

(1999) 01 OHC CK 0009

In the Orissa High Court

Case No : O.J. C. No's. 9655 of 1992, 6256,6520, 7107, and 7160 of 1994, 9796, 10279 of 1996, 564097, 13382"96, 5897/94, 9869/93, 503/95, 9416/96, 15214/97, 15487/97, 4818196, 14330/97, 14327/97, 8644/96, 15894/97, 16393/97, 16684, 16667,16548 and 16354 of 1997,

Priti Ranjan Pradhan and Others etc.

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 25-01-1999

Acts Referred:

Constitution of India, 1950 — Article 309
Education (Establishment and Recognition of Private High Schools) Rules, 1979 — Rule 3(1)
Orissa Education (Establishment, Recognition and Management of Private Junior Colleges/Higher Secondary Schools) Rules, 1991 — Rule 30
Orissa Education (Management of Private Schools) Rules, 1980 — Rule 2, 9, 9(1)
Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 — Rule 8(2), 8(3)
Orissa Education Act, 1969 — Section 2, 21, 27, 3, 7(D)
Orissa Education Code — Article 14, 285(5), 312
Orissa Secondary Education Act, 1952 — Section 28
Orissa Secondary Education Act, 1953 — Section 10(C), 11, 11(1), 2, 21(2)

Citation : (1999) 01 OHC CK 0009

Hon'ble Judges : S.N. Phukan, C.J.;P.K. Tripathy, J;P.K. Mohanty, J;P.C. Naik, J;A. Pasayat, J

Bench : Full Bench

Advocate : Gobind Das, S.K. Purohit, S.K. Behera, P.K. Sahoo, V. Prithvi Raj, Sruti Kanta Nayak, K.K. Swain, A.K. Rath, Manoj Mishra, U.C. Pattnaik, P.K. Das, M.R. Panda, D.K. Pani, S.K. Sahoo, M.K. Nayak, P.N. Mohanty, P. Choudhury, M.K. Sahoo, S.C. Padhi, Bibhudatta Sahoo, P.N. Mishra, P. Mishra, J.K. Rath, R.N. Mishra, S.K. Das, S.B. Mahanta, S.K. Nayak-2, S. Ghose, R. Sikdar, A. Sikdar, G.B. Dash, Ganeswar Rath, S. Mishra, A.K. Panda, T.K. Praharaj, S.R. Mohanty, M.S. Raman, A. Mishra, Sharat Ku. Das, L.D. Dash, S.C. Sahoo, S.K. Sahoo, A.P. Ray, G.C. Swain, S.P. Sahoo, G.N. Mohapatra, S. Mohanty, A. Swain, A.C. Mohanty, Nityananda Beuria, Satyabhusan Das, J.K. Khuntia, R.C. Mohanty, B.K. Mohanty, B.K. Biswal, K. Lenka, J. Gupta, B.K. Kar, M.R. Acharya, Satrughana Dash, P.K. Jena, P.C. Rout, B. Nayak, P.K. Mohapatra and L. Dash, for the Appellant; M.R. Mohanty, A.G.A. and Sujata Jena, A.S. C., R.K. Mohapatra, U.K. Samal, S. Swain, B.R. Barik, N.K. Sahoo, R.K. Dash, A.K. Panda, D.R. Swain and

Judgement

A. Pasayat, J.—Controversy regarding eligibility for promotion/appointment to the post of Headmaster of a High School has existed notwithstanding two Full Bench decisions of this Court and therefore, this Special Bench has been constituted to resolve the controversy.

2. The controversy arises in the background of Rule 8(3) of the Orissa Education (Recruitment and Conditions of Service of Teachers and Members of Staff of Aided Educational Institutions) Rules, 1974 (hereinafter referred to as the "Rules"). Said provision reads as follows:

8. Exceptions to selection by the Board (1) and (2) xx xx xx (3) Vacancies in the posts of Headmasters of aided Boys' High Schools and Headmistresses of Girls High Schools and Readers, including Principals of aided colleges under the fold of the "system of direct payment of full salary cost" shall be filled up by the eligible trained graduate teachers of respective categories of High Schools and Headmasters and Headmistresses of respective categories of High Schools and Headmasters and Headmistresses of respective categories of Middle English Schools, and by the lecturers belonging to the common cadre of the Aided Colleges, as the case may be, from the Select List prepared by the Selection Board in the manner prescribed in the Regulation framed by the Selection Board for the purpose. On the basis of the recommendation of a Committee to be constituted by the Government which shall be headed by the Director. The selection shall be made on the basis of seniority in the common feeding cadre and performance. The zone of consideration shall be thrice the number of vacancies:

Provided that in ad hoc promotions to the posts of Readers which includes Principals of aided colleges, Headmasters of aided Boys' High Schools and Headmistresses of aided Girls' High Schools under the fold of the "system of direct payment of full salary-cost" may however be made from the concerned common feeding cadre for a period of one year till the date of receipt of select list from the Selection Board, whichever is earlier, with the prior approval of Government:

Provided further that in the absence of common feeding cadres' appointment to the posts of Headmasters of aided Boys' High Schools and Headmistresses of aided Girls' High Schools of the State under the fold of the system of direct-payment of full salary cost can be made by the authority from amongst the eligible trained graduate teachers of the respective categories of aided High Schools and Headmasters and Headmistresses of respective categories of aided Middle English Schools, as the case may be, on the recommendation of the Selection Board through an open advertisement. The selection shall be on the basis of the length of service and performance as trained graduate teachers in

aided High Schools or Headmasters and Headmistresses in aided Middle English Schools.

Originally, Orissa Education Code (in short, the "Code") held the field relating to appointment to various categories of posts in educational institutions. The Orissa Education Act, 1969 (in short, the "Act") and The Orissa Secondary Education Act, 1953 (in short, "Secondary Act") were enacted subsequently. Regulations of the Board of Secondary Education (in short, the "Regulations") were made under the Secondary Act.

3. The starting point of litigation appears to be *Golakh Chandra Mohanty v. State of Orissa* (O.J.C. No. 714 of 1992) which was referred to the Full Bench with the following question:

Whether 7 years teaching experience as Trained Graduate teacher is necessary to make an Assistant Teacher eligible for promotion/appointment to the post of Headmaster of a High School ?

The Full Bench answered the reference as follows:

(1) Seven years" teaching experience as trained graduate teacher was necessary for an assistant teacher to be promoted to the post of Headmaster with the aid of Rule 8(2)(b) of the 1974 Rules in these cases where the appointments had been made on or after 29-4-1977, when the amended Regulation 17(2)(1) of the Board's Regulations has come into force. This applies both to aided and unaided schools.

(2) Promotions of incumbents made even after 29-4-1977 despite their not having had the requisite qualification (i. e., seven years teaching experience as trained graduate teacher) would not be reopened if the appointments have already been approved.

(3) Those cases of promotion relating to which approval order has not been passed by today shall be decided keeping in view what we have stated above, namely that if the incumbents had acquired the requisite qualification before 3-6-1988, the promotions/appointments shall be approved.

(4) Those cases in which the requisite qualification has not been obtained before 3-6-1988 shall not be approved, and the posts shall be treated as vacant on and from 3-6-1988 and shall be filled up by complying with the requirements of Rule 8(3) of the 1974 Rules.

(5) Rule 8(3) of the 1974 Rules applies to all aided schools irrespective of whether the schools have started receiving full salary cost or not.

Judgment of the Full Bench has since been reported. (See *Golakh Ch. Mohanty and Others Vs. State of Orissa and Others*,).

In *Priti Ranjan Pradhan etc. etc. v. State of Orissa and Ors.* (O.J.C. No. 9655 of 1992 and batch of cases) a Division Bench of this Court referred the matter to a

Full Bench for reconsideration as it was felt that some of the conclusions are not correct. While making the reference it was inter alia observed as follows:

Prima facie the contentions raised on behalf of the State Government is fully supported by the decision of the aforesaid Full Bench case. But to us it appears that it would create great harassment to all those teachers who were appointed as Headmasters of the different unaided schools when there was no embargo for their appointment.

4. The subsequent Full Bench in paragraph 7 observed as follows:

In view of the clear provision in the Rule it is not permissible to issue a direction for according approval to a person who had not been selected in the manner prescribed in the Rule as Headmaster of an aided High School. Therefore, this Court fixed 3-6-1988 as the cut off date for approval of persons who had acquired the requisite eligibility qualification for holding the post of Headmaster and directed that the post held by ineligible persons should be taken as vacant on and from that date and be filled up in the manner prescribed under the Rule. In the context it cannot be said that fixation of 3-6-1988 as the cut off date is arbitrary. Though as a consequence of the same, some persons functioning as Incharge Headmaster of High Schools will not be able to continue in the post and will have to wait till their term of promotion comes in the common feeding cadre of Trained Graduate Teachers, we are not persuaded to think that this causes harassment to them.

At paragraph 8 of their judgment it has been held that "on giving our anxious consideration to the matter, it is our considered view that the decision of, the Full Bench of this Court in Golakh Chandra Mohanty's case (supra) does not need reconsideration. The reference is answered accordingly". The judgment of the second Full Bench is reported in Priti Ranjan Pradhan and Others Vs. State of Orissa and Others, . It needs to be noted here that all the learned Counsel appearing for the Petitioners (except Mr. S.B. Mahanta) stated at the time of hearing of the reference that the first Full Bench decision did not warrant fresh consideration and on the other hand prayed for implementation of the decision. Regarding Mr. Mahanta's contention it was observed that it was impermissible to issue direction to accord approval to the services of a person who was not selected in the manner prescribed under the rule, as Headmaster of an aided High School.

5. While dealing with O.J. C. No. 9655 of 1992 with O.J. C. Nos. 6063,6266,6257 and 6520 of 1994 the Court noticed some conflicting views and for authoritative pronouncement reference was made to the larger Bench to adjudicate the following question:

Whether the Inspector's order of approval of an incumbent as Headmaster-in-charge of the school is protected under conclusion No. 2 recorded by the Full Bench in the case of Golakh Chaandra Mohanty (supra) and whether Rule 8(2)(b) of the Orissa Education (Recruitment and Conditions of Service of Teachers and

Members of the Staff of Aided Educational Institutions) Rules, 1974 is applicable to such order of approval made by the Inspector of Schools ?

6. While the matter was being heard by the Full Bench, learned Counsel for all the parties submitted that a full-dress hearing of the controversy is necessary as notwithstanding two Full Bench decisions some grey areas still remained and a fresh look was necessary. In the aforesaid background, reference was made to the Special Bench.

7. At this juncture, it is necessary to take note of SLP (C) No. 5524 of 1996 filed by the Government of Orissa before the Apex Court challenging the judgment passed by this Court in O.J.C. No. 5898 of 1994 disposed of on 5-7-1995. The stand of the State was that the case of the writ Petitioner in the said case was not covered by the judgment of the Full Bench and though the Petitioner was not eligible to hold the post of Headmaster and not entitled to receive the Headmaster's scale of pay, yet this Court allowed the case of the Petitioner on erroneous ground that the staff approval is the approval in terms of the requirement of the Full Bench judgment. Some of the intervenors in the writ applications under consideration had filed intervention petition before the Apex Court. By order dated 30-9-1997 the matter was remanded to this Court for fresh consideration. The said order reads as follows:

Leave granted.

Impleadment in respect of Mr. J.K. Das, Advocate (Intervenor) is allowed and in respect of Mr. H.S. Bhagat is dismissed..

It has been stated that a similar question is now pending before Bench of Five-Judges in the High Court of Orissa. It is the contention on behalf of Krushna Chandra Pradhan that his case is different as he was not appointed Headmaster in charge but he was a full-fledged Headmaster and this has been recognised by the letter written by the Inspector of Schools dated 21-2-1985.

Since the main controversy is before the Bench of Five-Judges, we set aside the order of the High Court and send this case back to be considered by the Bench of Five Judges of the High Court. The High Court will also consider whether the case of the Petitioner is distinguishable from the other cases and whether the Petitioner was really appointed as Headmaster and not as Headmaster in charge. The High Court will be entitled to decide all the questions in controversy in accordance with law as it deems fit. The appeal is disposed of. There will be no order as to costs.

8. In order to appreciate the controversy in its proper perspective background history of various statutory provisions which have relevance need to be noted.

Qualification required for appointment/promotion to to the post of the Headmaster in High School at different times.

Modalities/procedure for appointment to the post of Headmaster at different

times.it

1. Upto 22.12-1955 - The provision contained in Article 312 was in force which requires the Headmaster must be a trained graduate teacher.

2. From 22-12-1955 to 28-4-1977- The qualification for appointment/promotion to the post of Headmaster in High School has been mentioned in Regulation 18(2) which requires that in order to be a Headmaster in a High School at least 7 years of service either as a teacher in a High School or as Headmaster of a Middle English School or the two taken together with trained graduate qualification is required.

3. From 29-4-1977 to till date the qualification required for appoint

1. The Managing Committee was required to fill up the post of Headmaster from out of the qualified teachers till 1975 Rules came into force, i.e., 1-4-1975.

2. From 1-4-1975 the procedure to fill up the post of Headmaster was to fill up only by way of promotion in accordance with Rule 10 of 1974 Rules. The original Rule was amended on 3-9-1976.

3. The provision of Rule 10 of 1974 Rules was repealed on 10-12-1981 there being no other specific provision prescribing to fill up the post of the Headmaster the general provision under Rule 8(2)(b) operated in the matter of the promotion to the post of the Headmaster, Rule 8(2)(b) was also amended on 25-10-1976. Rule 8(2)(b) remains in the field upto 1-6-1988.

4. Rule 8(3) of 1974 Rules was enacted and came into force on 3-6-1988 which requires that ment/promotion to the post of the Headmaster in a High School is in accordance with the amended Regulation of Board of Secondary Education Regulation 17(2)(1) which provides that in order to be the Headmaster in High School the teacher must be a trained graduate with minimum 7 years of teaching experience after training. promotion to the post of promotion shall be made on the basis of seniority in the common feeling cadre and performance.

9. The provision of the Code, more particularly Article 312 thereof and certain provisions of the Regulations (before amendment and after amendment to it) need to be noted. Gist of the provisions are under, Article 312 of the Orissa Education Code-

312. Standard staff for High Schools-

(a) For High Schools with Classes IV to XI and no additional sections-

(i) Trained Graduates including the Headmaster ... - 4 posts

(ii) Trained Intermediates -3 posts

(iii) Trained Matriculates -2 posts

(iv) Classical" Teachers including one Headpandit - 1 post

(v) Physical Training Instructor - 1 post

(vi) Clerk - 1 post

In case it is found necessary, a trained Matriculate may be appointed in place of a classical teacher, other than the Headpandit. But where the number of pupils is less than 150, the number of teachers should be reduced to 10, the number of trained Matriculates or classical teachers being reduced to 1.

(b) For a school with Classes VIII to XI additional sections-

(i) Trained Graduates including the Headmaster -3 posts

(ii) Trained Intermediate -1 posts

(iii) Trained Matriculate -1 posts

(iv) Classical Teacher -1 posts

(v) Physical Training instructor -1 posts

(vi) Clerk -1 posts

Besides the above one extra post of a trained Graduate or of a trained Intermediate or of a trained Matriculate will be added for each of Class XI and X or of classes IX and VIII or of classes IV to VII respectively that is duplicated owing to increase in number of pupils on the rolls. For each Modern Indian Language which is taught as literature only one extra post will be added on the scale of pay admissible according to the qualification of the teacher selected. Two posts of trained Matriculates will be added for each additional Modern Indian Language used as a medium of instruction in classes IV to VII. One trained Matriculate is to be appointed for addition of each of the classes IV to VII to four classes High Schools. When the roll strength in each of the top three classes is between 40 and 50, an additional trained Graduate teacher should be appointed.

THE ORISSA SECONDARY EDUCATION ACT, 1953-"Section-2(e) "Headmaster" or "Headmistress" means the head of teaching staff of a recognised Secondary School by whatever named he or she may be designated.

Section-2(f) "High School" means an educational institution preparing candidates for the final examination of the Board and recognised as such by the Board.

Section-2(i) "Prescribed" means prescribed by Regulations made by the Board under this Act.

Section-2(l) "Regulation" means a Regulation made or deemed to have been made by the Board under this Act.

Section-3(1) The State Government shall constitute a Board called the Board of Secondary Education to regulate, control and develop Secondary Education in the State of Orissa.

Section-21(i) The Board may make Regulations for the purposes of carrying into effect the provisions of the Act.

Section-21(ii) In particular and without prejudice to the generality of the foregoing power, the Board may make Regulations providing for all or any of the following matters, namely:

Section-21(ii)(c) the conditions of recognition of institutions for the purposes of admission to the privileges of the Board including its examinations;

Section-21(ii)(g) the courses of study to be laid down for all certificates and diplomas;

Section-21(ii)(h) the conditions under which candidates shall be admitted to the examinations of the Board and shall be eligible for diplomas and certificates;

Section-21(ii)(q) all matters which by this Act are to be or may be provided for by Regulations.

REGULATIONS of THE BOARD of SECONDARY EDUCATION, ORISSA-

Regulation-16 A school seeking to open Class VIII and Class IX shall be required to fulfil the following requirements before permission to open the classes is given.

Regulation-16(4) Staff-(Minimum Staff required)-Regulation-16(4)(i) A trained Graduate (if a trained graduate is not available, an untrained graduate may be appointed temporarily).

Regulation-16(4)(ii) A Sahityacharya.

Regulation-16(4)(iii) A trained Science Graduate (in the case of non-availability of a trained Science Graduate, a Science Graduate or failing that an I. Sc. may be appointed temporarily) Regulation-17 A school seeking to open Class X shall be required to fulfil the following conditions before permission to open the class is given.

Regulation-17(2) ADDITIONAL STAFF:

Trained Graduate-I Trained Intermediate or Trained Matriculate-I (In the case of non availability of trained personnel untrained persons may be appointed temporarily).

Physical Training Instructor-I (If Trained Physical Training Instructors are not available, a trained Matriculate may be appointed temporarily).

Regulation-18 School seeking permission to open Class XI with the purpose of securing recognition for presenting candidates at the High School Certificate Examination of the Board shall be required to fulfil the following requirements before recognition is given.

Regulation-18(2) Additional Staff-One more trained Graduate or a trained Intermediate.

(In the case of non-availability of a trained graduate a Graduate may be appointed temporarily).

Clerk-I- The School should have a Headmaster who should have at least 7 years" service either as a teacher in a High School or as a Headmaster of a Middle School or the two taken together.

ORISSA EDUCATION ACT, 1969 "Section 3-Definitions:

In this Act unless the context otherwise requires-

(a)..

(b) "Aided Educational Institution" means a private educational institution which is recognised by and is receiving aid from the State Government;

(c) to (i)...

(j) "Private educational institution" means any educational institution which is not established and maintained by the Government of Orissa, the Union Government or the Government of any other State;

Explanation- An educational institution, the management whereof has been taken over by the State Government prior to the commencement of this Act shall, until the institution is declared by the State Government to be a Government educational institution, be deemed to be a private educational institution.

(k) "recognised educational institution" means any private educational institution which is or has been recognised by the State Government; and

(1) "Rules" mean rules made under this Act.

Section 4 - Establishment and recognition of educational institutions-

(1) The State Government may regulate the primary and other stage of education and courses of institution in Government and private educational institutions.

(2) The State Government shall take from time to time, such steps as they may consider necessary or expedient, for the purpose of providing facilities for general education, special education and for the training of teachers.

(3) The State Government may, for the purpose of providing such facilities-

(a) establish and maintain educational institutions; or

(b) permit any person or body of persons to establish and maintain aided educational institutions; or

(c) recognise any educational institutions established and maintained by any person or body of persons.

(4) All existing educational institutions shall be deemed to have been established in accordance with this Act.

(5) After the commencement of this Act, the establishment of any private educational institution or the opening of a higher class in any private educational institution shall be subject to the provisions of this Act and the Rules made there under and any such educational institution or higher class, established or opened otherwise than in accordance with such provisions shall not be entitled to be recognised by the State Government.

(6) The recognition shall be accorded by the prescribed authority on behalf of the State Government.

Section 5. Application for recognition-

(1) Any person or body of persons desirous of establishing any private educational institution or of opening a higher class in any such institution may, within the prescribed period and in the manner prescribed, make an application to the prescribed authority for according recognition thereto.

(2) While according recognition under Sub-section (1) to the establishment of a private educational institution the prescribed authority shall have regard to the following matters, namely:

(a) that there is adequate financial provision as may be prescribed for its continued and efficient maintenance;

(b) that provision for suitable and adequate accommodation, of and equipment has been made;

(c) that the institution is proposed to be located in sanitary and health surroundings; and

(d) such other matters as may be prescribed.

Section 6-Effect of non-recognition;
Notwithstanding anything to the contrary contained in any other law for the time being in force, no private educational institution which has not been recognised by the State Government under this Act shall be entitled,

(a) to be recognised by the Board of Secondary Education constituted under the Orissa Secondary Education Act, 1952 (Act 10 of 1953) or the Council of Higher Secondary Education Act, 1982 (Act 19 of 1982) or, as the case may be, to be affiliated to any University established under any law; or"

(b) to receive any aid from the State Government.

Section 10-Conditions of service of the staff of Aided Institutions;

(1) The qualifications required for appointment as teachers and other members of the staff of aided educational institution and their conditions of service relating to salary, leave, pension, provident fund, age of retirement, disciplinary action

and other matters shall be, as may be prescribed;....

Section 27 -Power to make rules-"(1) to (3)....

(4) Until rules are made under this section, the rules contained in the Orissa Education Code which were in force immediately prior to the coming into force this Act shall, in so far as they are not inconsistent with the provisions of this Act or of the Constitution be deemed to be rules made under this Act.

Section 28-Savings- The provisions contained in this Act shall be in addition to and not in derogation of the provisions contained in the Orissa Secondary Education Act, 1952 (10 of 1953) or in any law regarding University education for the time being in force and in the case of any inconsistency or repugnancy the provisions of this Act shall prevail.

10. Even though several contentions have been raised by the respective parties, in our considered opinion the pivotal issue is whether the stipulation in the Regulations of the Board of Secondary Education about seven years teaching experience in terms of Regulation 17(2) of Chapter IX, i.e., "a trained Graduate in Arts or Science with minimum seven years experience after training" occupying the field on 29-4-1977 has to be strictly followed. Arguments of the teachers functioning as Headmaster in charge or who have been approved as Headmaster in charge/Headmaster by the Inspector of Schools are that such a requirement does not apply to unaided institutions, and in any event the Regulation is not applicable and is at the most directory. The Regulations have been framed u/s 21(2)(f) of the Orissa Secondary Education Act, 1953. The Full Bench in Golakh Chandra Mohanty's case (supra) observed that the power to frame Regulations regarding pay and other conditions of service of teachers is confined only to schools which are controlled by the Board of Secondary Education and not to others. It is further submitted that even if for the sake of argument it is held that there was some infirmity sympathetic view is to be taken in the background highlighted above.

11. The passing note appended to Article 285(5)(i) of the Orissa Education Code may be noticed. The note stated that no untrained teacher should be appointed unless the principles of the training colleges and Headmaster of Secondary Training Schools report that they have no suitable candidates prepared to accept the appointment which is vacant. Such provision would also show the permissibility of appointment of untrained teachers in Government schools and at any rate the restrictions under the note on appointment of untrained teachers would stand modified by the corresponding provisions of the Orissa Subordinate Education Service (General Branch) and (Women's Branch) Rules, 1972 (in short, "1972 Rules") which is a rule framed under Article 309 of the Constitution of India, 1950. The Regulations are made with the approval of the State Government u/s 21 of the Secondary Act, and are statutory in character. Chapter, IX of the Regulations deals with recognition of institutions by the Board. Regulation 1 of Chapter IX stipulates that no school which is not recognised by

the Board shall be permitted to present candidates for any examination conducted by the Board. Regulation 17 being statutory in nature, it must be held that there is statutory requirement of Headmaster of High Schools as fulfilling such conditions.

12. Section 21(ii)(c) of the Secondary Act which has been referred to above deals with the conditions of recognition of institutions for the purposes of admission to the privileges of the Board including its examinations. Section 11 deals with the power and functions of the Board and stipulates that subject to the provisions of the Act the Board shall have powers and functions inter alia including the powers to recognise institutions for the purposes of admitting them to the privileges of the Board including examinations conducted by it. In the pre-amendment Chapter IX, Regulation 18(2) the stipulation was that the school should have a Headmaster who should have at least seven years' service either as a teacher in a High School or as a Headmaster of a Middle School of the two taken together. Under Regulation 20(a) for the post of Headmaster the qualification required was a Trained Graduate in a high school with classes VI to XI and no additional sections. Under Regulation 20(b)" the standard staff for a high school was prescribed with classes IV to XI and no additional sections. The requirement was the same qualification. After amendment the relevant Regulation is Regulation 17(2) which has been indicated above. In Section 7-D of the Act effect of non-recognition has been indicated, and it provides that notwithstanding any thing to the contrary in any other provisions of the Act no private educational institution which has not been recognised by the State Government under the Act and continues to be so shall be entitled to be recognised by the Board of Secondary Education constituted under the Secondary Act. Section 10-C deals with constitution of common cadre and its consequences.

13. At this juncture it is also necessary to take note of The Orissa Education (Establishment & Recognition of Private High Schools) Rules, 1979 (in short, "Establishment Rules"). Rule 3(1)(k) thereof stipulates that the institution will provide requisite number of qualified staff as per norms laid down by the Board and the State Government with emphasis on suitable staff competent to teach Science and Mathematics. In the Orissa Education (Management of Private Schools) Rule, 1980 (in short, "Management Rules"), Rule 2(b) defines "Board" and in Rule 9(g) it has, been provided that the managing committee is required to submit reports and returns required by the Government, the Director of Education, the Inspector of Schools, the District Inspector of Schools and the Board from time to time. Rule 9(h) requires the managing committee to ensure that institutions are imparted according to the standards prescribed by the Board and concerned authorities. Similarly under Rule 9(1) the managing committee is required to ensure observance and compliance of instructions issued by Government, the Board and other concerned authorities regarding smooth management of the institutions in all respects from time to time. In The Orissa Education (Establishment, Recognition and Management of Private High Schools)

Rules, 1991 (in short, "Management Rules, 1991") also Rule 30(c) provides that the managing committee is to ensure that instructions are imported according to the standard prescribed by the Board and concerned authorities and followed. Similarly under Rule 30(f) the managing committee is to ensure observance and compliance of instructions issued by the Government, the Board and other concerned authorities regarding smooth management of the institutions in all respects from time to time. Similar is the position under Rule 30(o) and Rule 30(p).

14. The word "controlled" as used in the Regulation is of wider amplitude and in the context would mean control exercised by the Board over the institutions. The Board has power to frame Regulations regarding conditions of service including appointment and promotion and that too in respect of all teachers of Secondary Schools and other institutions. This is evident from reading Section 11(1) and Section 21(2)(f) of the aforementioned Act. The word "controlled" has been used in both the said provisions. The expression "control" is of a very wide connotation and amplitude and includes a large variety of powers which are incidental or consequential to achieve the powers vested in the authority concerned. (See *Corporation of the City of Nagpur, Civil Lines, Nagpur and another Vs. Ramchandra and others*,). The word "control" is synonymous with superintendence, management or authority to direct, restrict or regulate (See *Shamrao Vithal Cooperative Bank Ltd., v. Kesargad Pandhura Mallva*: 1972 U.J. (S.C.) 204). It suggests check, restraint or influence (See *State of Mysore v. Allum Karibasappa*: (1974) 2 S.C.W.R. 259). Control means power to check or restrain, superintendence, management.

15. The reasoning indicated in *Golakh Chandra Mohanty's* case (supra) that there cannot be two parallel authorities to lay down conditions of service is not correct and as such the Regulations framed u/s 21(2)(f) and Section 11(i) are on the basis of subordinate legislation and in case any appropriate legislation in the field as embodied by the Education Act is to make good of the inconsistency or repugnancy. The question, therefore of simultaneous operation of two parallel authorities in the field does not arise. Rule 8(3) of the Rules was amended on 3-6-1988. It lays down the procedure for promotion. The requirement of seven years teaching experience as a trained graduate teacher as an eligibility condition for promotion as Headmaster is a statutory requirement with effect from 29-4-1977. Rule 8(3) of the Rules cannot be said to be dealing with eligibility qualification, and it merely provides that all those who are eligible are to be considered for promotion only -in a particular manner. A bare reading of the provision makes it clear that it does not lay down any new qualification to be possessed for promotion as Headmaster. The background facts highlighted above go to show that Article 312 of the Code provides that, there shall be four posts of Trained Graduate Teachers including the Headmaster in a high school. The Code applied to both aided and unaided schools. Essentially therefore, the Headmaster is required to be a trained graduate. This position continued till the Act was enacted. The said statute received the assent of the Governor on 23-5-1953.

Pursuant to the power available u/s 21, the Board framed Regulations on 22-12-1955, and Regulation 18(2) stipulates that in order to be a Headmaster in a High School at least seven years' service either as a teacher in a High School or as a Headmaster of a Middle School or the two taken together is required. This Regulation was amended on 29-4-1977 and Regulation 17(2)(i) was incorporated. Around this provision revolves the entire controversy. The said Regulation 17(2)(i) provides that in order to be a Headmaster in a High School, the teacher must be a trained graduate with minimum seven years experience after training. Meanwhile the Act had been enacted and Section 27 conferred rule making power pursuant to, which the Education Code became the Rules and various Rules were framed. The 1974 Rules were framed and given effect to from 1-4-1975. Rule 10 is the provision relating to appointment of Headmaster. The provision reads as follows:

Rule 10. The Selection Board shall be consulted in cases of promotion to the rank of Headmasters of Schools and in all cases of promotion of college teachers from one rank to the other.

This provision was amended on 3-9-1976, but was repealed on 10-12-1981. From that date specific provision not being available, general provision in Rule 8(2)(b) of the Rules operated in the matter of promotion of an employee of the school as Headmaster with prior approval of the Director. Rule 8(2)(b) was amended on 25-10-1976 from which date the Director was to give prior approval and not the Government. This rule came into force.

16. Rule 8(3) came into force with effect from 3-6-1988 as indicated earlier. It has to be noted that beginning from the time Article 312 of the Code held the field and it applied to both aided and unaided schools. In order to be appointed as a Headmaster one has to be a trained graduate and must have seven years of teaching experience. This position continued till 29-4-1977 and thereafter Regulation 17(2) of the amended Regulation came into force. This also provided that in order to be promoted to the post of Headmaster one has to have seven years teaching experience after training. This position continued till Rule 8(3) was inserted on 3-6-1988. Elaborate procedure for appointment of Headmaster from a common feeding cadre which has to be formed by the State Government was provided. Elaborate process relating to appointment to be made from a gradation list prepared according to seniority was specifically prescribed. The conclusion arrived at in Golakh Chandra Mohanty's case (supra) in sub-para 3 of paragraph 26 is clearly not that correct position in law. Direction was given to the effect that when the approval is pending and has not been decided it is to be decided in favour of the person promoted if he has acquired the qualification by 3-6-1988. The consequence of this direction is that even though at the time of promotion the person concerned was not qualified and his question of approval was pending, yet approval is to be accorded if he had acquired qualification by 3-6-1988. This would amount to postponement of operation of a provision to a future date. There would be an incongruous situation. By way of illustration it can

be said that if on the date of vacancy two or more persons are unqualified to hold the post, and yet one of them was promoted, and subsequently the person promoted and Ors. acquired the qualification by any particular date more particularly 3-6-1988, yet the promotion illegally made earlier shall be held valid without a fresh consideration of all the candidates eligible by 3-6-1988. The decision of this Court is that the date of vacancy is pushed to 3-6-1988 from the day when it actually occurs. To that extent the decision in Golakh Chandra Mohanty's case (supra) is not correctly decided. There is rationale in fixing 3-6-1988 as the date for fixation of qualification. There can be no rational basis for fixing the date and there is no reason indicated as to why persons who have not acquired the qualification by that date must be stopped from being promoted if in fact they have acquired the qualification later than that date. The basis of classification has no rational nexus with the object to be achieved, i.e.. the date on which the qualification is acquired.

17. Great stress has been laid on the orders of approval passed by the Inspectors of Schools in certain cases recognising the concerned teachers as Headmasters in charge/Headmasters. As highlighted above there is no such recognised post as Headmaster in charge or in charge Headmaster. The provisional, orders of the Inspectors of Schools in such cases only mean that the senior most teacher is kept in charge for carrying out the day to day affairs of the institution. Even if the Managing Committee of the institution passes a resolution requesting the educational authority to pay the headmaster scale to any person, as he completed seven years experience as a trained graduate teacher that will have no consequence and the Inspector of Schools cannot accord approval to the appointment as Headmaster. Even if it is done, it would be unauthorised. Section 21(2)(f) of the Orissa Secondary Education Act is applicable to all types of high schools. It is to be noted that various categories of schools are Government, Recognised (both Aided or Unaided) or Private. Under Section 27 of the Orissa Education Act, no rule has yet been framed regarding the qualification for promotion of teachers as Headmaster. As indicated above he is required to have requisite qualification for appointment as teachers in different teaching posts of secondary schools including Headmaster of high schools. Therefore, question of two parallel authorities laying down conditions of service as observed in Golakh Chandra Mohanty's case (supra) does not arise. After the amended provision, Regulation 17(2) in Chapter-IX came into force with effect from 29-4-1977, i.e., the date of publication of the aforesaid amendment in the Orissa Gazette Extraordinary. It has become operative and if anybody else has been appointed after 29-4-1977 as Headmaster in a High School without having seven years of teaching experience after training, the said appointment has no force in the eye of law. The cut off date 3-6-1988 is not rational. As indicated above, this Court cannot have prospective power of overruling as the said power is only available to the Supreme Court of India as has been decided in I.C. Golak Nath and Others Vs. State of Punjab and Another, .

18. It has been contended by the persons who have sought for regulatisation of

their appointment as Headmasters that they joined the institutions when none were willing to join and they acted as such since long and therefore, the principles of reasonable expectation and promissory estoppel apply in their case. This contention is only to be noted to be rejected because there cannot be estoppel against a statute. In any event the appointments being irregular cannot be given the seal of approval. Only on the ground of fortituous circumstances, even if it is accepted to be correct a person was willing to act as a teacher/ Headmaster in an institution where the salary was meagre. On the contrary it has been highlighted by the intervenors that the eligible persons are waiting to be appointed as Headmaster if they are permitted to act as Headmaster, and in several cases their students who were appointed in unaided institutions and have irregularly been promoted as Headmasters in charge/ Headmasters by the Managing Committee will get performance.

19. Our conclusions are as follows:

(a) The decision of the Full Bench of this Court in Golakh Chandra Mohanty's case (supra) as contained in sub-paras (2), (3) and (4) of paragraph 26 is contrary to law. In paragraph 26(2) of the judgment, use of expression "appointments" is admittedly improper as there is no question of direct appointment. In paragraph 20, the Full Bench itself observed that all posts were to be filled up as required by Rule 8(3) of the Rules. Regulation 17(2) of Chapter IX of Board's Regulations is applicable to both aided and unaided institutions and only when a person is a trained graduate with minimum of seven years of experience after training is eligible to become as Headmaster.

(b) In Priti Ranjan's case (supra) the second Full Bench observed that the date 3-6-1988 has rational nexus with the object sought to be achieved by the provisions. The conclusion is indefensible in view of the analysis made above. The basis for such conclusion was enactment of Rule 8 (3). In view of the analysis made that the Regulation 17(2)(i) operated at all times, the basis for such conclusion does not hold good. The conclusion in Golakh Chandra Mohanty's case (supra) as followed in Priti Ranjan Pradhan's case (supra) that in cases where prescribed qualifications had not been acquired by 3-6-1988, but were acquired subsequently were to be approved is clearly without any basis.

That there can be no arbitrariness in fixation of even a cut off date is not disputed before us by the learned Counsel for the parties. This stand has been correctly taken, because after Article 14 has spread its wing in the field of administrative law following what was principally held in *Mrs. Maneka Gandhi Vs. Union of India* (UOI) and *Another*, no stand can be taken by any administrative authority that it can act arbitrarily. Indeed, even before the decision in *Maneka Gandhi*, law was that no administrative authority has absolute discretion to decide a matter within its competence the way it chooses. This has been the accepted position and the Apex Court had cited with approval what had been stated in this regard in *United States v. Munderlich* : (1951) 342 U.S. 98, the relevant part of which reads as below:

Law has reached its finest moments, when it has freed man from unlimited discretion of some ruler, some official, some bureaucrat. Absolute discretion is a ruthless master. It is more destructive of freedom than any man's other invention.

In so far as fixation of cut off date is concerned, the same can be regarded as arbitrary by a Court if the same be one about which it can be said that it has been "picked out from a hat", as was found to be by the Apex Court in D.R. Nim, I.P.S. Vs. Union of India (UOI), because of which fixation of 19-5-1991 as the date for the concerned purpose was held to be invalid.

As to when choice of a cut off date can be interfered was stated by Holmes, J. in Louisville Gas and E. Company v. Caleman (1927) 277 U.S. 32 by stating that if the fixation be very wide of any reasonable mark" the same can be regarded arbitrary. What was stated by Holmes, J. was cited with approval by the Apex Court Union of India (UOI) and Another Vs. Parameswaran Match Works and Others, in paragraph 10 by also stating that choice of a date cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances. It was further pointed out where a point or line has to be, there is no mathematical or logical way of fixing it precisely, and so, the decision of the legislature or its delegate must be accepted unless it can be said that it is very wide of any reasonable mark.

The aforesaid decision was cited with approval in D.G. Gose and Co. (Agents) Pvt. Ltd. Vs. State of Kerala and Another, ; so also in State of Bihar and others Vs. Ramjee Prasad and others, . The position, was again reiterated in Union of India and Another Vs. Sudhir Kumar Jaiswal, .

(c) The orders of approval passed by the Inspectors of Schools are of no consequence and do not have any force on the question of promotion in terms of Rule 8(3).

20. Since we have laid down the position of law, the writ applications are disposed of. The opposite parties shall take a decision so far the Petitioners are concerned keeping in view the conclusions indicated supra, and the consequences flowing from the same. No costs.

S.N. Phukan, C.J.

21. I agree.

P.C. Naik, J.

22. I agree.

P.K. Mohanty, J.

23. I agree.

P.K. Tripathy, J.

24. I agree.

Writ applications disposed of.