulers whose States had merged with the State of Orissa with effect from 26-1-1950, the date on which the Constitution of India came into force. Though the said schools were declared to have been converted to Government schools in 1964, the Supreme Court held that the teachers seniority would be counted from 26-1-1950 because the management had come over to the Government from that day. According to Mr. Swamy the aforesaid decision supports the stand taken by the State to the effect that after taking over the institutions, the teachers cannot claim the past services rendered by them prior to the date of taking over to be taken into consideration and cannot assert that the age of retirement should be sixty years and not fifty-eight years. He has reiterated the defence case as has already been recorded earlier.

30. As regards the ground raised by Dr. Panda that by prescribing the mode of seniority as in para 2.1 of the resolution Annexure-3, Government has contravened the service rules governing the seniority of Government employees, it is submitted that such grievance, if any, can be made only by the existing employees in the Government schools. This contention is not available to be raised for the present litigation.

31. Mr. Swamy has strongly relied on the decision reported in Judgment Today 1995 (6) SC 225 (State of Punjab and Ors. v. Dev Dutt Kaushal) and draws attention of the Court to paras, 5, 7, 8, 10 and 12 of the said judgment.

32. Having heard learned lawyers for several petitioners and the learned Addl. Govt. Advocate for the State, we find that in fact there is no serious challenge to the taking over of the management of the private aided schools in terms of the cabinet decision. There was consistent demand for taking over management of

the schools by Government and the Government decision taking over the management appears to be sound and fair. More so, this beneficial act as to taking over is not seriously doubted or disputed. All that the employees of the schools are worried, anxious and aggrieved is as to reduction of their age of superannuation, retirement benefits, calculation of pension, other fringe benefits, etc. due to non-reckoning of their past services.

33. To appreciate the petitioners case and/or their grievances in depth, it transpires that they have mainly challenged paras 2, 2.1, 2.3, 2.5 and 2.7 of the impugned resolution Annexure-3 in the present case. In order to understand more pointedly, para 2 refers to the cut-off date and states that the employees would be treated as Government servants with effect from 7-6-1994 only and their service conditions would be as mentioned in the sub-paras to para 2. This para is challenged saying that the cut-off date has no nexus to the purpose it wants to achieve. This cut-off date has no relevance without considering the past services of the employees for no fault of theirs. This cut-off date will cause irreparable loss and injury to the employees and the same is not just and fair.

34. Para 2.1 of the resolution relates to seniority. It is stipulated that seniority of the taken-over employees in the respective cadres under the State Government would be determined taking into account 7-8-1994 as the date of entry into Government service and the inter se seniority of the taken-over employees prior to 7-6-1994 would be determined in accordance with the guidelines prescribed in letter No. 27236 dated 26-8-1994 of the school and Mass Education Department, subject to decision of competent Court of law where such matter would be pending on the date of take-over. This paragraph is challenged on the footing that such a clause is contrary to and inconsistent with the previous service conditions of the employees and their long past services and seniority vis-a-vis other Government employees similarly situated Cannot be reconciled and the employees will have to sacrifice their interest which is unwarranted and uncalled for.

35. Para 2.3 of the resolution relates to pensionary benefit. It is indicated inter alia that pensionary and other retirement benefit admissible to State Government servants shall be admissible to such employees for the period of their service under Government with effect from 7-6-1994. The remaining sided service shall be governed by the Orissa Aided Educational Institutions Employees Retirement Benefit Rules, 1981. This para is challenged as to calculation of pensionary benefits of the employees who retire after the schools are taken over and it is demonstrated that on calculation and re-calculation the financial benefits to them will be reduced. They were to get higher financial benefit in terms of the earlier prevailing pension rules.

36. Challenge is made to para 2.5 of the resolution which says that leave benefit as admissible to Government servants shall be admissible to such employees on the basis of the service rendered by them with effect from 7-6-1994.

37. Main challenge is made to para 2.7 which is regarding the age superannuation whereby these employees will have to retire on completion of fifty-eight years of age although they were to retire on completion of sixty years of age as per the earlier rules.

38. This Court upon perusal of the pleadings of the parties, scrutiny of the materials on record and consideration of the submissions made on behalf of the respective parties has only to consider as to legality, validity, rationality and fairness of paras 2, 2.1, 2.3, 2.5 and 2.7 of the resolution as discussed above.

39. We have considered the submissions of Dr. Panda as to challenge to the step of entire taking-over the management of the schools as erroneous. In fact, we do not find any merit for such submission as to step of the Government to take-over the management of the schools. In the background of the demand of the Teachers Association and the right of the State to take over the management of the fully aided schools, it is neither contrary to nor inconsistent with the bounds of the constitutional rights. Further, the act done and/or caused to have been done by the State in taking over the management of the fully aided schools is found to be fair, just and a right step as demanded by the Teachers' Association.

40. The real challenge is not to the validity of the entire resolution and/or the scheme of taking over the management of the aided schools. The scheme as per the resolution is otherwise found acceptable to the petitioners, nay they are ardent supporters of it, nay further they seek the benefit of it only by certain punctuation. The employees challenge only that part of the scheme by which their earlier benefits as to superannuation, larger pension and better leave facilities are curtailed. Their purpose to visit the writ Court is to delete the portions of the scheme which are not otherwise essential to them. It is not the case that the scheme has to be taken as a whole or rejected as a whole. The date from which it came into force is no doubt an integrated and inseparable part of the scheme. But if a beneficial scheme is framed by the appropriate Government, the Court in an appropriate case may have its judicial, scrutiny if any part or portion thereof is repugnant to the fairplay and/or is causing harm instead of granting the benefits thereof.

41. Article 39(e) of the Constitution of India requires the State to secure that the health and strength of workers, men and women, and children of tender age are not abused and that citizens are not forced by economic necessity to either avocation unsuited to their age or strength. Article 41 obligates the State within the limits of the economic capacity and development, to make effective provision for securing the right to work, to education and to provide assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want. Article 43(3) requires the State to endeavour to secure amongst other things full enjoyment of leisure and social and cultural opportunities. Furthermore, the principal aim of a socialist State as envisaged in the Preamble is to eliminate inequality in income and status and standards of life. The basic framework of socialism is to provide a decent standard of life to

the working people and especially provide security from cradle to grave. This amongst others on economic side envisaged economic equality and equitable distribution of income.

42. In view of the aforesaid position in law and life, we do not intend to interfere with the scheme as a whole. The scheme of taking-over management of the aided schools is not artificially created nor it is as such that the scheme should be rejected nor it may be conceived that if any part and/or portion is found to be not just and fair, the entire scheme would not be viable.

43. Under this concept, if we test the impugned paragraphs and/or clauses of the resolution, we can answer the result as warranted in law, taking particularly para 2 of the impugned resolution as to the cut-off date being fixed as 7-6-1994 from which date the taken-over employees are to be treated as Government servants. An argument has faintly been made that if the take-over decision is implemented, no cut-off date should have been fixed. Instead, the teaching and non-teaching staff of the taken-over schools should be flatly treated as Government employees and their past services should be considered for getting all benefits and for fixation of seniority accordingly. This argument appears to be fallacious. Article 14 of the Constitution though forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, viz, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group ; and (ii) that the differentia must have a rational relation to the objects sought to be achieved by the statute in question. In the case of *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, , it has been elaborately observed :

"The classification may be founded on differential basis according to objects sought to be achieved but what is implicit in it is that there ought to be nexus, i.e., causal connection between the basis of classification and object of the statute under consideration. It is equally well-settled by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

44. Here, while by the impugned resolution a group of employees, i. e. teaching and non-teaching staff of the taken-over schools, have been given certain benefits, there is a nexus to the object it proposes to achieve. In this prospective, the cut-off date 7-6-1994 does not appear to be contrary to law or inconsistent with the, facts as prevailing in the instant case. So on proper tests, we do not find that paragraph 2 of the impugned resolution indicating the cut-off date as 7-6-1994 is in any way repugnant to the constitutional provisions and/or protection of equality under Article 14 of the Constitution.

45. Next comes paragraph 2.1 as to seniority. On scrutiny of the said paragraph, it appears that seniority of the taken-over employees in the respective cadres

under the State Government would be determined taking into account 7-6-1994 as the date of their entry into Government service and the inter se seniority of the taken-over employees prior to 7-6-1994 will be determined in accordance with the guidelines prescribed in letter No. 27236 dated 26-8-1934 of the School and Mass Education Department, subject to decision of the competent Court of law pending on the date of take-over. Admittedly petitioners cannot ask for any seniority above the Government employees before the date of take-over as made in terms of the cabinet decision. Furthermore, the guidelines as indicated in the said letter are not challenged by the petitioners in the writ applications. The State Government is fully aware of the inter se seniority of the employees, namely, the teaching and non-teaching staff of the taken-over schools by reckoning their past services and the guidelines are the safeguards. If the guidelines affect any individual and if any such case is made out, the same may be considered by the appropriate Court in a given case. But on general challenge, this Court does not find that paragraph 2.1 of the resolution as to seniority is vitiated under the tests of equality as envisaged under Article 14 of the Constitution.

46. Paragraph 2.3 of the resolution is regarding pensionary benefits. It is indicated that pensionary and other retirement benefits admissible to State Government servants shall be admissible to such employees for the period of their service under Government with effect from 7-6-1994. The remaining aided service shall be governed by the Orissa Aided Educational Institution Employees Retirement Benefit Rules, 1981. What is a pension? What are the goals of pension? What public interest or purpose, if any, it seeks to serve? If it does seek to serve some public purpose, is it thwarted by such artificial division or retirement pre and post a certain date? The Supreme Court has considered these questions in the case of *D.S. Nakara and Others Vs. Union of India (UOI)*, . The Supreme Court in the said case has observed that the antiquated notion of pension being a bounty, a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in *Deokinandan Prasad Vs. The State of Bihar and Others*, , wherein the Supreme Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a Government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon anyone's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied matters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was re-affirmed in *State of Punjab and Another Vs. Iqbal Singh*, . There are various kinds of pensions and there are equally various methods of funding pension programmes. The present enquiry in the instant case is as to whether by the decision of Government to take-over management of the

aided schools, the erstwhile employees, namely, the teaching and non-teaching staff are affected. The better or beneficial scheme to get larger pension should not be curtailed by virtue of the impugned resolution, and in particular by paragraph 2.3 thereof. The artificial two limbs made in the said clause are not appreciated by this Court. In the first limb it is provided that pensionary and other retirement benefits admissible to State Government servants shall be admissible to such employees for the period of their service under Government with effect from 7-6-1994. The second limb is that the remaining aided service shall be governed by the Orissa Aided Educational Institutions' Employees Retirement Benefit Rules, 1981. By implementation of such provisions there will be various anomalies and the inconsistencies have been demonstrated by the petitioners in making a graphic chart how a person having shorter period of service after the take-over will be prejudiced and the persons having longer period of service after the takeover will have a different answer. By introduction of a new scheme, the consistent policy and scheme available to the erstwhile employees to get larger pensionary benefits should not be in jeopardy. Considering this aspect fully, we are of the view that the State Government has not properly applied its mind while providing for the pensionary, benefits in paragraph 2.3 of the impugned resolution. The State Government will have to consider the detailed advantages and disadvantages of the erstwhile employees, namely, the teaching and non-teaching staff of the aided schools, their scheme for pensionary benefits, the impact of the Government scheme for pension as in the case of Government employees if made applicable to them and their eligibility criteria, their period of service to get the larger amount of pension and various other factors should also be taken notice of and a proper scheme has to be framed for pension. Until such scheme is framed, the petitioners, namely, the teaching and non-teaching staff of the erstwhile aided schools will get their pensionary benefits under the prevailing rules applicable to them. On this limited aspect, the provisions of paragraph 2.3 cannot be sustained. This paragraph is found to be irrelevant, inconsistent and irrational and is thus struck down.

47. As regards paragraph 2.5 of the resolution, it relates to leave. It is indicated that leave benefit as admissible to Government servants shall be admissible to such employees on the basis of service rendered by them with effect from 7-6-1994. Leave is an incidental feature of the service tenure. Under the service jurisprudence, leave has its own meaning and connotation. We do not find that leave rules and leave facilities as available to Government employees if made available to the petitioners after their schools are taken over the same would affect or curtail the rights of the petitioners. The challenge to paragraph 2.5, on scrutiny, is found to be without any merit. This Court does not find anything wrong with paragraph 2.5 and overrules the objection of the petitioners.

48. The most important aspect of the challenge of the petitioners and the bone of contention of the parties is with regard to paragraph 2.7 of the resolution as regards the age of superannuation. It is provided in the said paragraph that the employees other than class IV employees will retire on completion of 58 years of

age. The age of, superannuation for class IV employees shall be sixty years. The teaching and non-teaching staff other than class IV employees who are continuing in service beyond the age of 53 years shall be relieved forthwith. Their continuance beyond 53 years after 7-6-1994 shall not count towards pension and pensionary benefits, but they shall be entitled to salary for the period they have worked beyond 53 years. Much argument has been advanced on behalf of the parties over the aspect of superannuation and as to propriety, legality and validity of this paragraph 27. It is pointed out that under Rule 19 of the Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 it is provided that every employee shall retire on completion of sixty years of age. The said 1974 Rules are certainly subordinate legislation and the petitioners were of right to continue in service till completion of sixty years of their age. The petitioners were admittedly employees of the aided educational institutions and the 1974 Rules were applicable to them as regards their service conditions. Since their right to continue in service till sixtieth year was conferred by Rule 19 of the 1974 Rules, question arises as to whether such right can be taken away or curtailed by any executive instruction or Government resolution which cannot have a greater force in the eye of law. Argument has been advanced that the petitioners have given their option. Though the petitioner in the present case and some other petitioners in other writ applications have given their option mentioning "without prejudice" yet, in the cases of others, option has been given without any such proviso and therefore question arises what would be the impact of the said option to avoid the consequences of Rule 19 of the 1974 Rules.

49. In *Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another*, the Supreme Court considered Section 23 of the Contract Act vis-a-vis the expression "opposed to public policy" as being not defined in the Contract Act and as to the scope of transactions falling thereunder varying from time to time. It was observed by the Supreme Court that the law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. It must keep time with the heartbeats of the society and with the needs and aspirations of the people. As the society changes, the law cannot remain immutable, the early nineteenth century essayist and wit, Sydney Smit, said, "When I hear any man talk of an unalterable law, I am convinced that he is an unalterable fool." The law must, therefore, in a changing society march in tune with the changed ideas and ideologies. Legislatures are, however, not best fitted for the role of adapting the law to the necessities of the time, for the legislative process is too slow and the legislatures often divided by politics, slowed down by periodic elections and overburdened with myriad other legislative activities. A constitutional document is even less suited to this task, for the philosophy and the ideologies underlying it must of necessity be expressed in broad and general terms and the process of amending a Constitution is too cumbersome and consuming to meet the immediate needs.

This task must, therefore, of necessity fall upon the Courts because the Courts can by the process of judicial interpretation adopt the law to suit the needs of the society.

50. The Supreme Court decision as aforesaid evidenced that for example. Section 1138 (2) of the German Civil Code provides that a transaction is void "when a person" exploits "the distressed situation, inexperience, lack of judgmental ability, or grave weakness of will of another to obtain the grant or promise of pecuniary advantageswhich are obviously disproportionate to the performance given in return." It was found that the position according to the French law was very much the same.

51. It was found in para 90 of the said decision Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another,) at page 1610-11 that should then our Courts not advance with the times? Should they still continue to cling to outmoded concepts and outmoded ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of nineteenth-century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the Courts sit back and watch supinely while the strong trample under foot the rights of the weak? We have a Constitution for our country. Our Judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the Courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No Court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This

principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully exhaustive.

52. This principle as enunciated by the Supreme Court has been highlighted in the aforesaid decision. It has to be seen whether such principle can be applied to the present case. If the facts and circumstances of the present case are put to acid and alkaline tests, this Court will find that on one side there is strong State Government and on the other side there are poor, humble and helpless teachers, and employees of the private schools. On the face of the Government decision to take-over the management, they set down their option having no power of bargaining or power to counter the situation. They might give option to the take-over but they cannot be victimised to sacrifice their beneficial clause under a prescribed set down standard option form to bind them. The Court certainly has its power of judicial review to go into various dimensions of this problem and to see whether the signing of the option form will preclude the employees to raise their voice against the illegal, irrational and unfair acts and call upon them to sacrifice two valuable years of their service tenure. While the petitioners are protected under the statutory rules as to their period of superannuation up to completion of sixty years of age, the same cannot be curtailed and the option form though signed by the petitioners cannot immunise them from challenging the same as irregular, illegal and unconstitutional. In view of the statutory Rule 19 of the 1974 Rules, the State Government is found to be not just and fair to make bargain and to curtail two years of service by reducing the age of superannuation to fifty-eight years from sixty years. Besides, the immediate impact of the resolution to terminate the service of various employees at the last leg of service is also unimaginative and will cause tremendous hardship. The step taken to reduce the age of superannuation abruptly, whimsically and arbitrarily cannot be permitted. Paragraph 2.7 of the impugned resolution as to the age of superannuation which reduces the age of superannuation by two years and provides other consequences is found to be unjust and in violation of the constitutional protection. The said clause on scrutiny is found to be bad in law and cannot be sustained. The same is thus struck down. No other part or portion and/or paragraph of the impugned resolution dated 16-12-1994 is challenged before us.

52-A. The point of jurisdiction of the High Court as raised by the State is found to have no merit. There is no dispute between State and State Government employees to go to Service Tribunal. There is challenge to Government decision as to taking over the management of Government aided private schools. Its legality and propriety being challenged. Articles 32 and Article 226 provide the

forum to ventilate the grievances. The writ petition is quite maintainable in law.

53. This judgment will however not preclude the State Government to make an appropriate provision taking notice of the statutory rules and take any legislative action in this regard as permissible as under law. No executive instruction will have any better right to override the statutory protection as the petitioners are found to be entitled at present.

54. As already stated, this case was heard along with hundreds of similar cases as listed on 19-9-1995. There are also other similar cases pending in this Court. All the cases are to be deemed to have been listed on the same day and by this comprehensive judgment all the pending cases in this Court challenging the same resolution are to be disposed of. The registry of the Court will see that the cases which have not been listed may be brought to the notice of this Bench for recording necessary disposal as warranted in law and procedure.

55. In the result, the writ petitions are allowed in part. Paragraphs 2.3 and 2.7 of the impugned resolution dated 16-12-1994 of the School and Mass Education Department as to pensionary benefits and age of superannuation respectively are struck down. It is made clear that the petitioner-employees are entitled to continue in service up to the age of sixty years in terms of the previous service rules. The petitioner-employees those have been made to retire during the pendency of the writ applications be recalled to rejoin their services and they shall continue till completion of their sixty years of age. As regards their pensionary benefits, the State Government is directed to consider the detailed advantages and disadvantages of the erstwhile employees, namely, the teaching and non-teaching staff of the aided schools, their scheme for pensionary benefits, the impact of the Government scheme for pension as in the case of Government employees if made applicable to them and their eligibility criteria their period of service to get the larger amount of pension and various other factors should also be taken notice of and frame a proper scheme for pension. Until such scheme is framed, the petitioners, namely, the teaching and non-teaching staff of the erstwhile aided schools will get their pensionary benefits under the prevailing rules applicable to them. They shall also be entitled to all service benefits as admissible in law. There shall be no order as to costs.

D.M. Patnaik, J.

56. I agree.