

(1998) 08 KL CK 0053

In the High Court Of Kerala

Case No : O.P. No's. 10373 etc. of 1998

K. Krishnankutty and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 18-08-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 141, 143, 16, 16(1)

Kerala Education Act, 1958 — Section 10, 11, 2(1), 3, 3(1)

Kerala University Act, 1974 — Section 57, 57(4), 83

Citation : (1998) 2 KLJ 301

Hon'ble Judges : D. Sreedevi, J;AR. Lakshmanan, J

Bench : Division Bench

Advocate : T.R. Ramachandran Nair, D. Somasundaram, E. Subramani, K. Radhakrishnan, Benoy Thomas, George Varghese Kannanthanam, T.A. Ramadas, Kurian George Kannanthanam, P.G. Chacko, T.R. Ravi, Paulson Thomas, V.A. Mohammed, S. Ramesh Babu, G.S. Reghunath, Mohan Jacob George, John Varghese, M. Sasindran, M. Vijayakumar, M. Ramesh Chander, T.K. Venugopalan V. Devan, P.V. Mohanan, Salil Narayanan K.A., K. Jaju Babu, P. Santhoshkumar Tr., V.P. Seemandini, P.V. Vijju, R.S. Kalkura, P.V. Venugopal and P.C. Haridas, for the Appellant; M.K. Damodaran) and Sr. Government Pleader (Alexander Thomas), for the Respondent

Final Decision : Dismissed

Judgement

AR. Lakshmanan, J.—Government of Kerala issued G.O.(MS) No. 162/98/G.Edn. dated 13-5-1998, an order regarding opening of Higher Secondary Schools for the year 1998-99. In the said Government Order, a method is prescribed for appointment of higher secondary school teachers in Government Higher Secondary Schools and Aided Higher Secondary Schools. It is provided that 25% of the vacancies will be reserved for appointment from qualified High School Assistants and Primary School teachers and the remaining 75% of posts in Government schools will be filled up by direct recruitment through Public Service Commission. Appointment to the 75% vacancies earmarked for direct recruitment in the Aided Higher Secondary Schools will be done by the

management. If qualified teachers are not available for appointment as mentioned above, the management will fill up such vacancies also by direct recruitment. Selection of candidates for direct recruitment in Aided Higher Secondary Schools will be done by a Staff Selection Committee consisting of the Manager or his representative, the Principal of the School and the government nominee from a panel of officers consisting of the Deputy Director of Education, the District Educational Officer of the area and the DIET Principal of the district. The management can select the nominee from among the officers. The above officers are permitted to attend the Staff Selection Committee meeting without further sanction. It is useful to reproduce the above Government Order:

GOVERNMENT OF KERALA Abstract

Higher Secondary Education - Opening of Higher Secondary Schools for 1998-99--Sanctioned orders issued.

GENERAL EDUCATION (T) DEPARTMENT

G.O.(MS) No. 162/98/G.Edn.

Dated, Thiruvananthapuram, 13-5-1998

Read: 1. Notification No. 11042/T2/97G.Edn. dated 2-4-1997

2. G.O.(MS) No. 204/97/G.Edn. dated 12-6-1997

ORDER

As per the G.O. read as second above, Government have published a provisional list of Government and aided schools in which Higher Secondary courses are proposed to be started in the year 1998-99. It was also ordered that the facilities available in the above schools will be verified. It was further ordered that after scrutinising the verification reports and satisfying the infrastructure available in each school, Government will notify the final list of schools and courses to be offered in each school from 1998-99 onwards. Accordingly, as authorised in G.O. (RT) No. 631/98/GE dated 13-2-98 the Deputy Directors, Education, verified the facilities available in these schools and submitted their reports. Government after considering the reports of the Deputy Directors, are pleased to sanction Higher Secondary courses in 95 Government Schools and 178 Aided Schools as detailed in the annexure to this order. The above schools are sanctioned Higher Secondary courses on the subjects noted against the name of each school subject to the following conditions:

- i. The schools will be permitted to open Standard XI during the academic year 1998-99.
- ii) The last date for students to submit their application form will be 30th June 1998.

The posts of Higher Secondary School teachers in Government Higher Secondary Schools and Aided Higher Secondary Schools will be filled up as follows:

i. 25% vacancies will be reserved for appointment from qualified High School Assistants and Primary School Teachers.

ii. The remaining 75% of posts in Government school will be filled up by direct recruitment through the Public Service Commission. In the absence of select list with the Public Service Commission the vacancies will be filled up by candidates from Employment Exchange. Should there be shortage of suitable candidates from the Employment Exchange, Guest Lecturers may be appointed as is done in colleges. The selection of Employment Exchange candidates will be done by Director of Higher Secondary Education and that of the Guest Lecturers will be done by the concerned Deputy Director, Education by constituting a selection committee consisting of the Principal, Deputy Director/and President of the concerned PTA.

iii. Appointments to the 75% vacancies earmarked for direct recruitment in the Aided Higher Secondary Schools will be done by the management. If qualified teachers are not available for appointment as mentioned in item (i) above, the management will fill up such vacancies also by direct recruitment. Selection of candidates for direct recruitment in Aided Higher Secondary schools will be done by a staff selection committee consisting of the Manager or his representative, the Principal of the school and a Government nominee from the panel of officers consisting of Deputy Director, Education, DEO of the area and DIET Principal of the district. The management can select a nominee from among the above officers. The above officers are permitted to attend the staff selection committee meeting without further sanction.

2. While making appointments the Manager will see that only part-time teachers are appointed when the periods to be taught are less than 15 in a week. This procedure will be followed in Government Schools also when direct recruitment is resorted to through Employment Exchange. But the teachers appointed from General Education Subordinate Service will be treated as appointment by promotion and they will be full-time teachers irrespective of the periods to be taught.

In the schools where the course of Humanities is sanctioned for the year 1998-99, the subject of Sociology will be offered as an optional subject in place of Geography.

(By order of the Governor) K. JAYAKUMAR SECRETARY TO GOVERNMENT

3. The aforesaid Government Order has stirred hornet's nest of litigative venture by unemployed persons aspiring for job, teachers and management trying to assert their exclusive rights and privileges. For the sake of convenience, the different Original Petitions can be classified into 12 categories. They are:

Category No. 1:--

Government School Teachers claiming 100% vacancies (with last year's list) have filed O.R Nos. 10373 of 1998, 10377 of 1998, 11263 of 1998, 11488 of

1998, 12136 of 1998, 12575 of 1998 and 11121 of 1998.

Category No.2:--

Government School High School Assistants not included in the last year's list and seeking fresh preparation of list on the basis of seniority as on June 1998 filed O.P.No.12841 of 1998.

Category No. 3:--

Surrendered Aided School High School Assistants now working in Government Schools seeking inclusion in the list by combining seniority in aided schools and government schools filed O.P. No. 1 1082 of 1998.

Category No.4:--

Government Primary Department Teachers in last year's list seeking appointment in preference to High School Assistants not included in last year's list filed O.P. No. 10874 of 1998.

Category No.5:--

Government High School Assistants seeking preparation and recasting of list by observing communal reservation and rotation for appointment from High School Assistants to Higher Secondary School Teachers filed two Original Petitions, namely, O.P. Nos. 10529 of 1998 and 11149 of 1998.

Category No.6:--

Private Aided School High School Assistants seeking 100% vacancies by seniority filed O.P. Nos. 10616 of 1998, 13305 of 1998, 6016 of 1998 and 6400 of 1998.

Category No.7:--

Private Aided School High School Assistants seeking only 25% vacancies and implementation of the G.O.(MS) dated 13-5-1998 strictly on the basis of seniority filed O.P. Nos. 13315 of 1998 and 14331 of 1998.

Category No. 8:--

Private Managers (non-minority) claiming right to make 100% appointments by direct recruitment filed O.P. No. 13839 of 1998.

Category No.9:--

Minority Managers seeking 100% appointment right and challenging prescription of selection committee etc. have filed O.P. Nos. 12830 of 1998, 14177 of 1998, 12855 of 1998, 14677 of 1998 and 14772 of 1998.

Category No. 10:--

Public spirited persons and parents alleging arbitrary selection by managers and also alleging non-observance of communal reservation in Aided Schools and for

framing Rules etc. filed O.P. No. 11457 of 1998.

Category No.11:--

Unemployed qualified persons seeking appointment for 100% vacancies by direct recruitment in both Government and Private Aided Schools filed O.P. No. 12832 of 1998.

Category No.12:--

M.Com candidates seeking exemption from B.Ed. for appointment as Higher Secondary School teachers in Commerce filed O.P. No. 11614 of 1998.

4. All the above Original Petitions came up before K.A. Abdul Gafoor, J. who, by his order dated 28-7-1998, referred the matter to a Division Bench for an authoritative pronouncement since the learned Judge has felt that the question referred has for fetching effect not only on the prospects of teachers as respectively contended by them, but also on the entire educational system in Kerala and on the fate of several thousands of students now admitted or aspiring for admission to the Higher Secondary course and also on the rights of the management. In addition, the managements of the various institutions also have put forward certain rights challenging the right of the Government to implement policy decisions taken by them. Accordingly, the matters were placed before us as per the directions of the Honourable the Chief Justice.

5. Before considering the cases category-wise a brief resume of the previous history of the case may be stated.

6. The education system in the traditional mode consisted of 10 years of school; a two-year course of Pre-degree and a three-year degree course. The pre-degree and degree courses were being administered by the Universities through affiliated colleges with the Universities conducting the examination. The National Educational Policy stipulates 10 + 2 structure for school education. The National System of Education envisages a common educational structure. The 10 + 2 + 3 structure has now been accepted in all parts of the country and efforts are being made to have the +2 stage accepted as a part of school education throughout the country. The +2 level is not by and large considered as part of the university education elsewhere in the country. The University Grants Commission has also been pressing the State of Kerala to delink the pre-degree courses from the University system since the rest of the states in the country have already switched over to the +2 system. This was felt necessary to improve the academic atmosphere of the colleges as well as to strengthen the education at the higher secondary stage. As a first step, even before the actual commencement of the delinking process, +2 course was introduced in some schools. Later, the government issued orders in 1997 sanctioning 102 government higher secondary schools as part of delinking pre-degree courses. Since the teachers had to be appointed in the schools as early as possible, government had authorised the Director of Higher Secondary Education to invite fresh applications from willing

and qualified hands for temporary appointment as Higher Secondary School Teachers and accordingly applications were invited from qualified Departmental High School Assistants who are in regular service as on 31-5-1997 and willing to be posted on such temporary basis. Later, it was ordered that in the absence of qualified High School Assistants, qualified Primary Departmental Teachers could also be considered. It is pointed out that the vast majority of the High Schools are in Malayalam medium and High School Assistants who teach in the High School classes will naturally find it difficult to handle the higher secondary classes in English. The Government thereafter decided that it would be conducive to have teachers in the +2 system directly recruited. It was in these background the Government had issued G.O.(MS) 162/98 dated 13-5-1998. It was also felt that experience in teaching at school level will not necessarily enable those teachers to fulfil their obligations at +2 level and that the promotional aspirations of school teachers cannot be given a weightage overlooking the educational rights of the students. However, government felt that qualified teachers have to be given a reasonable chance for advancement without sacrificing the efficiency of the school by providing 25% reservation of the posts in +2 courses, first for qualified high school teachers and in the absence of qualified high school assistants, to primary teachers. The decision regarding the sources appointment to a particular post and the respective quotas is purely within the domain of policy decision making. According to the government, no category has any legally vested right to be the sole claimant for recruitment to such posts. Since the Public Service Commission selection process may take some time and in view of the immediate necessity of providing teaching staff at higher secondary level, the vacancies in the direct recruitment quota are to be temporarily filled up through Employment Exchange hands under R.9(a)(i) of Part II of Kerala State & Subordinate Services Rules. For the purpose of appointing Rule 9(a)(i) hands as High School Assistants, Primary Department teachers, the Director of Public Instructions have already issued Circular No. A-1/40496/94 dated 27-5-1995 which provide for reasonable norms for selecting such provisional hands and that the government will be issuing necessary guidelines and norms for selection of Rule 9(a)(i) hands as Higher Secondary School teachers.

7. As far as the teaching staff in the Higher Secondary Schools are concerned, a Master's degree in the subject concerned with B.Ed. was prescribed as the minimum qualification for the time being till framing of Rules for the purpose of regular appointment. The teachers were to be selected on the basis of seniority and suitability from qualified government teachers. The teachers who were appointed to the Higher Secondary schools were appointed on full time basis without any specific scale of pay, but they were allowed to draw their existing salaries with a special pay of Rs. 250/- per mensem. It was specified in the Government Order of 1990 that no specific scale of pay will be prescribed for the Higher Secondary teachers till Rules for recruitment are framed. In 1991, the Government decided to open a few more Higher Secondary Schools in the Government sector and also for the first time decided to permit the opening of

Higher Secondary courses in the aided school sector as well. The appointment of teachers to Government Higher Secondary schools was to be made from the government school teachers. For the purpose of regulating the appointment of teachers to the private aided higher secondary schools, a selection committee which included a government nominee was constituted to select the teachers. The minimum qualification prescribed for higher secondary school teachers continues to be a IInd Class Master's degree in the subject concerned with B.Ed. The appointment of teachers made to the higher secondary courses in the private aided schools had to be got approved by the District Educational Officer having jurisdiction over the area and the Government had prescribed that the relevant form in the Kerala Education Rules with suitable modifications be used for the time being. It was made clear that filling up of posts of higher secondary teachers would be made on a permanent basis by regular appointees only after relevant rules were framed with the concurrence of the Public Service Commission prescribing the various parameters for the posts. There was some delay in delinking of the pre-degree courses due to opposition from various quarters. Therefore, it was being postponed with the result that the higher secondary teachers continued to be filled up by temporary appointment from existing High School Assistants and Primary Department teachers.

8. By Government Order No. GO(MS) 84/92/G.Edn. dated 7-4-1992, a specific scale of pay was sanctioned to the higher secondary school teachers. However, the scale of pay could not be implemented because the legal requirements for regular recruitment had to be completed and due to other aspects. Later, it was ordered as per G.O.(MS) 182/93/G.Edn. dated 5-11-1993 that fresh temporary appointments of higher secondary school teachers may be made in the scale of Rs. 1450-2825/-. However, such appointments were made provisionally and temporarily. Prior to the decision to implement the principle of state-wise seniority and selection, teachers in many districts had to face the spectre of supersession owing to non-uniform method of selection for appointment to the post of teachers of higher secondary course which had resulted in certain original petitions before this court. Government had obtained clarifications from this court to draw up state-wise seniority list of High School Assistants and Primary Department Teachers in government schools who are eligible for appointment as higher secondary school teachers and list had been drawn up. The list was to be valid for three years and the life of the list expired in the year 1997. During 1997-98, government finally decided to start the process of delinking the pre-degree courses and, with that in view, had promulgated the Pre-degree course (Abolition) Ordinance, 1997. Pursuant to the Ordinance, during the year 1997-98, about 40 pre-degree batches from various colleges under the different universities in the State were delinked. Also, new Higher Secondary Courses were started. During the academic year 1997-98 all the posts of higher secondary school teachers continued to be filled up temporarily from the existing qualified school teachers. The Pre-Degree Course (Abolition) Act, 1997 (Act 3 of 1988) was enacted. Thus, fairly large scale delinking of Pre-degree courses and

commencing of higher secondary courses resulted in the necessity to appoint sufficiently large number of higher secondary school teachers under various new courses. Based on the previous experience, it was decided by the government that from that year onwards only 25% of the posts in the higher secondary course will be filled up by appointing the existing teachers in the school system and the balance 75% is to be filled up by direct recruitment through the Public Service Commission. Since drawing up of the PSC rank list would take some time and new courses have to be commenced immediately, the Government decided that 75% direct recruitment quota will be filled up under R.9(a)(i) of the Kerala State and Subordinate Services Rules from among the qualified persons sponsored by the Employment Exchanges. Insofar as the appointments to the 75% vacancies earmarked for direct recruitment in the aided higher secondary schools are concerned, the same had been decided to be done by the management by constitution of a staff selection committee consisting of the Manager of his representative, principal of the school and a Government nominee from the panel of officers consisting of Deputy Director of Education, District Educational officer of the area and Principal of DIET of the district and the managements have been given freedom to select the nominee from among the government officers specified. The above said decision, as already noticed, saw light in G.O.(MS) 162/98 dated 13-5-1998.

9. We shall now consider the case put forward by the Original Petitioners and the resistance to the same by the Government of Kerala. We shall first consider the case put forward by the petitioners in Category No. 1 (Government School Teachers claiming 100% vacancies with last year's list).

10. Challenging the Government Order impugned, it is submitted by the petitioners in OP.10373 of 1998 that the restriction now made to limit 25% vacancies alone to qualified High School Assistants for which a list has already been published is arbitrary and contrary to the relevant provisions. There is no select list by the Public Service Commission as no recruitment Rules have been framed and no selection has been made. The proposal to select fresh recruits from Employment Exchanges and others as Guest Lecturers is also contrary to the notification dated 18-6-1997 and the norms already brought into force and governing the field. They submitted that the impugned Government order, as far as it concerns appointment of High School Assistants in Government Higher Secondary Schools, is arbitrary and illegal. According to them, the notification was brought out after a comprehensive selection based on seniority criteria and the selection was done after inviting fresh applications from among willing and qualified teachers in regular service as on 31-5-1997. It has been specified that the list is valid for a period of three years from the date of publication or till regular appointments as per Rules. Since no rules have been framed for regular appointments so far, the appointments can only be done by the method provided in the notification dated 18-6-1997 (Ext.P1 therein) or till Rules are framed. It is also submitted that the method now provided for in the impugned Government Order is arbitrary and illegal and the provision in respect of 75% vacancies in

government schools is also irrational and unsound. No reason is stated in the order to resort to appointment of Employment Exchange hands and Guest lecturers. Persons included in the existing list are experienced in teaching and have considerable length of service and by appointing Employment Exchange hands and Guest lecturers, the purpose of raising standards of education will be defeated. The rank list prepared is in force and appointments have been made already from the list according to the ranking. Therefore, it is evident that there is a clear and unequivocal promise intended to create legal relations to arise in future and the promise or representation has been acted upon and binding. Hence, the government is not justified in going back on the promise to make appointment as per the list published.

11. The Original Petitioners in the other connected cases have also raised similar grounds. It is submitted by the petitioners in O.P. 10377 of 1998 that since the earlier selection method is still continuing and that has not been withdrawn or cancelled by the impugned Government Order, two incongruous methods are prevalent for one cadre. Therefore, it is submitted that the new selection method is irrational, arbitrary and against the fundamental right of the petitioners under Arts. 14 and 16 of the Constitution of India.

12. Petitioners in OP 11263 of 1998 have submitted that the impugned Government Order is malafide and intended only to facilitate favouritism and nepotism by giving discretion for appointment from the Employment Exchanges. In the absence of Special Rules prescribing qualifications and method of appointment, regular appointments cannot be made. Framing of Special Rules has been conveniently put off till the entire delinking of Pre-degree course from colleges and universities is completed. Since the existing list is valid for three years from 1997, according to them, they are entitled for appointment from the list during its currency.

13. Petitioners in OP 11488 of 1998 have urged that they are having long years of teaching experience coupled with necessary qualifications to be appointed as Higher Secondary School teachers and if the impugned Government Order is given effect to, large number of experienced High School teachers will be denied of their legitimate right to get promotion as higher secondary school teachers. At the same time, persons having no experience as teachers and those who are having only academic qualifications will be appointed as higher secondary school teachers overlooking the service experience and better qualifications of the petitioners. It is also submitted that the impugned Government Order will lead to rampant corruption especially when appointments are made by the aided school managements.

14. Petitioners in O.P.12136 of 1998 has submitted that due to earlier selection method and preparation of ranked list petitioners have legitimately expected that they would get appointment as higher secondary school teachers during the current year for the vacancies arising during this year and that the impugned Government order has been issued which is adverse to their legitimate

expectation.

15. Petitioner in O.P. 12575 of 1998 has submitted that when the earlier selection method is still continuing and that has not been withdrawn or cancelled by the impugned Government Order, the new selection method is irrational, arbitrary and against the fundamental right of the petitioner under Arts. 14 and 16 of the Constitution of India.

16. Petitioners in OP 11121 of 1998 are also working as High School Assistants in different Government High Schools. They also challenge the impugned Government Order on various grounds. According to them, the existing valid panel for temporary appointments cannot be substituted by another mode of temporary appointments. Therefore, the impugned Government Order suggesting a particular mode of temporary appointment while the list is in force is absolutely illegal and is against the ratio of a number of decisions rendered by the Apex Court.

17. The contention of the petitioners in all the above Original Petitions is that the prescription of a IInd Class Master's Degree is bad and that a mere pass at the Post-graduate level with teaching experience should be deemed to be sufficient qualification for appointment as higher secondary school teachers. It is contended by them that from the list published during last year, a number of persons have already been appointed and during the current year, due to increased vacancies in the existing schools and also fresh vacancies arising in the newly granted schools persons from the list for the last year are entitled to be appointed. They argued that since last year's list is valid for three years or till regular appointments are made as per Rules, the said list can be given a go-bye only when one of the two contingencies mentioned in the notification of last year occurs. They contend that the prescriptions in the impugned Government are hit by the principles of Promissory Estoppel since the method of recruitment was prescribed in a particular mode. It is contended that by the fact of inviting applications and preparing of select list, there has been a clear and unequivocal promise by the Government to create legal relations in future and that promise or representation has been acted upon by the teachers and is binding upon the Government. Therefore, there is no justification in resiling from the methods adopted during the previous years insofar as the appointment of higher secondary school teachers is concerned. The doctrine of legitimate expectation has also been pressed into service by the petitioners on the contention that the new method prescribed in 1998 will adversely affect the prospects and promotional avenues of the existing teachers. They also contend that the post of High School Assistants is the next lower feeder category for promotion to the post of higher secondary school teachers and hence they are entitled as of right to be temporarily promoted as higher secondary school teachers under Rule 31 of the Kerala State and Subordinate Services Rules.

18. Category No.2:-- (Government School High School Assistants not included in the last year's list and seeking fresh preparation of list on the basis of seniority

as on June 1998).

Only one Original Petition (O.P.No.12841 of 1998) has been filed by a Government High School Assistant, who was not included in the last year's seniority list for appointment as higher secondary school teacher, seeking fresh preparation of a list on the basis of seniority as of June 1998 and claiming that the appointment to the post of higher secondary school teachers during this year must be made from that of fresh list. Petitioner in this case is presently working as High School Assistant in a Government High School. According to him, he acquired the qualification of M.A. degree in the examination held in October 1997 and by acquiring the said qualification, he has become eligible to be appointed as teacher in the higher secondary school. According to him, the attempt on the part of the government to fill up the vacancies is highly illegal and arbitrary and there is no justification on the part of the government to fill up the vacancies which arose in the year 1998 also from among the teachers who were found place in the list prepared pursuant to the notification dated 18-6-1997. He entered service as a High School Assistant on 1-10-1984 and that juniors to him, ie. teachers appointed in the year 1986 are included in the list prepared last year and they got promotion as higher secondary school teachers in 1997 itself. He would submit that the attempt on the part of the Director of Higher Secondary Education to fill up the posts of higher secondary school teachers from the list prepared last year, ie. before the date of occurrence of vacancies is arbitrary and illegal and, therefore, liable to be interfered with. It is the reasonable legitimate expectation of the petitioner that his name also will be considered for promotion to the post of higher secondary teacher and non-consideration of the same for the current year is against the theory of legitimate expectation.

19. The petitioner, on the basis of the above arguments, contends that the list prepared earlier would take away the right of the teachers who are seniors and who are qualified as on the date of occurrence of vacancies in July 1988. Petitioners herein has not challenged the Government Order dated 13-5-1998.

20. Category No.3. In this category, O.P.No.1 1082 of 1998 has been filed by the teachers working in an aided school which has been surrendered to the Government, claiming that they should also be included in the list of Government School teachers for appointment as Higher Secondary School Teachers. Petitioners contend that since their school had been surrendered to the Government, they should also be considered as Government School Teachers.

They point out that the school is generally considered as a Government school and, therefore, they should be treated on par with regular Government School Teachers and their non-inclusion in the list of Government School teachers prepared for the purpose of appointment as Higher Secondary School Teachers will destroy their chances of becoming Higher Secondary School Teachers for all time.

21. Category No.4:-- O.P. No. 10874 of 1998 has been filed by Government

Primary Departmental Teachers who were included in the list prepared earlier for appointment as Higher Secondary School Teachers. They challenge the impugned Government Order prescribing 25% and 75% of the vacancies of Higher Secondary School Teachers to be filled up by appointing qualified High School Assistants and Primary School Teachers, and by direct recruitment, and claim that since they had been included in the list during earlier years, they should be appointed to the posts arising pursuant to the sanction of new schools during the current year. Their case is that they are fully qualified to be appointed and have considerable experience as teachers in Government schools. According to them, the provision in the Government order limiting the opportunities for the petitioners and High School Assistants to 25% is highly arbitrary and unreasonable and is liable to be quashed. Their case is that there is no justification in appointing fresh hands overlooking the claim of the petitioners and that there is also no justification to depart from the practice which has been followed during the last year.

22. Category No.5-- The petitioners in category No. 1 is in conflict with category No. 5. In this category two original petitions have been filed by the petitioners who are High School Assistants in Government schools. They seek recasting of the list of candidates for appointment as Higher Secondary School Teachers by applying the rules relating to communal rotation and reservation from among the High School Assistants. According to them, the posts of Higher Secondary School Teachers are substantive in nature and appointments are in substantive capacity. Therefore, according to them, the method of appointment adopted to fill up such substantive posts on an ad hoc basis is arbitrary and violative of the Constitution of India. It is submitted that the posts of Higher Secondary School Teachers were being filled up until 1997 from the combined statewide eligibility list prepared after calling for applications from qualified and eligible candidates and after inviting objections to the provisional list. It is further submitted that the appointments to the vacancies of Higher Secondary School Teachers is recruitment by transfer to the service of Higher Secondary Schools and, therefore, filling up of 75% of the vacancies by nominees of the employment exchange while there is a valid select list infringes the vested rights of the candidates already included in the eligibility list. It is pointed out that any appointment to the cadre of Higher Secondary School teachers without observing the rules of reservation and communal rotation would amount to negation of the fundamental right conferred under Art. 16(4) of the Constitution of India and would be violative of Rules 14 and 17 of the Kerala State and Subordinate Services Rules as also Act 16 of 1995. They say that the State, as a model employer, should be fair in public employment and the continuance of the service conditions in a fluid state is contended to be arbitrary.

23. Category No.6. This category consists of four Original Petitions, viz. O.P. Nos. 6016, 6400, 10616 and 13305 of 1998. These Original Petitions have been filed by private aided school High School Assistants, who contends that all the vacancies of Higher Secondary School Teachers are to be filled up from among

the existing school teachers on the basis of their seniority. They seek filling up of 100% vacancies in aided schools by seniority. According to the petitioners, right from the time of introduction of Higher Secondary School course, the posts of Higher Secondary School teachers were being filled up from among qualified High School Assistants and only in the absence of qualified High School Assistants, other methods of recruitment were resorted to. It is submitted that filling up of 75% of vacancies by direct recruitment would adversely affect the promotional avenues of experienced High School Assistants and that the present method adopted by the Government would lead to qualified and experienced Higher School Assistants giving way to fresh hands and adversely affecting the institution as well as the students. The salary of all the teachers in Higher Secondary Schools are being paid by the Government. In the absence of any statutory rules regulating the conduct of the schools and the service conditions of the teachers, permission granted to the aided school Managers to fill up 75% of the vacancies according to their whims and fancies is against public interest, according to the petitioners. They have filed Ext.P8 a true copy of the Government order G.O.Ms. 1091 - Edn. dated 15-6-1978 issued by the Government of Tamil Nadu along with C.M.P. No. 26771 of 1998. In this case, several petitions were filed for impleading the petitioners therein as party respondents to the original petition. A counter affidavit has been filed by additional respondents 8 to 10. The 8th additional respondent is the Kerala School Managers' Association and the 9th respondent the Inter-church council for education. A counter affidavit has been filed by the Educational Agency under the Arch Diocese of Changanacherry. C.M.P. No. 25791 of 1998 was filed in O.P. No. 10616 of 1998 to raise Additional Grounds E to K. It is stated that the State of Kerala can issue the impugned Government Order only in accordance with the provisions of the Kerala Education Act and the Rules made thereunder. They have also referred to Sections 2(1), 3(1) and 3(5) of the Kerala Education Act in the additional grounds. In view of the above provisions it is submitted that the State can establish schools only subject to the provisions of the Act and the rules thereunder even in respect of the higher classes and in view of the above statutory provisions, the Government can establish Higher Secondary Schools only in accordance with the provisions of the Kerala Education Act and the Rules. A reference was also made to Secs. 9, 10, 11 and 12 of the Kerala Education Act. By virtue of Rule 43 Chap.XIV-A of the Kerala Education Rules, vacancies in any higher grade of pay shall be filled up by promotion of qualified hands in the lower grade according to seniority, if such hands are available. This is precisely the prayer of the petitioners in the Original Petition. They also referred to Note (1) to rule 43 mentioned above, which, according to the petitioners, is relevant. By virtue of Rule 2(3) of Chapter II, according to the petitioners, Higher Secondary Schools are also included in the schools for general education and therefore, the petitioners are entitled to be promoted as Higher Secondary School Teachers on the basis of their seniority, provided they satisfy the qualifications prescribed.

24. A counter affidavit has also been filed on behalf of the Provincial of the

Sacred Heart Provincial House of the C.M.I., Rajagiri, through their Corporate Manager. It is stated that standards XI and XII for the purpose of conducting Higher Secondary School course are not covered by schools for general education contemplated under Rule 2 of Chapter II of the Kerala Education Rules. The plus two course which is also called the Higher Secondary School Course, is not covered by Chapter II of the Kerala Education Rules, according to him. This respondent also does not agree with the procedure contemplated for the selection of teachers through a Selection Committee constituted by the Government. It is stated that the reservation of 25% vacancies to be filled up by qualified High School Assistants and Primary School Teachers is not legally sustainable so far as schools administered by religious minorities are concerned. The very same management has filed another Original Petition, O.P. No. 14677 of 1998 contending that reservation of 25% of the vacancies to be filled up by appointment from High School Assistants is not valid and also that the provision to fill up those posts through the Selection Committee is also not valid. The writ petitioners in O.P. No. 10616 of 1998 has filed a reply affidavit to the counter affidavit referred to above.

25. O.P. No. 13305 of 1998 has also been filed on the same lines. O.P. No. 6016 of 1998 is filed by one Saji Thomas and others stating that since the Special Rules relating to Higher Secondary School Service have not been framed by the Government, Exts.P1 to P7 orders filed along with the Original Petition should govern the field. The petitioners say that they are entitled to be considered for appointment as Higher Secondary School Teachers in private aided schools in the State of Kerala like the High School Assistants and Upper Primary School Assistants in the Government Schools.

26. The petitioners in O.P. No. 6400 of 1998 are High School Assistants in private aided High Schools, having post graduate degree in Mathematics and Malayalam respectively with B.Ed. They entered service in 1981, 1985 respectively and are continuing in the respective schools. They have also raised grounds similar to those in the other three writ petitions. According to them, by virtue of Exts.P2, P4 and P6, Higher Secondary School Teachers having the minimum qualification of second class in masters degree with B.Ed., conferred or recognised by the Universities in Kerala alone are eligible to be appointed as Principles of Higher Secondary Schools in respect of vacancies arising after the academic year 1990-91 and thereafter. They have sought for a declaration to the above effect and a mandamus compelling the respondents to implement the provisions contained in Exts. P2, P4 and P6 and to appoint Principals of Higher Secondary Schools only from among Higher Secondary School Teachers based on basic educational qualification of a second class in masters degree with B.Ed. conferred or recognised by the Universities in Kerala.

27. Category No.7: O.P. No. 13315 of 1998 has been filed by private aided school High School Assistants seeking to implement the Government Order dated 13-5-1998. The petitioners contend that on the basis of the impugned

Government Order they are eligible to be appointed as Higher Secondary School Teachers, but the managements of the schools in which they are working would not implement the Government Order. They, therefore, seek a writ of mandamus to ensure that the Government Order dated 13-5-1998 is implemented.

28. Category No.8 O.P. Nos. 14331 and 13839 of 1998 are the two writ petitions filed in this category. The petitioners in O.P. Nos. 13839 of 1998 have formed a registered association to represent all the individual private school managers throughout the State. It is submitted that the imposition of job reservation to the existing teachers is beyond the jurisdiction of the State Government. They have filed the above Writ Petitions to quash the impugned Government Order to the extent of reserving 25% of the vacancies of Higher Secondary School teachers for appointment from qualified High School Assistants and Primary School Teachers, since it will have the effect of violating the petitioners' fundamental rights.

29. O.P. No. 14331 of 1998 was filed by the manager B.J.S.M. Madathil Vocational Higher Secondary School, Thazhavannur, Kollam and the Managers of two nearby schools. The petitioners also seek to quash Ext.P3 Government Order to the extent to which it reserves 25% of the vacancies of Higher Secondary School Teachers for appointment from qualified High School Assistants and Primary School Teachers and a mandamus compelling the respondents to permit the petitioner to make direct recruitment to 100% vacancies of Higher Secondary School teachers in their schools. It is contended that the aided schools which were accorded sanction to conduct Higher Secondary School course during the previous years and those which have been sanctioned Higher Secondary School course now are being treated differently without any reasonable criteria for such classification. It is also contended that the very purpose of introducing Higher Secondary Course in the schools is the implementation of national policy of education and that the national policy of education is to introduce the national system for ensuring the minimum level of learning for each stage of education. The qualitative improvement of educational standard is the goal envisaged by the National Policy of Education. It is contended that the goal of National Policy of Education cannot be achieved by appointing High School Teachers who are inexperienced on handling the present syllabus as Higher Secondary Teachers. Invoking the aid of Art.41 and 51A of the Constitution it is contended that the State has a responsibility to ensure excellence in all spheres of individual and collective activities. It is also submitted that when the Pre-degree courses are delinked and the Higher Secondary courses are substituted, there is no justification in insisting the vacancies of Higher Secondary School Teachers to be filled by appointing existing High School Teachers. It is also submitted that the power of the State Government to make reservation in the matter of appointment is circumscribed by Art. 16 of the Constitution, which confers such power only in relation to job in Government institutions. Therefore, it is submitted that the Government has no power to impose reservation in private management schools fully owned by private individuals. It is argued that though

the private schools are aided by the State Government, the aided school managements have a right to administer their institutions and that making appointments forms part of administration of their institutions. It is also pointed out that the new syllabus for the plus two course is not really in continuation of the syllabus that is followed in standards 1 to 10. National Level pattern being followed in CBSE schools is stated to be followed in the plus two/Higher Secondary Course. Hence it is contended that the experience of the teachers does not merit any special consideration for appointment as Higher Secondary School Teachers. Mere possession of Post Graduate degree qualification and experience in teaching in high schools, it is contended, will not enable existing school teachers to handle new pattern of syllabus which is being followed in the Higher Secondary Course. It is, therefore, contended that aided school Managers should be given absolute freedom to fill up all the teaching posts, with more qualified persons from the open market. It is contended that the provision of job reservation in Higher Secondary Schools for High School teachers and Primary School Teachers is a malafide exercise of executive power of the Government and hence it is ultravires, illegal and arbitrary and the impugned Government Order will result in sub-classification among the aided school teachers into two groups since all aided schools in the State have not been allowed Higher Secondary Course. The said classification is stated to have the effect of nullifying Sections 10 and 11 of the Kerala Education Act and it is contended that unless the element of freedom and discretion is conferred in the private school managers, they will not be in a position to discharge their responsibilities under Arts. 14 and 41A of the Constitution of India.

30. Category No.9: In category No.8 non-minority community managers filed original petitions claiming right to make 100% appointments by direct recruitment, whereas in category No.9 the minority community managers have filed five Original Petitions seeking the right to make appointment to 100% of the vacancies and challenging the prescription of Selection Committee, etc. These Corporate Educational Agencies claim protection of Art.30(1) of the Constitution of India and contend that the prescriptions in the Government order dated 13-5-1998 infringe upon their right to administer their educational institutions guaranteed under the said article. They contend that while it may be permissible for the Government to make provisions reserving 25% of the vacancies of Higher Secondary School Teachers in Government Schools for qualified High School Assistants and Primary School Teachers in exercise of the powers under Art.16(1) of the Constitution, the Government cannot impose such restriction upon the institutions managed by a minority which is State aided. It is submitted that teachers in minority run State aided institutions are not officers under the State and, therefore, the Government lacks constitutional power to reserve 25% of the vacancies of Higher Secondary School teachers in any manner. The absence of constitutional power, according to them, renders the Government action a fraud on the constitutional power under Art.16(1) of the Constitution and hence, the reservation postulated by the Government is a colourable exercise of power and

ultra vires and void. It is contended that telling the minority management that it has no freedom to choose and appoint qualified teachers in the course run by it amounts to interference with the fundamental right of administration granted to minority management under the Constitution. These corporate educational agencies also reiterated the contentions of the Kerala Private School Managers Association pointing out that the appointment of school teachers to Higher Secondary course will adversely affect the quality of education since the existing teachers are not qualified or competent to handle NCERT syllabus which is to be followed in the Higher Secondary Course. It is submitted that such reservation has no nexus with the object sought to be achieved by the introduction of the Higher Secondary course, namely, achievement of excellence of education in a national level. The Corporate Managers seek a declaration that the Government Order dated 13-5-1998 is violative of the Constitution and hence void in so far as it seeks to reserve 25% of the vacancies of Higher Secondary School Teachers in minority institutions for qualified High School Assistants and Primary School Teachers and also for a mandamus directing the State to permit the institutions run by the minority to make appointments to 100% of the vacancies of Higher Secondary School Teachers by direct recruitment.

31. Mr. Binoy Thomas, in support of his contentions, cited the decisions reported in *The Ahmedabad St. Xavier's College Society and Another Vs. State of Gujarat and Another*, *State of Kerala v. Corporate Management of Schools of Arch Diocese of Changanacherry* (1970 KLT 232), *Rev. Father W. Proost and Others Vs. The State of Bihar and Others*, *D.A.V. College, Bhatinda, etc. Vs. The State of Punjab and Others*, *A. Thomas v. Deputy Inspector of Schools* (AIR 1976 Mad. 214), *Lily Kurian Vs. Sr. Lewina and Others*, *All Bihar Christian Schools Association and Another Vs. State of Bihar and Others*, *All Saints High School, Hyderabad and Others Vs. Government of Andhra Pradesh and Others*, *Monte Guirin Educational Society v. Union of India* (AIR 1980 Goa 1), *Virendra Nath Gupta and another Vs. Delhi Administration and others*, *State v. Jolly* (1992 (1) KLT 240 (FB), and *Joseph Kachappilly v. State of Kerala* (1997 (2) KLT 740) as also the judgment in W.A. No. 746 of 1998. Similar contentions have been raised in O.P. No. 14177 of 1998 and also in O.P. No. 12855 of 1998 filed by the Manager of M.S.M. Higher Secondary School, Kayamkulam. O.P. No. 14677 of 1998 was filed by the Corporate Manager of Sacred Heart Corporate Educational Agency of C.M.I. The Corporate Manager says that their commitment is to the parents who entrust their children with them believing that they run the institutions in the best way possible in the interest of the children and who believe that the children are safe in their hands. It is submitted that it is with this ulterior mission in mind they select teachers. The medium of instruction in their schools is English. Appointing/promoting the existing teachers without assessing their suitability will be against the interest of the student community, where the management aim at excellence in education. According to the petitioners, as far as minority institutions are concerned, they cannot be super imposed by a staff selection committee, especially where the management has no absolute majority

and that the selection of teachers is one of the cardinal rights protected under Art.30(1) of the Constitution and that cannot be infringed by executive orders like the present one. It is, therefore, submitted that the Government order impugned in these petitions, in so far as it imposes the condition on appointment, has to be struck down. Mr. George Varghese Kannanthanam, in support of the above contentions, cited the decisions reported in *Younus Kunju v. State of Kerala* (1988 (2) KLT 299) and *Joseph Kachappilly v. State of Kerala* (1997 (2) KLT 240 (FB)). Mr. T.R. Ravi, counsel for the petitioner in O.P. no. 14772 of 1998, after adopting the arguments of the other counsel in the above category cases, cited the decision reported in *State of Kerala v. Benedict Mar Gregorios* (1977 KLT 62 (FB) in support of his contention that the Government has no power to constitute a screening committee.

32. Category No.10: O.P. No. 11457 of 1998 was filed by public spirited persons and parents alleging that private school managements make arbitrary selection to the posts teachers, that they had not observed the rules of reservation and communal rotation in aided schools and that action must be taken by framing rules to ensure that avoidance of rules of reservation and communal rotation are stopped. They also pray that pre-degree course must be allowed to continue during the current year. It is contended that the entire exercise of the State of sanctioning Higher Secondary courses is vitiated by non-application of mind. It is pointed out that the delinking of Pre-degree course without framing of proper rules is a negation of the right to education flowing directly from right to life. The sanctioning of Higher Secondary Course in schools without prescribing any regulation for appointment of staff is stated to point out the non-application of the mind by the Government. It is contended that since the academic year has already commenced, pre-degree courses in colleges already existing must be allowed to continue at least for the year 1998-99. On the basis of these contention they seek a writ of mandamus directing the Government to open up admission for pre-degree courses in all colleges where course existed previously for the academic year 1998-99 also; and a direction to the Government to frame rules and regulations governing the appointment of staff, selection of students, etc. for higher secondary course before commencing the said course.

33. Category No.11: O.P. No. 12832 of 1998 was argued by Mr. P.G. Chacko. That petition was filed by a number of persons claiming themselves to be post graduate with high marks and B.Ed., seeking a declaration that the Government order dated 13-5-1998 is bad in law and violative of the Constitution in so far as it reserves 25% of the vacancies in the post of higher secondary school teachers in aided schools and Government schools in favour of existing teachers, and also for a direction to the respondents to follow direct recruitment method to 100% vacancies to the post of teachers in Government Higher Secondary Schools and to permit aided schools, both minority and non-minority, to resort to open recruitment to 100% vacancies in the post of higher secondary school teachers. The contentions in this Original Petition are more less in line with the contentions raised by private school management claiming minority status.

34. Category No.12: O.P. No. 11614 of 1998 was filed by three persons holding post graduate degree in commerce, namely M.Com seeking a mandamus directing the Director of Higher Secondary Education to comply with circular issued by the Government exempting persons with M.Com. degree from passing B.Ed. for appointment to post of Higher Secondary School Teachers (Commerce). They contend that no B.Ed. course is offered for M.Com. holders in many of the Universities. It is pointed out that all the schools where higher secondary courses are started have arts and commerce groups. It is contended that the number of persons with B.Ed. among commerce graduates are very few compared to the number of posts of Higher secondary school teachers available, and the students who join higher secondary course in commerce group faces a situation where they do not have teachers. Therefore, it is contended that in the interest of the students and the institution, B.Ed. qualification should be dispensed with in the case of post graduates in commerce.

35. The petitioners in O.P.Nos. 12575, 10377 and 10373 of 1998 submitted through their counsel M/s. D. Somasundaram, K. Radhakrishnan and T.R. Ramachandran Nair that the petitioners are experienced and qualified high school teachers who were admitted in Government service through a tough process of selection at the hands of the Public Service Commission after a written test and interview. According to them, clauses 1 and 2 of paragraph 2 of the impugned order is not founded on any intelligible differentia, and that the impugned order, to the extent it is challenged, is bad in law since it is irrational due to the infraction of Wednesbury Principle of unreasonableness, disproportionate, unfair and vitiated for want of jurisdiction in view of the statutory bar contained in sub-section 2 of Sec.3 of the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959. The impugned order does not contain any reason to justify the drift in stand. The legitimate expectation, the express promise given by the public authority and the existence of regular paractice followed from 1990 onwards cannot be displaced through the impugned order. The statutory right of the petitioners to get promotion as contained in Rule 31(a)(i) of the Kerala State and Subordinate Services Rules cannot be displaced through an executive order. There are no guidelines for the process of selection contemplated through employment exchange. Unbridled and uncanalised power conferred in the said process vitiates the same and hence the impugned order, according to counsel, is liable to be quashed to the extent challenged.

36. A detailed counter affidavit was filed in OP 10373 of 1988 defending the Government Order dated 13-5-1998. The principal contentions are:

(a) No teacher in the existing school system, who is appointed as per the provisions of the Kerala Education Rules, has got any implicit right of appointment as higher secondary school teacher.

(b) The content and the extent of higher secondary syllabus in different subjects is so vast that fresh postgraduates with B.Ed. are admittedly better equipped to handle these classes. It is submitted that the level of higher secondary syllabus

based on NCERT syllabus is much higher than even the Pre-degree syllabus and the medium of instruction in higher secondary is English. The vast majority of the High Schools are in Malayalam medium and High School Assistants who teach in the High School classes will naturally find it difficult to handle the higher secondary classes in English. Experience in teaching at school level will not necessarily enable those teachers to fulfil their obligations at Plus Two level. The promotional aspirations of the school teachers cannot be given a weightage overlooking the educational rights of the students. However, in fairness, qualified teachers have to be given reasonable chance for advancement without sacrificing the efficiency of the school and this is adequately achieved by providing 25% reservation of the posts in Plus Two courses, first to qualified High School teachers and in the absence of qualified High School Assistants, to primary teachers.

(c) The decision regarding the sources of appointment to a particular post and the respective quota is purely within the domain of policy decision making and no category has any legally vested right to be the sole claimant for recruitment to such posts.

(d) The policy decision to prescribe the sources of appointment and the respective quota is based on relevant and rational factors. There is no illegality impropriety or irrationality in the decision taken as per the impugned Government Order.

(e) The decision taken as per the notification dated 18-6-1997 was taken only in view of the then prevailing situation that the teachers had to be appointed in the schools as early as possible and at a time when the Pre-degree delinking had not been effectively commenced.

(f) The government's conscious decision not to make appointments by way of promotion in view of the contemplated amendment of the Rules cannot be considered as arbitrary and illegal and that the candidates like the petitioners have no legally vested right to demand appointment for all or any of the vacancies.

(g) The State Government has the executive power in respect of Entry 41, List 2, Schedule 7 of the Constitution and there is nothing in terms of Art.309 of the Constitution which abridges the power of the executive to act under Art. 162 of the Constitution without law.

(h) It is not obligatory to make rules for appointment etc. before a service can be constituted or a post created or filled up and the government in exercise of the executive power can make appointments in the absence of rules.

(i) Government has now decided as per the impugned Government Order that 75% of the quota for direct recruitment will be filled up through the Public Service Commission and that the government will take expeditious steps to elicit the considered views of the Kerala Public Service Commission regarding

qualification and method of appointment for the post of higher secondary school teachers in government schools and after completing the above process, the government will be issuing a consolidated government order. It is submitted that thereafter the government and the directorate concerned will be taking expeditious steps to assess the posts in the district recruitment quota and to report the same to the Public Service Commission for sanction and regular appointment as early as possible.

(j) The Public Service Commission selection process may take sometime and in view of the immediate necessity of providing teaching staff at higher secondary level, the vacancies in the direct recruitment quota are to be temporarily filled up through Employment Exchange hands under R.9(a)(i) of K.S. & S.S.R. It is submitted that the government will be issuing necessary guidelines and norms for the selection of Rule 9(a)(i) hands as the higher secondary school teachers and that there are sufficient safeguards inbuilt in Rule 9(a)(i) regarding the continuance of provisional hands. Since classes at Plus Two level had to be commenced immediately, it has been decided that temporarily the direct recruitment quota is to be filled up by Rule 9(a)(i) hands. This is because the regular recruitment through Public Service Commission will take sometime.

37. The Secretary to Government, General Education Department filed an additional affidavit on behalf of the State of Kerala. In the additional counter, it is submitted that the provisions contained in the Kerala Education Rules are not applicable to the higher secondary courses and as per the definition in Rule 2(4) of Chapter I, KER, the "Director" means the Director of Public Instruction or such other officer or officers who may be appointed from time to time by the Government to exercise all or any of the powers of the Director of Public Instruction. The Director of Higher Secondary Education is not Director of Public Instruction as defined in the KER and the government has separately appointed the Director of Higher Secondary Education. Rule 2(5) of Chapter I defines "Educational Officer" in respect of KER as the District Educational Officer or the Assistant Educational Officer. The Educational Officer within the meaning of the KER is not the Educational Officer for the Higher Secondary Education Directorate. At the initial stage of the introduction of plus two system, it was ordered as a provisional measure for the sake of administrative convenience, certain functions have been entrusted with the District Educational Officer concerned as a stop gap arrangement. This was done at a time when the system was in its infancy stage. It is further stated in the additional counter as follows:

As the General Education Department in Government was the administrative department in respect of both schools under KER as well as for the newly introduced Plus 2 system, it was felt more expedient and convenient from the point of view of administration that the above work may be carried out through the District Educational Officer. It was on this basis that as per GO(Rt) 631/98/GE dated 13-2-1998, the Dy. Directors under the control of the Director of Public Instructions were asked to verify the facilities available in the applicant schools

for Plus 2 courses. Later, the above responsibility of approval of appointments of the employees in aided Higher Secondary Schools have been taken away from the District Education Officer and is now vested with the Director of Higher Secondary Education. The District or Sub District as defined in the KER has no relevance to the Higher Secondary system and the State as a whole is a single unit as far as the Higher Secondary Education Directorate, Chapter 5 of KER has no relation to the opening and recognition of Higher Secondary Schools. Plus 2 courses are sanctioned by the Government in executive orders based on the reports for the need and the facilities available in the existing High Schools. On the basis of the statutory stipulations in Chapter V of KER, areas for opening of new schools or upgradation of the existing schools under KER shall be based on Rule 2 Chapter V of KER. In the composite unit of the erstwhile Higher Secondary Course mentioned in Rule 2(3) and 2(4) of Chapter II of KER admission of the pupils to the 11th standard who successfully completed the 10th class was automatic, whereas in the Plus 2 system, Higher Secondary course, admission to standard XI is based on a selection process and also after observing the community reservation principles.

Paragraphs 7 and 8 may also be usefully reproduced for the present purpose:

7. In aided schools coming under the purview of KERs appointment of teachers are made by the managers directly in the manner prescribed in Chapter XIV-A or KER from among the persons having qualifications prescribed in Chapter XXXI of KER. In aided Higher Secondary Schools appointment of teachers are made by the managers from the select list as mentioned in para.2(J)(iii) of G.O.(MS) 162/91/GE dated 1-10-1991.

8. It is thus submitted that the Higher Secondary School system is totally outside the scope and applicability of KER. The argument that Chapter XIV-A of KER is applicable has no merit and the school teachers in aided schools cannot claim the benefit of Rule 43 Chapter XIA-A for the purpose of appointment as Higher Secondary School Teachers. It is also submitted that Chapter XIV-A KER is not at all applicable to the High School Assistants and primary teachers of Government Schools and they cannot seek any benefit under Chapter XIV-A. The qualifications, method of recruitment, promotion prospects etc. for teachers in Government School are regulated by relevant executive orders.

38. We have already noticed the contentions that have been raised on behalf of the aided private school teachers by relying upon the provisions of the KER. We have also noticed the contentions raised by different category of petitioners for and against the impugned Government order.

39. We have heard arguments of M/s. K. Jaju Babu, G.S. Raghunath, K. Radhakrishnan, D. Somasundaram, P.V. Mohanan, M. Sasindran, Binoy Thomas, George Varghese Kannanthanam, Kurian George Kannanthanam, P.G. Chacko, T.A. Ramadas, M. Vijayakumar, T.R. Ravi, Mrs. V.P. Seemanthini and Mr. M.K. Damodaran, learned Advocate General ably instructed by Mr. Alexander Thomas,

Senior Government Pleader. Elaborate arguments were advanced by the respective counsel in support of their respective contentions. We have been taken through the entire pleadings, counter affidavit and additional affidavit of the State, reply affidavit filed by some of the parties, various Government orders issued by the Government of Kerala particularly the impugned Government Order and the various decisions cited by both sides. We have given our anxious consideration and carefully considered the respective submissions. We have already extracted the submissions made by different counsel in respect of their cases and the stand taken by the government in passing the impugned Government Order. Our attention was also drawn to the provisions of the Kerala Education Act and Rules and particularly Rule 43 of Chapter XIV-A. Our attention was also drawn to the provisions of the Employment Exchanges Compulsory Notification of Vacancies Rules, 1959. M/s. Binoy Thomas, George Varghese Kannanthanam and Kurian George Kannanthanam, after referring to certain Supreme Court decisions, submitted that no reservation in any form can be made in respect of the minority institutions and that the government can only prescribe qualifications, but cannot impose any kind of restrictions. They submitted that 25% reservation cannot be made applicable to minority institutions. They also challenged the constitution of selection committee which replaced the management. They cited various decisions in support of their plea. Mr. T.R. Ravi submitted that government has no power to constitute a screening committee for a minority institution which is prohibited under Art.30 of the Constitution of India. Mr. M.K. Damodaran, learned Advocate General, after referring to the various provisions of the Kerala Education Rules, submitted that the High School service is different from Plus Two service and that the teachers are not having substantive rights for appointment. He also submitted that mere inclusion of the names in the list of some teachers will not confer a right on them to get appointed.

40. The following are the gist of the submissions made by various petitioners:

- (1) Government school teachers claimed that they have the right to be appointed as higher secondary school teachers as against all the vacancies of higher secondary school teachers. They questioned the prescription of quota for government school teachers and direct recruitment.
- (2) Private aided school teachers contended that they have the right to be appointed as higher secondary school teachers in aided private higher secondary schools. Some petitioners questioned the prescription of quota and constitution of selection committee for appointment of higher secondary school teachers from among existing aided school teachers.
- (3) The minority managements submitted that prescription of quota and constitution of selection committee for appointment of higher secondary school teachers from among the existing teachers are violative of Art.30(1) of the Constitution of India insofar as it is made applicable to educational institutions managed by the minority institutions.

41. On the above pleadings and arguments, the following questions arise for decision in these cases:

(1) Had the Government School teachers in service any right to be appointed as Higher Secondary School teachers as against all vacancies of higher secondary school teachers?

(2) Is the prescription of quota at 75% for government school teachers and direct recruitment valid?

(3) Whether the principle of reservation and communal rotation are applicable for appointment of higher secondary school teachers from among existing qualified school teachers?

(4) Whether the Higher Secondary Schools established under the new system are governed by the Kerala Education Rules?

(5) Whether the private aided school teachers have any right to be appointed as higher secondary school teachers in aided private higher secondary school?

(6) Is the prescription of quota and selection committee for appointment of higher secondary school teachers from among existing aided school teachers valid?

(7) Whether the Schools run by the minority institutions are entitled to protection afforded by Art.30(1) of the Constitution and whether the prescription of quota and selection committee for appointment of higher secondary school teachers are violative of the said Article insofar as it is made applicable to educational institutions managed by the minorities?

42. Question No.1:-- Learned Advocate General submitted that when the higher secondary schools were started, the vacancies were being filled up by appointing government school teachers on a provisional basis as a temporary measure. Such appointments were being made on the basis of the executive orders issued by the government from time to time. The executive orders do not confer any permanent right upon the government school teachers. According to learned Advocate General, the government school teachers have no subsisting right to claim appointment as higher secondary school teachers. Government school teachers in service submit that they have the right to be appointed as against all the vacancies. They also say that inclusion of their names in the last year's list confers on them the right to be appointed.

43. We are unable to appreciate the above contention. We are of the view that inclusion in the list does not confer any right on those teachers. Our attention was drawn to the decision of the Supreme Court reported in *Shankarsan Dash Vs. Union of India*, where in the Supreme Court has held that mere inclusion in the list does not confer any right or claim of appointment. This court also in *Vakkom Vijayan v. Chief Justice (1994 (1) KLT 280)* held that mere inclusion in a list shall not confer any claim for appointment. In *Mohammed Nazim v. State of*

Kerala (1993 (2) KLT 721) this court held that only right vested in those included in the select list is to be considered for selection in accordance with the Rules as they exist on the date of advertisement. But, that right can also be deprived even by retrospective amendment of the recruitment rules. The Supreme Court in *State of Bihar and Others Vs. Secretariat Assistant Successful Examinees Union 1986 and Others*, also held that a person who is selected does not on account of being in the panel alone acquire any indefeasible right of appointment. Empanelment is at the best a condition of eligibility for the purposes of appointment and that by itself does not amount to selection and that will not create a vested right to be appointed. Few other decisions cited by the learned Advocate General are also to the same effect.

44. We are, therefore, of the view that inclusion of names in the last year's list does not confer on the government teachers any right to be appointed and that the government always has powers to issue fresh executive orders superseding the earlier ones and to take fresh policy decisions as to the mode of appointment to the post of higher secondary school teachers.

45. It is also settled by the law laid down by the Supreme Court that the right of the State to change its policy from time to time in changing circumstances and that the court cannot be asked to test the benefit and defect of the policy or to test the utility. It has been clearly explained in the counter affidavit about the various considerations weighed with the government in taking the policy decision envisaged by the Government Order dated 13-5-1998. It is also explained that the post of High School Assistants and Primary Department teachers are in non-gazetted rank in General Education Subordinate Service whereas the post of higher secondary school teachers is in the gazetted rank in the service as prescribed in G.O.(MS) 182/93/G.Edn dated 5-11-1993. At the time of hearing, a statement has also been filed on behalf of the State on 6-8-1998 clarifying the word "promotion" occurring in G.O.(MS) 182/93 dated 5-11-1993 and GO (MS) 162/98 dated 13-5-1998 relating to appointment of higher secondary school teachers shall be construed by the government as "transfer". The appointment to the post of higher secondary school teachers is thus an appointment by transfer on temporary basis made under Rule 9(a)(i) of the KS & SSR. It is to be noted that the government teachers have never been prescribed as the feeder category for the post of higher secondary school teachers. Thus, the appointment to the post of higher secondary teachers is only an appointment by transfer and there is no promotion involved when the government school teachers are appointed as higher secondary school teachers.

46. Rule 31 of Part II, Kerala State and Subordinate Services Rules provides for temporary promotion in cases of emergency, a vacancy which has arisen can be filled up immediately in public interest in a post borne on the cadre of a higher category in service or class by promotion from a lower category and if there would be undue delay in making such promotion, the appointing authority may promote a person otherwise than in accordance with the rules temporarily. This

rule was invoked by the teachers to claim appointment to the post of higher secondary school teachers as if the said appointments were by promotion. We are unable to agree. Since there is no promotion involved, Rule 31 of the KS & SSR under which temporary promotion alone are made to a higher category in a service is not applicable to the cases on hand. We are, therefore, of the opinion that the Government school teachers in service do not have any right whatsoever to be appointed as higher secondary school teachers much less any right to claim appointment to all vacancies.

47. Question No.2: This question relates to the prescription of quota for government school teachers and direct recruitment. Petitioners have questioned the prescription as invalid. The mode of recruitment and category from which recruitment to a service should be made are all matters which are exclusively within the purview of the executive policy and filling up of posts is a matter of administrative exigency and necessity. *State of Andhra Pradesh and Another Vs. V. Sadanandam and Others*, was relied on by the government. In the above case, the mode of recruitment and the category from which the recruitment to a service should be made were questioned. The Supreme Court held that the mode of recruitment and the category from which the recruitment to a service should be made are all matters which are exclusively within the domain of the executive and it is not for judicial bodies to sit in judgment over the wisdom of the executive in choosing the mode or recruitment or the categories from which the recruitment should be made as they are matters of policy decision falling exclusively within the purview of the executive. The question of filling up of posts by persons belonging to other local categories or zones is a matter of administrative necessity and exigency. When the rule provides for such transfers being effect and when transfers are not assailed on the ground of arbitrariness or discrimination, the policy of transfer adopted by the government cannot be struck down. It is for the government to fill up the posts of teachers in the government higher secondary schools and it had to ensure that various interests and objectives had to be considered and had to reflect in the government policy. As already pointed out in answer to question No. 1, the teachers in the existing school system do not have any implicit right of appointment as higher secondary school teachers. The content and course of the higher secondary syllabus in different subjects are so vast. The necessity of injecting fresh blood into teaching system also could not be ignored. It is stated that the new higher secondary syllabus is higher than the pre-degree syllabus and medium of instruction is in English. As a matter of fact, vast majority of the High Schools are in Malayalam medium and High School Assistants teaching in High School classes will naturally find it difficult to handle higher secondary classes in English Medium. Therefore, learned Advocate General submitted that the government felt that it would only be fair to set apart 25% posts for the existing qualified teachers from the present school system and also decided that 75% of the teaching posts would be filled up by direct recruitment. It is submitted by learned Advocate General that the decision of the government has been taken after weighing all the pros and cons

of all the aspects of the problem and the percentages have been fixed with due consideration of the academic and administrative realities and expectations. The Supreme Court held that the prescription of quota is a matter of policy and the said policy in the instant case has been arrived at after considering various aspects of the problem as argued by the learned Advocate General. We are, therefore, of the view that the challenge to the prescription of quota has to fail.

48. Question No.3:- Some petitioners argued that the new selection method is arbitrary, irrational and against the fundamental rights of the petitioners under Arts.14 & 16 of the Constitution of India. As seen earlier, in category No.5 cases, the petitioners seek recasting of the list of candidates for appointment as higher secondary school teachers by applying the Rules relating to communal rotation and reservation from among the High School Assistants. Therefore, they contend that the method of appointment now adopted to fill up the substantive posts on an adhoc basis is arbitrary and violative of the provisions contained in the Constitution and that any appointment to the cadre of higher secondary school teachers without observing the rules of reservation and communal rotation would amount to negation of the fundamental right conferred under Art. 16(4) of the Constitution.

49. Art. 16 provides for equality of opportunity in matters of public employment. Articles 16(1) and 16(2) guarantee equality of opportunity to all citizens in the matter of appointment to any office or of any other employment under the State. However, Arts. 16(3) and 16(4) lay down several exceptions to the above rule of equal opportunity. Under Art. 16(4), the State is not prevented from making any provisions for reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State is not adequately represented in the services under the State. Clause (4) is not in the nature of an exception to clauses (1) and (2), but an instance of classification permitted by clause (1). Thus, in the interest of backward class of citizens, the State cannot reserve all the appointments under the State or even a majority of them. In other words, the doctrine of equality of opportunity shall be reconciled in favour of backward classes in such a way that the latter while serving the cause of backward classes shall not unreasonably encroach upon the field of equality. Thus, it is seen that Art. 16(4), which is an enabling provision, confers discretionary powers on the State to make reservation of appointments in favour of the backward classes of citizens which, in the opinion of the State, are not adequately represented in the service. In this context, we may usefully refer to the decision of the Supreme Court in *Indira Sahni v. Union of India* ((1992) Supp (3) SCC 254) wherein the Supreme Court held that Art. 16(4) does not permit provision for reservation in the matter of promotion. Subsequent to the said decision, the Constitution has been amended and Art. 16(4-A) was inserted enabling the government to provide for reservation in the matter of promotion. Art. 16(4-A) was introduced by the Constitution (Seventy-seventh Amendment) Act, 1995 dated 17-6-1995. The said provision enables the State Government from making provision for reservation in matters of promotion to any class or classes of posts in the

services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

50. The service under the State of Kerala is governed by Rule 14 part II of the Kerala State and Subordinate Services Rules insofar as it relates to "reservation of appointments". The said rule provides that where special rules lay down that the principle of reservation of appointments shall apply to any service, class or category; or where in the case of any service, class or category for which no special rules have been issued, the Government have by notification in the Gazette declared that the principle of reservation of appointments shall apply to such service, class or category, appointments by direct recruitment to such service, class or category shall be made on the basis of the prescriptions in the said Rule. Thus, Rule 14 providing for reservation of appointments is for direct recruitment to any service, class or category. Sub-clauses (a) and (b) and the proviso to the said Rule provide for the procedure for appointments by reservation. Rule 15 which was relied on by the parties provides that if a suitable candidate is not available for selection from any particular community or group of communities specified in the annexure, the said community or group shall be passed over and the post shall be filled up by a suitable candidate from the community or group of communities immediately next to the passed over community or group in the said annexure in the order of rotation and if no suitable candidate is available for selection in any of the above communities or group of communities, selection shall be made from the open competition candidates. Rule 16 provides for sub-rotation among major groups of other backward classes. Rule 17 provides for the grouping of other backward classes for the above purpose as indicated in the said Rule. Therefore, the application of Rules 14 to 17 of the KS & SSR can be only in matters relating to direct recruitment to service, class or category. The government also have not so far issued any notification nor is there any rule, regulations or executive orders prescribing that the principles of reservation shall be followed for appointments to any service, class or category through methods other than direct recruitment. As rightly pointed out by learned Advocate General that where the appointment to the post of higher secondary school teachers is made by transfer, the principle of reservation cannot be applied. As far as the appointments to private aided higher secondary schools are concerned, it is stated that there is no rule or notification prescribing that the principle of reservation shall be applied while making appointments to the posts in such private aided schools. Therefore, for appointments of higher secondary school teachers from among the existing school teachers, the principles of reservation and communal reservation cannot be applied.

51. Question No.4:-- The non-applicability of the Kerala Education Rules to the Higher Secondary Schools established under the new 10+2+3 system has been clearly explained in the additional counter affidavit filed on 1-8-1998. Some of the relevant paragraphs in the additional counter affidavit have also been

extracted in the earlier parts of this judgment. It is also seen that the State as a whole is a single unit under the Higher Secondary Education Directorate. Chapter V of the Kerala Education Rules has no application to the opening and recognition of Higher Secondary Schools, since the plus two course is sanctioned by the Government under executive orders based on the report on the need and the facilities available in the existing High Schools. The method of appointment of the school teachers under the purview of the Kerala Education Rules and the Higher Secondary School Teachers are distinct and different. There is no statutory provision or executive order treating High School teachers or Primary School teachers as in the feeder category for promotion as Higher Secondary School Teachers. In aided schools coming under the purview of the Kerala Education Rules, appointment of teachers are made by the Managers directly in the manner prescribed in Chapter 14A of the Kerala Education Rules from among persons having the qualifications prescribed under Chapter XXXI of the Kerala Education Rules. In aided Higher Secondary Schools appointment of teachers are made by the Managers from the select list as mentioned in para.2(j)(iii) of the Government order, G.O.(MS) 162/91/GE dated 1-10-1991. Under clause 2(J)(iii), a selection committee for selecting Higher School Teachers in aided schools had been constituted vide Government Order dated 27-2-1991 and circular dated 13-3-1991. In such committee in respect of aided schools the Manager will include the District Educational Officer concerned, or a person not below the rank of a Gazetted Officer nominated by the District Educational Officer. However, in respect of minority schools, a Government Officer not below the rank of a Gazetted Officer in the Education Department in the Revenue District will be nominated by the Manager of the Educational Agency. In respect of unaided schools, there is no compulsion on the Manager to include a Departmental nominee. Thus, it is seen that the Higher Secondary School system is totally outside the scope and applicability of the Kerala Education Rules and that the argument that Chapter XIV-A of the Kerala Education Rules is applicable has no merit. Aided school teachers cannot claim the benefit of Rule 43 Chapter XIV-A of the Kerala Education Rules for the purpose of appointment as Higher Secondary School Teachers. In the above circumstances, the argument advanced on behalf of Government that High School Assistants and Primary Departmental Teachers who are appointed and governed by the Kerala Education Rules cannot prefer any claim for appointment as Higher Secondary Teachers on the basis of an archaic provision in the Kerala Education Rules which has no bearing on the present plus two system merit acceptance.

52. The above contention is endorsed fully by certain minority institutions/petitioners, on the stand taken by the government in its additional counter affidavit. It is stated that none of the rules of the present Kerala Education Rules applies to plus two system and that fresh rules have to be made under the Kerala Education Act till such rules are made, the Government orders issued from 1990 till date covering almost all aspects of plus two system under Art. 162 of the Constitution of India read with Section 3 of the Act hold the field. The present

Kerala Education Rules only contemplates only two grades, namely primary and secondary and the present rules empowers the Government to upgrade Lower Primary Schools to Upper Primary Schools and Upper Primary Schools to High Schools only. Power to upgrade High Schools to Higher Secondary Schools is not contemplated by the present rules. In other words, higher secondary schools do not come within the contemplation of the existing rules. Separate rules prescribing service conditions, etc. of newly appointed teachers to higher secondary schools are yet to be framed. Rule 43 has no application as far as higher secondary schools are yet to be framed. Rule 43 has no application as far as higher secondary school teachers are concerned, which has application only with respect to the two grades created by the existing Kerala Education Rules, viz. primary and secondary. The plus two or higher secondary is a separate stage. After the 10th standard, the students leave the school. Admission is not automatic to standards XI and XII. Hence, as pointed out by the learned counsel, no right emerges to any of the existing teachers to be appointed as Higher Secondary Teachers on the basis of any of the provisions of the existing Kerala Education Rules. Executive orders govern the field.

53. Question No.5: In considering question No. 4 we have held that Kerala Education Rules do not apply to Higher Secondary Schools and, therefore, the claim made by the private aided school teachers for appointment in the Higher Secondary Schools as Higher Secondary Teachers on the basis of Rule 43 Chapter XIV-A of the Kerala Education Rules is not tenable. Even assuming that Rule 43 Chapter XIV-A is applicable, the said rule envisages only promotion from the lower grade to higher grade in the same service. According to the learned Advocate General, teachers in the private aided schools belong to a different service from the teachers of private aided Higher Secondary Schools. Since there would be change of service for a private aided school teacher if he is appointed to private aided Higher Secondary School, such appointment cannot be characterised as promotion. It is not in dispute that the appointment of private aided school teachers as higher secondary teachers during the previous years were being made under executive instructions issued by the Government. As already explained, the Government issued fresh instructions this year after considering the various aspects involved in the matter. Teachers in private aided schools who were being appointed in earlier years cannot claim that the policy adopted in the earlier years should be continued and that they should be continued to be appointed to the Higher Secondary Schools. Therefore, private aided school teachers do not have any right, whatsoever, to get appointed as higher secondary teachers in private aided higher secondary schools.

54. Question No.6:--As already seen, the decision to prescribe quota as regards the sources of appointment of higher secondary school teachers was taken as a policy decision and as per the Government stand, the policy was adopted after considering all the parameters involved. Under Entry 25, List III of the VII Schedule of the Constitution of India, the State has legislative competence to make law regulating education including technical education, medical education,

and universities. With regard to Higher Secondary education no statute has been promulgated yet. Therefore, the State is exercising its powers by issue of executive orders by virtue of the power under Art. 162 of the Constitution of India. Art.162 of the Constitution deals with the extent of executive powers of the State. This Article says that the executive power of a State is co-extensive with its legislative power. The proviso relates to the concurrent sphere where both the union and the State have power to make laws, providing the stare legislation to give way to the Union legislation in case of repugnancy.

55. The right of educational agencies to administer educational institutions is not an absolute right and it can be subjected to regulations. What has been done by the impugned Government order, according to the Advocate General, is only to prescribe sources from which the private educational agencies may recruit persons for appointment as Higher Secondary Teachers. The Supreme Court, in the decision reported in *Bharat Sevashram Sangh and Others Vs. State of Gujarat and Others*, held that Sec.34(1) of the Gujarat Secondary Education Act of 1973, which provides 15% of the vacancies of teaching staff of a registered private school shall be filled up by persons belonging to scheduled castes/scheduled tribes, suffer from no illegality and that the said provision does not interfere with the managerial functions. In the instant case, what has been done by the Government is only to prescribe a broad guidelines by directing 25% of the vacancies of Higher Secondary Teachers must be filled up by appointing existing qualified Higher School teachers and 75% of the vacancies through direct recruitment. The Government has also constituted a Selection Committee for appointment of Higher Secondary Teachers to private aided schools. The Committee consist of the Manager or his representative, the Principal of the school and a government nominee from the panel of officers consisting of the Deputy Director of Education, District Educational Officer and the Principal of DIET of the district. The management can select a nominee from among the officers. The above officers are permitted to attend the staff selection committee meeting without further sanction. The composition of the selection committee also cannot be said to be unreasonable, because out of the three persons in the selection committee, two are of the management's choice, viz. the Manager and the Principal who is appointed by the Manager. As far as the 3rd member of the committee is concerned, the management is given liberty to choose one among the three officers named in the Government Order. The prescription of inclusion of a Government Officer, according to the Government, is only to ensure that managements do not capriciously select appointees to the post of teachers whose salary is to be borne by the Government. Therefore, the constitution of the committee does not fetter any right of the educational agencies and is a reasonable regulation which is permissible in the interest of the institution, the students and in larger public interest.

56. Question No.7:-- On this question arguments were advanced by Mr. Benoy Thomas, Mr. George Varghese Kannanthanam and Mr. Kurian Varghese Kannamthanam. The Government, for this year, had sanctioned higher secondary

course for the Sacred Heart High School, Thevara. Relating to appointment of teachers in the impugned Government order three main conditions were imposed. (1) 25% of the vacancies will be reserved for appointment from among qualified teachers under the management. (2) 75% will be filled up by direct recruitment (3) There will be a staff selection committee to select teachers. Mr. George Varghese Kannamthanam submitted that all these three conditions are violative of the rights guaranteed to the petitioners under Art.30(1) of the Constitution of India. According to him, it is a hindrance against the free selection of the best talents available to the management. As far as the 25% reservation is concerned, it is submitted that a reading of the order will show that it is by promotion and not by selection. It is contended that the mere fact that those teachers were once selected by the management and they have the required qualification does not automatically make them suitable for the present post. As far as the petitioner in O.P. No. 14677 of 1998 is concerned, the educational agency has three aided schools and all the three are Malayalam medium schools except for the Sacred Heart High School, Thevara, where they have one division of English medium. It is submitted that nobody has assessed the competence of the teachers to teach in English, which is the medium of instruction for plus two, and the capability of the teachers to teach in higher classes, and therefore, appointment/promotion of the existing teachers without assessing their suitability will be against the interest of the student community, where the management aim at excellence in education.

57. As far as the selection committee is concerned, the submission is that the constitution of the committee is such that the management has no majority and may not be possible to have the decisive say always. It is stated that the Headmaster need not always be with the Manager. The Committee does not complete a subject expert and, it is contended that without a subject expert it is impossible to assess the competence of a teacher, especially at Post Graduate level. Thus, it is submitted that as far as the minority institutions are concerned, they cannot be super-imposed by a staff selection committee, especially where the management has no absolute majority. According to the counsel for the petitioner, selection of teachers is one of the cardinal rights protected under Art.30(1) of the Constitution and that cannot be infringed by executive orders and, therefore, the impugned Government order, in so far as it imposes the conditions for appointment on minority institutions, has to be struck down. Certain passages from the decisions reported in *The Ahmedabad St. Xavier's College Society and Another Vs. State of Gujarat and Another*, was also relied on apart from citing the decisions reported in 1970 KLT 232, 1977 KLT 62 and 1988 (2) KLT 299 in support of the above contention.

58. Mr. Benoy Thomas also, on behalf of the petitioner in O.P.14177 of 1998, challenged the Government Order on various grounds. The first attack is against the 25% reservation in favour of the existing teachers. By the impugned reservation clause, it is submitted, the Government has identified the sources of recruitment, viz. minimum qualified working teachers in primary schools and

high schools and those who are in open market. He cited the decision reported in *Deepak Sibal v. Punjab University* (AIR 1990 SC 903) in support of the proposition that identification of the source is classification. Therefore it is submitted that the impugned Government Order made a classification of a source of recruitment and reserved 25% for one source, viz. qualified lower level teachers. He would further submit that the alleged source of power under Art. 162 of the Constitution of India is subject to other parts of the Constitution and since the only source of power for making classification and consequent reservation in favour of a particular source being Art. 16(1) read with Art. 14 is not available for the State in the case of minority institutions, which are not having any office or employment under the State, the impugned provision is a fraud on the constitutional powers and void as it is made applicable to minority institutions. At any rate, according to counsel, Art.30 rights are unqualified special rights and not subject to other limitations imposed by the Constitution and that it cannot be regulated by an executive order issued under Art. 162. Referring to the provisions of the Kerala Education Rules he submitted that they are not applicable to plus two course and do not contemplate reservation of any kind as far as minority institutions are concerned. He also referred to the Division Bench decision of the Madras High Court reported in *Thomas v. Dy. Inspector of Schools* (AIR 1976 Mad. 214) where in the court, relying on the Nine Judges' Bench decision of the Supreme Court reported in *The Ahmedabad St. Xavier's College Society and Another Vs. State of Gujarat and Another*, , held that minority institutions have 100% choice for recruitment of teachers and Government can prescribe only minimum qualification and that such institutions have a fundamental right under Art.30 of the Constitution of India to appoint more qualified hands for excellence of education. It is submitted that the impugned provision compelling the minorities to fill up 25% quota with minimum qualified hands is an unreasonable restriction on their fundamental rights under Art.30. Referring to the decision of the Supreme Court reported in *Virendra Nath Gupta and another Vs. Delhi Administration and others*, he submitted that the minorities can even prescribe additional essential qualifications to preserve their culture. According to the learned counsel, the 25% reservation is not intended for achieving excellence of education, and the total reservation is also bad.

59. Petitioners also challenge the constitution of the staff selection committee. According to counsel, such a selection committee cannot be imposed on the minority institutions and that the managements must be permitted to make appointment on their own. It is submitted that the minorities have a fundamental right to appoint teachers of their choice, and that the outlook and philosophy of the candidates are important factors to be considered while making selection of teachers in institutions run by religious minority. According to counsel, the choice of teachers for appointment in a minority institution is not to be guided by the qualification prescribed for the generality of the schools, but must also be tested by suitability for employment in the minority schools concerned consistent with Art.30 of the Constitution. If the Manager is displaced and a committee is

imposed, that will be hit by Art.30 of the Constitution.

60. It is submitted that ever since the introduction of plus two course in Kerala in 1990, the State Government was bargaining with the minority managements in Kerala to waive their fundamental rights under Art.30 by imposing a staff selection committee. The Government changed the composition of the committee seven times as evidenced by Exts.P3, P4, P5, P9, P10, P2, P2(a) and P2(b), and it is submitted that the same is hit by the doctrine of unconstitutional conditions. It is, therefore, submitted that the constitutional court can invalidate unreasonable and irrelevant restrictions on Art.30 of the Constitution of Art.30(1) and Art. 14 of the Constitution. For this proposition he relied on the decision reported in *Mamoo v. Manager, Moovery M.L.P. School* (1968 KLT 537), *Assistant Educational Officer v. Mamoo* (1968 KLT 556) and also the *St. Xavier's college* case (*supra*).

61. Learned counsel further submitted that by the impugned order government functionaries also take part in the original selection process and therefore the impugned order is vitiated by arbitrariness and opposed to all canons of fairness, and therefore, amounts to unreasonable restriction, hit by Art.30(1) and 14 of the Constitution of India, because the Manger is displaced or overshadowed for all practical purposes. He referred to the decision reported in *Kerala Education Bill, In Re: The Kerala Education Bill, 1957*. Reference Under Article 143(1) of The Constitution of India, in which advisory opinion was given by the Supreme Court to the President of India under Art. 143 of the Constitution of India, on a reference made by the President for the opinion of the Supreme Court on certain questions of law of considerable public importance touching certain provisions of the Kerala Education Bill, 1957, which was passed by the legislative assembly of the State of Kerala on 2nd September, 1957 and was, under Art.200, reserved by the Governor of the Kerala for consideration of the President. It is contended that the advisory opinion given by the Supreme Court is not a law within the meaning of Art. 141 of the Constitution of India and when pitted against the nine Judges' Bench decisions of the Supreme Court in *St. Xavier's College* case (*supra*) and *Rev. Sidhajibhai Sabhai and Others Vs. State of Bombay* and Another, which are judicial declaration under Art. 141 of the Constitution the latter will prevail. He would say that the same view was taken by a Division Bench of this Court in *State of Kerala v. Corporate Management of Schools* (1970 KLT 232).

62. On the above arguments of learned counsel for the minority managements, the question that arises for consideration is whether the prescription of quota and constitution of selection committee for appointment of higher secondary school teachers are violative of Art.30(1) of the Constitution insofar as it is made applicable to educational institutions run by the minorities. The question of protection afforded by Art.30(1) of the Constitution has been the subject matter of very many decisions by various High Courts and the Supreme Court. In a recent decision of the Supreme Court in *St. John's Teacher Training Institute* (for

Women), Madurai, Vs. State of Tamil Nadu and others, etc. etc., , the Supreme Court quoted with approval the following principles of law:

1. The fundamental right declared by Art.30(1) of the Constitution is absolute in terms, but subject to regulatory measures.
2. There is no fundamental right under Art. 19(1)(g) of the Constitution to establish or administer an educational institution, if recognition is sought therefor.
3. The institutions must be educational institutions of the minorities in truth and reality and not mere masked phantoms.
4. There is no fundamental right to recognition and any institution seeking recognition should abide by the regulations prescribed by the State as conditions therefor.
5. The minority institutions must be fully equipped with educational excellence to keep in step with other institutions in the State.
6. The regulations framed by the State cannot abridge the fundamental right of the minorities and they should be in the interests of the minority institutions themselves and not based on State necessity or general societal necessities.
7. The regulations should be with a view to promoting excellence of educational standards and ensuring security of the services of teachers and other employees of the institutions and in the true interests of efficiency of institutions, discipline, health, sanitation, morality, public order and the like.
8. Even unaided institutions are not immune from the operations of general laws of the land such as Contract Law, Tax measures, Economic Laws, Social Welfare Legislations, Labour and Industrial Laws and similar other laws which are intended to meet the need of the society.

In the light of the principles of law as approved by the Supreme Court in the above case, the prescriptions in the impugned Government Order dated 13-5-1998 have to be examined.

63. It is now well settled that the right conferred by Art.30(1) on the religious and linguistic minorities to administer educational institutions of their choice is not an absolute right and it can be subject to regulations. What is to be seen is whether the impugned regulations interfere substantially with the autonomy of the religious minority institutions. If the object of the provision or regulation is only to improve the tone and temper of the administration and there is anything contained therein which cannot be said to be affected the core of the right that is guaranteed to the minorities, the regulation is to be upheld. The various considerations which weighed with the government in prescribing the quota and selection, as far as the private aided schools are concerned, are the following:

- (a) The necessity to protect the aspirations of the existing teaching community for upward mobility.

(b) The necessity to ensure that fresh blood with exposure to modern education is induced to teaching system.

(c) The health of the overall education system which is dependent essentially on the contentment of the teaching community.

In our opinion, the core of the freedom of the minority education institutions to select and appoint teachers of their choice to their schools has not been affected. What has been done by the government is to prescribe a broad regulation insofar as the source of recruitment is concerned. We have already referred to some of the Supreme Court Judgments wherein the Court has clearly held that prescriptive of source of recruitment is within the policy domain of the executive government. It is pertinent to notice that salary of the teachers who are ultimately to be appointed by the management of the minority institution is to be borne by the State Government. Viewed in that angle, the broad regulation prescribing the source of recruitment does not touch the freedom of the management to select the best qualified individuals of their choice. As already noticed, the core of the freedom to administer educational institutions is not touched by the government regulation and, therefore, we are of the opinion that the regulation does not violate Art.30(1) of the Constitution. As far as the composition of the selection committee is concerned, the Government Order prescribes a selection committee of three out of which two are from the management side. The only person, who is an outsider, will be one of the three specified government officials, namely, Deputy Director of Education, District Educational Officer of the area and the DIET Principal of the district. The management was given the power to select the nominee from among the above officers. Thus, it is seen that the constitution of the selection committee does not in any way affect the freedom of the management to form the selection committee and to carry out the selection process. The regulation insofar as it insists that there should be a government nominee to be chosen by the management does not take away or abridge the fundamental rights of the minorities. Such a prescription, as rightly pointed out by learned Advocate General is only for the betterment of the selection process.

64. In *Re: The Kerala Education Bill, 1957*. Reference Under Article 143(1) of The Constitution of India, was relied on by both the sides. The Kerala Education Bill was introduced in 1958. On a Presidential reference, the Supreme Court considered various provisions of the Bill. The questions referred to the opinion of the Supreme Court have been extracted in para. 10 of the judgment. The Supreme Court considered the main point canvassed before it, namely, what are the scope and ambit of the right conferred by Art.30(1) of the Constitution. In para.23, it is observed that Art.30(1) leaves it to the choice of the minorities to establish such educational institutions as will serve both purposes, namely, for the purpose of conserving their religion, language or culture and also the purpose of giving a thorough good general education to their children. The next thing to note is that the Article in terms gives all minorities, whether based on

religion or language, two rights, namely, the right to establish and the right to administer educational institutions of their choice. The right to administer cannot obviously include the right to mal-administer. The minorities cannot easily ask for aid or recognition for an educational institution run by them in unhealthy surroundings without any competent teachers possessing any semblance of qualification and which does not maintain even a fair standard of teaching or which teaches matters subversive to the welfare of the scholars. It stands to reason, then, that the constitutional right to administer an educational institution of their choice does not necessarily militate against the claim of the State to insist that in order to grant aid the State may prescribe reasonable regulations to ensure the excellence of the institutions to be aided. Learned Attorney General conceded that reasonable regulations may certainly be imposed by the State as a condition for aid or even for recognition. The Supreme Court has opined that Clauses 6, 7, 9, 10, 11, 12, 14, 15 and 20 relate to the management of aided schools. Some of these provisions eg., 7, 10, 11(1) 12(1) (2) (3) and (5) may easily be regarded as reasonable regulations or conditions for the grant of aid. Clauses 9, 11(2) and 12(4) are, however, objected to as going much beyond the permissible limit. It is said that by taking over the collections of fees etc. and by undertaking to pay the salaries of the teachers and other staff, the Government is in reality confiscating the school fund and taking away the prestige of the school, for none will care for the school authority. Likewise, clause 11 takes away an obvious item of management, for the manager cannot appoint any teacher at all except out of the panel to be prepared by the Public Service Commission, which, apart from the question of its power of taking up such duties, may not be qualified at all to select teachers who will be acceptable to religious denominations and in particular sub-clause (2) of clause 11 is objectionable for it thrusts upon educational institutions of religious minorities teachers of Scheduled Castes who may have no knowledge of the tenets of their religion and may be otherwise weak educationally.

65. On the above argument, the Supreme Court has observed in the end of para.31 as follows:

But considering that those provisions are applicable to all educational institutions and that the impugned parts of clauses 9, 11 and 12 are designed to give protection and security to the ill paid teachers who are engaged in rendering service to the nation and protect the backward classes, we are prepared, as at present advised, to treat these clauses 9, 11 (2) and 12(4) as permissible regulations which the State may impose on the minorities as a condition for granting aid to their educational institutions. We, however, find it impossible to support clauses 14 and 15 of the said Bill as mere regulations.

Their Lordships further observed that:

In our opinion, sub-clauses (3) of clause 8 and clauses 9, 10, 11, 12 and 13 being merely regulatory do not offend Art.30(1), but the provisions of sub-clause (5) of clause 3 by making the aided educational institutions subject to clauses 14

and 15 as conditions for grant of aid do offend against Art.30(1) of the Constitution.

66. The majority opinion of the court was delivered by S.R. Das, C.J., T.L. Venkatarama Aiyar, J. did not concur with the majority opinion as regards question No. 2, ie. clauses 20 of the Bill. According to the learned Judge clause 20 of the Bill, in its application to educational institutions of minorities religious or linguistic, is repugnant to Art.30(1) of the Constitution and is, in consequence, to that extent void. In the result, the learned Judge's answer to question No. 2 was that, excepting clauses 14 and 15, the other provisions of the Bill do not offend Art.30(1) of the Constitution.

67. In *Frank Anthony Public School Employees' Association Vs. Union of India (UOI) and Others*, , the Supreme Court held as follows:

The right guaranteed to religious and linguistic minorities by Art.30(1) is two fold; to establish and to administer educational institutions of their choice. The key to the Article lies in the words "of their own choice". These words indicate that the extent of the right is to be determined, not with reference to any concept of State necessity and general societal interest but with reference to the educational institutions themselves, that is, with reference to the goal of making the institutions effective vehicles of educational for the minority community or other persons who resort to them. It follows that regulatory measures which are designed towards, the achievement of the goal of making the minority educational institutions effective instruments for imparting education cannot be considered to impinge upon the right guaranteed by Art.30(1) of the Constitution. The question in each case is whether the particular measure is, in the ultimate analysis, designed to achieve such goal, without of course nullifying any part of the right of management in substantial measure.

68. The *Ahmedabad St. Xavier's College Society and Another Vs. State of Gujarat and Another*, was cited by learned counsel for the petitioners. In the aforesaid ruling, various provisions of the Gujarat University Act were impugned as being violative of Art.30(1) of the Constitution in so far as they made inroad to the right of the minority to administer their institutions. The provision in the Gujarat University Act, which has been considered by the Supreme Court and which has relevance in the context of the instance case, was Sec.33-A. Section 33-A(1)(b) prescribes constitution of the selection committee. The Gujarat University (Amendment) Act, 1972 substituted the word "court" for the word "senate" and the words "executive council" for the word "syndicate". The Gujarat University Act, as amended by the Amending Act, was reproduced in para.65 of that judgment. The Amendment Act mandates that there shall be a selection committee which include the representative of the University to be nominated by the Vice Chancellor and Head of the Departments of the subject concerned. It is seen from para.42 of the judgment that the said provisions contained in Sec.33-A(1)(b) were not challenged by the Ahmedabad St. Xaviers College society. The intervenors challenged those provisions. The Hon. Chief

Justice for himself and on behalf of Palekar, J. held that unlimited and undefined power is conferred on the Vice Chancellor and that the approval by the Vice Chancellor may be intended to be a check on the administration. Section 51-A(b) of the Act cannot be said to be a permissible regulatory measure inasmuch as it confers arbitrary power on the Vice Chancellor to take away the right of administration of the minority institutions. Section 51-A of the Act cannot, therefore, apply to minority institutions. For these reasons, the Supreme Court held that the provisions contained in Ss.40, 41, 33-A(1)(a), 33-A(1)(b), 51-A and 52-A cannot be applied to minority institutions as these provisions violate the fundamental rights of the minority institutions. Justice Jaganmohan Reddy for himself and on behalf of Alagiriswami, J., while agreeing with the Honourable Chief Justice, wrote a separate opinion. Khanna, J. has also considered the scope and ambit of the rights of the minority whether based on religion or language to establish and administer educational institutions of their choice under Art. 30(1) of the Constitution. Mathew, J. for himself and on behalf of Chandrachud, J. also agreed with the views expressed by the honourable Chief Justice and wrote a separate opinion. Beg J. also expressed his opinion from para. 197 onwards. Dwivedi, J. partly agreed and partly disagreed with the plurality-opinions and, therefore, he wrote a separate judgment. The learned Judge said in para.276 of the judgment that the majority opinion In Re: The Kerala Education Bill, 1957. Reference Under Article 143(1) of The Constitution of India, support the construction which he is seeking put on Art.30(1) of the Constitution. The learned Judge has quoted a passage from In Re: The Kerala Education Bill, 1957. Reference Under Article 143(1) of The Constitution of India, in order to bring out the technique of adjudging the constitutionality of a statute which has commended itself to the majority of the court. That technique requires the court to balance the right conferred by Art.30(1) and the social and individual interests which it is necessary to protect. The learned Judge has also referred to the decision Rev. Sidhajibhai Sabhai and Others Vs. State of Bombay and Another, wherein Shah, J. said that "regulations made in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed. Such regulations are not restrictions on the substance of the right which is guaranteed; they secure the proper functioning of the institution, in matters of education". According to Dwedi, J. the above passage shows that the court has adhered to the view taken by Das, C.J. in In Re: The Kerala Education Bill, 1957. Reference Under Article 143(1) of The Constitution of India, to the effect that the State has power to make regulations for protecting certain social interests. In paras. 10, 20, 22, 23, 29, 51, 56, 80, 97, 98, 99, 108, 111, 118, 134, 150, 162, 178, 193, 209, 214, 217, 218, 232, 244, 246, 248, 276 and 279 of the judgment, their Lordships referred to the judgment In Re: The Kerala Education Bill, 1957. Reference Under Article 143(1) of The Constitution of India, . By a majority opinion, the Supreme Court held that Secs. 33-A, 40, 41, 51-A(1)(b), 51-A(2)(b) and 52-A of the Gujarat University Act, 1949 as amended do not apply to institutions established and administered by linguistic and religious minorities.

69. It is seen from the above judgment that the provisions were struck down for the reasons that the statute do not prescribe guidelines as to how the nominee of the Vice Chancellor could be determined. Likewise, it is also seen that their Lordships basically agreed with the opinion of Das, C.J. in *Re. Kerala Education Bill, 1959* (supra). Their Lordships held that the provisions prescribing the selection committee is violative of the Constitutional right guaranteed under Art.30(1).

70. In our case, things are different. In *Frank Anthony's case* (supra), which we have referred to earlier, the court held that the right of the management in substantial measure should not be nullified. In the instant cases, only two measures have been prescribed by the impugned Government order. The private aided institutions including the minority institutions have been directed to fill up 25% of the teaching vacancies from among the existing teachers in their own High Schools, who were in the first instance appointed by them. Secondly, a selection committee is postulated for direct recruitment to the balance 75% of the teaching vacancies and the said selection committee is to consist of two persons exclusively belonging to the management and one person who is a government nominee, who is to be chosen by the management from out of three officers prescribed by the Government. Such a regulation, in our opinion, cannot be said to be impinge upon the right of administration to any substantial measure. As pointed out by the Supreme Court, it would only prevents mal-administration. The aforesaid provisions prescribed by the government satisfy the test laid down by the Supreme Court in *Frank Anthony's case* (supra) as well as in the line of decisions which we have referred to in this judgment.

71. The facts of *The Ahmedabad St. Xavier's College Society and Another Vs. State of Gujarat and Another*, , which was heavily relied on by the counsel for the petitioners, are different and distinct from the facts of our cases. The Supreme Court in that case proceeded on the basis that the entire selection committee prescribed in the Gujarat University Act was to consist of outsiders and the managements do not have any say in the constitution of the selection committee. The Supreme Court has also noticed that there were no guidelines as to how the nominee of the Vice Chancellor would be selected. However, in the impugned Government Order, the selection committee prescribed is to consist of two managements' representatives and a government official who is to be selected by the management. Therefore, the dictum laid down in *St. Xaviers College's case* on facts cannot be applied to the facts and circumstances of the cases on hand. On the facts and circumstances of these cases, as held by the various decisions of the Supreme Court referred to by us, regulatory measures prescribed in the impugned Government Order satisfy the test laid down by the Supreme Court.

72. Learned Advocate General invited our attention to some of the provisions of the Kerala University Act, 1969 which were held to be ultra vires of Art.30(1) of the Constitution by the Full Bench in *V. Rev. Mother Provincial v. State of Kerala*

(1969 KLT 749 - FB) which was confirmed by the Supreme Court in State of Kerala, etc. Vs. Very Rev. Mother Provincial, etc., . Thereafter 1969 Act was repealed and the Kerala University Act, 1974 was enacted. Section 57 of the 1974 Act deals with appointment of teachers. Similar provisions are contained in Sec.58 of the Calicut University Act, 1975 and Section 59 of the Mahatma Gandhi University Act, 1985. Some of the provisions of the Kerala University Act, 1974 including Section 57 were challenged before this court. A Full Bench of this court in Benedict Mar Gregorios v. State of Kerala (1976 KLT 458 - FB) held that Sec.57 seems to suffer from the vice of interference with the free and unfettered choice of the management in the selection of teachers by confining it, in the first instance to promotion from among the existing staff, and only if none of them is found fit, to make the appointment by direct recruitment. An almost similar provision in Sec.53(7) of the 1969 Act was upheld by the Full Bench in Very Rev. Mother Provincial v. State of Kerala (1969 KLT 749 - FB) and the decision was confirmed by the Supreme Court in State of Kerala, etc. Vs. Very Rev. Mother Provincial, etc., . In view of these decisions, the Full Bench upheld the said provision.

73. A review of the above decision was filed before this court. The petition for review was based on the ground that the conclusion stated in para.22 of the judgment was inconsistent with the reasoning and discussion in regarding to Sec.57(4) of the University Act entered in para.14 of the judgment. In summarising the conclusion in para.23 of the judgment, the Full Bench has stated that only sub-section (4) of Sec.57 was invalid which was an obvious mistake which the State wants to correct by the review petition. The Bench allowed the review petition and reviewed the earlier judgment to this extent by substituting the sentence to the effect that sub-section (4) of Sec.57 is valid.

74. As per Sec.83 of the Kerala University Act, 1979 the State Government promulgated the Kerala University (Conditions of Service of Teachers and Members of Non-teaching Staff) First Statutes, 1979 and Chapter II thereof deals with constitution of selection committee for appointments. Statute 4 says that in order to ensure that appointment of teachers by direct recruitment is on the basis of merit such appointment shall be made by the educational agency from a panel of three names for every vacancy recommended by a selection committee constituted by the educational agency and consisting of the following members, namely, two representatives of the educational agency nominated by it; one of whom shall be the Chairman of the selection committee, the Principal of the College, the Head of the Department in the subject concerned and one expert in the subject nominated by the Vice Chancellor. Similar provisions are contained in the Calicut University First Statutes and Mahatma Gandhi University First Statutes. It is submitted on behalf of the government that all the private managements including the minority managements have been following the above Statutes without any demur for the past several years in matters of appointments for pre-degree and degree level throughout the State which shows that the above provisions do not in any way violate Art.30(1) of the Constitution,

but only ensure reasonable regulations for effecting proper selection process.

75. The selection committee constituted under the impugned Government Order is, in our opinion, regulatory in nature. As held by the Supreme Court, the minority managements have the right to administer their institutions, but this right implies obligation and duty of the minority institutions to render the very best to the students and in the right of administration, checks and balances in the shape of regulatory measures are required to ensure the appointment of good teachers and their conditions of service. The right to administer is to be tampered with regulatory measures to facilitate smooth administration and the best administration will reveal no trace of colour of minority. The regulations now introduced would only serve the interest of the students, teachers, efficiency of teachers, discipline and fairness in administration which are necessary for preserving harmony among all. It is submitted by the State that the selection committee in the impugned Government Order does not in any way interfere with the right of the management to appoint the Principals/Headmasters of minority schools and the selection committee is applicable only in the case of appointment of ordinary teaching staff. As per G.O.(MS) 18/91/G.Edn. dated 1-2-1991, the Headmaster will be re-designated as the Principal and the Principal/Headmaster is the appointee of the minority manager of his choice. The rulings cited by the petitioners in *Rt. Rev. A.M. Patroni v. Kesavan* (1964 KLT 791 - FB), *Rev. Fr. Daniel v. Director of Public Instruction* (1965 KLT 927), *Manager, C.E. Agency v. State of Kerala* (1990 (2) KLT 240) and W.A. Nos. 746 and 747 of 1998 are not applicable to the facts and circumstances of the cases on hand. Those cases relate to the right of the minority manager to appoint the Headmaster of his choice and thus, the dicta of those cases are not applicable to the constitution of the selection committee for ordinary teaching staff.

76. We, therefore, hold that the prescription of quota and the constitution of the selection committee for appointment of higher secondary school teachers are not violative of Art.30(1) of the Constitution insofar as the schools run by the minority managements are concerned. We also hold that the fundamental rights claimed by the minority institutions can only be subject to the regulatory measures and that the regulations now framed under the impugned Government Order by the State will not abridge the fundamental right of the minorities and we say that it is in the interest of the minority institutions themselves. The regulations have also been introduced with a view to promote excellence of educational standards and ensuring security of the service of the teachers and other employees of the institution and in the true interest of the efficiency of the institutions, discipline, health, morality, public order and the like.

77. The government has now taken a policy decision evidenced by the impugned Government Order prescribing quota for the qualified school teachers and the remaining quota for direct recruitment. The Supreme Court, in the decision reported in *State of Andhra Pradesh and Another Vs. V. Sadanandam and Others*, has held that the mode of recruitment and the category from which the

recruitment to a service should be made are all matters which are exclusively within the purview of the executive and that filling up of posts is a matter of administrative necessity and exigency. Such a policy decision cannot be challenged by the teachers. Again in *M.P. Oil Extraction v. State of Madhya Pradesh* (AIR 1998 SC 145), the Supreme Court held that the executive authority of the State must be held within its competence to frame policy for the administration of the State. In *State of Punjab and Others Vs. Ram Lubhaya Bagga Etc. Etc.*, the Supreme Court has upheld the right of the State to change its policy from time to time under the changing circumstances and that the same cannot be questioned. In similar matters, the Supreme Court has upheld the impugned change in the policy. It is argued on behalf of the petitioners that till statutory regulations were made or laws were passed, there could be no appointment of the personnel etc. In *J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc.*, the Supreme Court has held that the existence of statutory rules is not a condition precedent to appoint an eligible and fit person to a post and that the executive power is co-extensive with legislative power of the State and under Art. 162, the State can create civil posts and fill them up according to executive instructions consistent with Arts. 14 and 16 of the Constitution. In *Ravi Paul and Others Vs. Union of India (UOI) and Others*, the apex court has held that it is well settled that it is not obligatory to make rules for recruitment before a service can be constituted or a post created or filled and that the government in exercise of its executive power can make appointments in the absence of rules. The same view has been taken by the Supreme Court in *Dr. Krushna Chandra Sahu and others Vs. State of Orissa and others*.

78. At the time of hearing, learned Advocate General submitted that the Government and the Directorate will take expeditious steps to frame statutory rules and regulations for selection and appointment as expeditiously as possible. The government without framing statutory rules for all these years have introduced plus two system in the State and continued to introduce the said system year after year to several schools. It is not proper or advisable to recruit people for the vacancies in the direct recruitment quota and fill up temporarily through Employment Exchanges under Rule 9(a)(i) of the Kerala State and Subordinate Services Rules. We, therefore, make it clear that the Government shall positively frame the statutory rule before the commencement of the next academic year (1999-2000). We hope and trust that the government will, without resorting to temporary appointments, take immediate steps to frame the statutory rules and regulations in this regard. We, therefore, answer the seven questions posed for our decision as follows:

(1) The government school teachers in service have no right to be appointed as higher secondary school teachers as against all vacancies of higher secondary school teachers.

(2) The prescription of quota for government school teachers and direct

recruitment are valid.

(3) For appointment of higher secondary school teachers from among the existing school teachers, the principles of reservation and communal rotation cannot be applied.

(4) The higher secondary schools established under the new 10 + 2 + 3 system are not governed by the Kerala Education Rules.

(5) The private aided school teachers do not have any right whatsoever to get appointed as higher secondary school teachers in private aided higher secondary schools.

(6) The prescription of quota and the constitution of the selection committee do not fetter any right of the educational agency and are reasonable regulations which are permissible in the interest of the institutions, the students and in the larger public interest.

(7) The prescription of quota and the constitution of the selection committee for appointment of higher secondary school teachers from among existing school teachers are not violative of Art.30(1) of the Constitution insofar as the schools run by the minority managements are concerned.

In the result, all the Original Petitions are dismissed. No costs.