

(1990) 05 CAL CK 0047
In the Calcutta High Court
Case No : C.O. No. 5353 (W) of 1984

West Bengal Headmasters' Association and Others	APPELLANT
Vs	
State of West Bengal and Others	RESPONDENT

Date of Decision : 08-05-1990

Acts Referred:

Bengal (Rural) Primary Education Act, 1930 — Section 66(2)(P)
Constitution of India, 1950 — Article 14, 16
Management of Recognized Non Government Institutions (Aided and Unaided) Rules, 1969 — Rule 28, 28(1)
West Bengal Board of Secondary Education Act, 1963 — Section 45, 45(1), 45(2)

Citation : (1990) 2 CALLT 327 : 94 CWN 1166

Hon'ble Judges : Khwaja Mohammad Yusuf, J

Bench : Single Bench

Advocate : Arun Prokash Chatterjee, Debi Prosad Pal, S. Pal and S. Mukherjee, for the Appellant; Saktinath Mukherjee, Pradipta Roy and S. Basu, for the Respondent

Final Decision : Dismissed

Judgement

Khwaja Mohammad Yusuf, J.—The petitioners have moved this writ application against the impugned Memo No. 372-Edn.(B) dated 31st July, 1981 for writ of Mandamus commanding the respondents to cancel and withdraw the offending portion of the said Memo by which the age of retirement has been reduced from 65 years to 60 years, a writ of Certiorari for quashing the relevant "portion of the said impugned Memo which had reduced the age of retirement from 65 years to 60 years and also a writ of Prohibition directing the respondents not to make any discrimination in the matter of fixation of the age of retirement amongst the teaching and non-teaching staff. The "offending portion" of the impugned Memo dated 31st July, 1981 as described in paragraph 25 of the writ petition which is the target of attack is a portion of Clause 6 of the said Memo which is quoted as under :-

"The teachers in all Government aided educational institutions opting for the

revised scales of pay shall retire at 60 years, provided however, that who were above 54 years but below 57 years of age on April 1, 1981 shall retire on completion of 62 years of age on March 31, 1989 whichever is earlier, and for such teachers who were above 57 years of age on April 1, 1981 retirement will be on completion of 65 years or on March 31, 1987 whichever is earlier.

The non-teaching employees of all Government aid institutions shall retire at 60 years of age."

2. The case of the petitioners is, in short, as follows :-Prior to the issue of Memo dated 31st July, 1981 the age of superannuation of the teaching and non-teaching staff of the schools in the State of West Bengal was 60 years and that after attaining of the age of superannuation, there was provisions for extension of service year by year for another period of 5 years on condition that the teacher concerned was mentally alert and physically fit. Under Rule 28(1)(iii) of the Rules for Management of Recognised Non-Government Institutions (Aided and Unaided), 1969 it was provided that the Managing Committee of a School shall subject to the approval of the Director have the power to extend the service of teachers and other employees beyond the date of superannuation and that Rule 28(2) 6 (3) of the said Rules provided the procedure to be followed in case of non-granting of extension of service of the teachers and the employees. It is submitted that under the impugned Memo those who are in service on 31st March, 1981 should exercise option either to retain their existing scale of pay and existing terms and conditions of service or to come under the revised scale of pay together with the revised terms and conditions of service as may be determined by the State Government and that under the revised terms and conditions of service one has to retire after attaining the age of 60 years. The petitioners contended that the classification provided for teaching and non-teaching staff who would be opting for new scale of pay and new terms and conditions are not based on any intelligible differentia and the provision is highly discriminatory. The petitioners cited several cases including the case of petitioner No. 3 to show that this particular petitioner retiring at the age of 65 years would be drawing Rs. 3,67,056/- and that the difference of new scale and the old pay scale will result in a loss of not less than Rs. 1,05,006/-. It is also stated that in case of college teachers the retirement age was 58 years and 60 years and the same has been increased up to 65 years. It is contended that the determination of the age of retirement at the age of 60 years in respect of teaching and non-teaching staff of both primary and secondary schools is highly arbitrary and not based on any rational basis and a discrimination has been done in the case of school teachers and college teachers in determining the age of retirement.

3. It is specifically contended in the writ petition that the impugned Memo changing the age of retirement could not supersede the statutory rule framed under the provision of a Statute as it has been sought to be done and the exercising of option in terms of the impugned Memo obtaining for the new revised pay scale and the revised terms and conditions would tantamount to

violation of Articles 14 and 16 of the Constitution of India. The petitioners further contended that the teachers whether of colleges or schools form one homogenous class and there cannot be any mini-classification or discrimination within the class designated as teachers. The impugned Memo did not spell out the *raison d'être* for liberalising the pay scale formula with the burden of age limitation. In a welfare state where longevity has actually increased, shortening the period of service is highly arbitrary. It is further stated that law as an institution ushers in socioeconomic justice and the rules of natural justice or their origin to ethical and moral code. The school teachers both primary and secondary have already accrued the right to work upto the age of 65 years and - all of them have the right to get the financial benefits for working till the age they lawfully deserve. By an executive order the rights and privileges of the petitioners cannot be taken away by bringing a situation which would result in apparent discrimination apart being highly unreasonable and arbitrary. It is also contended that the options exercised by the petitioners pursuant to the impugned Memo resulted out of ignorance of their legal rights and/or under duress cannot bind those teachers. Hence the writ petition to quash the impugned Memo.

4. The respondents contested the writ petition by filing Affidavit-inOpposition. It is denied that any discrimination is made in fixing the age of retirement of the teachers. The introduction of the revised pay scale by the Government on the recommendation of the Second Pay Commission was to give more financial benefit to the teachers in the shape of higher pay scales as well as higher pensionary benefits and to bring a uniformity with regard to the age of retirement after making reasonable classification amongst certain categories of teachers who were differently placed with regard to age. Keeping in view the aforesaid fact the impugned Memo dated 31st July, 1981 was issued with particular reference to its Clause 6 exempting categories of teachers, the period of their services, etc. It is stated that the said classification as contained in Clause 6 of the said impugned Memo is based on rational differentia and has a nexus with the object achieved, namely, to bring a uniformity in pay scale, compensatory benefits, etc and accordingly the classification has real and substantial relation to the object of the whole scheme. The teachers were given the provision of option so that before obtaining for the new scale they should get an opportunity to consider the pros and cons of such revised scale and the revised terms and conditions of service. It is further stated in the said Affidavit that the college teachers and school teachers are totally on different footing having different service conditions and Recruitment Rules and as such they cannot be grouped into one class and the allegation of discrimination between college teachers and school teachers in determining the age of retirement is denied. It is strongly denied in the said Affidavit that the impugned Memo of 31st July, 1981 (as clarified in G.O. dated 12th September, 1983) supersedes any statutory rules framed under the provisions of any Statute. It is further stated that the teachers who have once exercised option cannot go back and they are

stopped from disclaiming the option once exercised.

5. The said Affidavit-in-Opposition further states that the writ petition was not filed in a representative capacity and no prayer has been made under Order 1 Rule 8 of the CPC or Rule 11 of the Rules framed by the High Court and as such the petitioners Nos. 1, 2 and 8 cannot claim any protection under Articles 14 and 16 of the Constitution. It is further contended that the writ application is premature and misconceived as well as politically motivated to vitiate the welfare scheme enunciated by the Government of West Bengal. It is further stated that the school teachers and college teachers are not similarly placed persons within the Articles 14 and 16 of the Constitution. The age of retirement in respect of college teachers is 60 years with provision of extending the service of exceptionally talented college teachers for a period upto 65 years of age whereas there is no such thing in case of school teachers. Paragraph 18 of the Affidavit-in-Opposition unambiguously pointed out the case of the State-respondents on the limitation in the age of retirement of school teachers. The Affidavit makes it clear that the extension of service by 5 years after 60 years was subject to the fulfilment of certain conditions and such extension of service was never crystalised into an absolute legal right so much so that it cannot be altered even if it goes against public interest and employment policy of the Government. As such it is prayed that the writ petition be dismissed with costs.

6. The petitioners in the Affidavit-in-Reply state that there is no reasonable basis for making classification under question among the teachers and that there is no nexus between the classification and the object sought to be achieved in this respect and as such the impugned Memo clearly discriminates and violates the provisions of Article 14 of the Constitution. It is further contended that the principle of promissory estoppel have no manner of application in the instant case. As there is the matter of fixation of age which is violated Article 14 of the Constitution as such there cannot be any estoppel and weaver in respect of any fundamental right guaranteed under the Constitution. It is reiterated that both school teachers and college teachers are at par and there is no basis for making any classification in the matter of fixation of age and such classification is wholly unreasonable and arbitrary. It is further stated in the Reply that the writ petition has been filed in representative manner because a large number of poor teachers are affected and the petitioner has a right to prosecute such a writ petition at least as a public purpose litigation and they should not be deprived to move this Hon"ble Court. It is further stated that even a stranger who have no interest in the matter is entitled to file a writ petition to expouse the cause of poor teachers as a public interest litigation. Save and except as stated hereinbefore the petitioners reiterated their, case as stated in the writ petition.

7. In a written argument the petitioner No. 1 submitted that the Calcutta University issued rules for Management of Non-Government High Schools including Aided Schools in 1949 and Note 2 to paragraph 25 thereof contained the provision that the teachers of school should ordinary retire at the age of 60

but the Appointing Body may allowed a teacher an extension of service of one year at a time upto the age of 65 years. Then by the West Bengal Secondary Education Act, 1950 the principal rule-making authority in regard to such matters as the age of superannuation of teachers was the Board of Secondary Education. In this connection reference was made to the Circular No. 47/Oct-/53 dated 13th October, 1953 and Circular No. 2/54 dated 18th January, 1954. Under these circulars it is stated that "service of a teacher will terminate as soon as he attains the age of 65 years" and that "no teacher, however, should be retained beyond the date when he or she completes his or her 65th year age. . . ." (Circular No. 2/54). Thereafter the West Bengal Board of Secondary Education Act, 1963 was enacted and the Rules relating to matters of superannuation of teachers were entrusted to the Government of West Bengal. It is contended by him that the retention of the teachers beyond the date of superannuation was statutory provided in Rule 28 of the Management of Recognized NonGovernment Institutions (Aided and Unaided) Rules, 1969. It is specified in the said Rule that the Managing Committee shall subject to the approval of the Director have the power to extend the service of teachers and other employees beyond the date of superannuation and if the Director does not approve the extension of service he shall communicate the reasons to the Committee. On the other hand, if the Managing Committee does not recommend extension of service of a teacher it shall record reasons and the persons aggrieved may make his representation to the Director; whose decision would be final.

8. It is submitted that by Notification dated 31st July, 1989 issued by the Government of West Bengal new pay scale and condition of service recommended by the Second Pay Commission was introduced as contained in Clause 6 of the Notification. The petitioners at once moved this Hon"ble Court (on 25th April, 1984) and got an interim order of injunction. (Let it be noted here that the interim order was obtained ex parte on 3rd July, 1984). In compliance with the interim order of this Hon"ble Court the Government issued a Notification dated 31st March, 1986 and extended the benefit of the interim order to all employees of Non-Government Primary and Secondary Schools including Madrasahs to the effect that they would retire at the age of 60 and would be allowed extension of service year by year upto the age of 65 subject to the conditions. It was pointed out in the said Notification that the decision would be reviewed by the Government after disposal of the relevant case now sub-judice. It is further contended that the matter though still sub-judice the Government has issued a fresh Notification effecting the reduction of age of superannuation to 60 years without any possibility of the same being extended irrespective of the fact that the interim order of injunction is persisting. It is stated that the primary teachers are governed by the Bengal (Rural) Primary Education Act, 1930 and Rule 4A of the Rules framed under Clause (p) of Section 66(2) of the said Act where it is provided that a teacher appointed by the District School Board may be retained in service upto the age of 60 years but the Board may, if it thinks fit, grant thereafter extension of service of teacher on year to year basis upto the

age of 65 years with conditions. It is further contended that under Rule 4A extension of service beyond 60 years will count towards increment, terminal benefits, etc. It is contended that this is a statutory rule and cannot be superseded by the Memo dated 31st July, 1981. It is also stated that there is a Notification of a draft amendment relating to Rule 4A but that has not yet been adopted and the Statutory Rule 4A stands. It is further contended that the West Bengal Urban Primary Education Act, 1963 does not make any provision for retirement of a teacher prior to 65 years. It is further contended that the impugned Memo dated 31st July, 1981 is ultra vires to the West Bengal Board of Secondary Education Act, 1963, and the West Bengal (Rural) Primary Education Act, 1930 and the West Bengal Urban Primary Education Act, 1963.

9. It shall be fair to point out that Mr. Arun Prokash Chatterjee when appearing for the petition No. 1 did not make all the submissions as made out in the written argument submitted on behalf of the petitioner No. 1. In fact, Rule 4A of the Rules framed under Clause (p) of Section 66(2) of the Bengal (Rural) Primary Education Act was not placed before the Court. In the written argument a reference was made of the recommendation of the Third Pay Commission but in my opinion this writ petition is confined to the Memorandum dated 31st July, 1981. Mr. Chatterjee has squarely argued his case on the basis of the Circulars of West Bengal Board of Secondary Education being Circular No. 21 dated 12th December, 1952, Circular No. 46/Oct./53 dated 13th October, 1953 and Circular No- 81Edn(B)/IM-3/82 dated 31st March, 1986 which relates to extension of service, extension of services of superannuated teachers and age of superannuation of the employees of the Government and Non-Government Primary and Secondary Schools including Madrasahs, respectively. He drew the attention of the Court to the terms of reference of the Second Pay Commission in paragraph 2 in Appendix AI on page 535 of the Commission's Report and submitted that the Second Pay Commission (1977-1980) has nothing to do with the age of retirement. His emphasis was upon the terms of reference in Clause (a) of Para 2 where the Commission was asked to examine the structure of emoluments of all employees under the rulemaking control of the Government of West Bengal. He referred in particular Article 43 of the Constitution relating to the Directive Principles of State Policy and contended that the restriction on the age of superannuation imposed by the State of West Bengal by the impugned Memo is against the basic principle underlined in this Article and is a fraud on the exercise of power. In support of his contention Mr. Chatterjee cited a number of decisions which are noted as follows :-(1) G.M. Talang and Others Vs. Shaw Wallace and CO. and Another, ; (2) British Paints (India) Ltd. Vs. Its Workmen, ; (3) State of Haryana, Vs. Shamsheer Jang Bahadur, etc. etc., ; (4) Express Newspapers Pvt. Ltd. and Others Vs. Union of India (UOI) and Others, ; and (5) C.L. Verma Vs. State of M.P. and another, .

10. In a written submission submitted on behalf of the petitioners Nos. 2 to 8 the impugned Memo dated 31st July, 1981 was challenged on the grounds, inter alia, that the Rules for Management of Recognized NonGovernment Institutions (Aided

and Unaided), 1969 have been framed in exercise of the power conferred u/s 42(2)(d) of the Wgst Bengal Board of Secondary Education Act, 1963 and as such the said Rules are Statutory Rules. Under Rule 28(1) (iii) of the said Rules the Committee subject to the approval of the Director has the power to extend the service of teachers and other employees beyond the date of superannuation and approval for such extension must be sought for from the Director or any Officer authorised by him within a certain period. Under Rule 28(2) in case of non-approval of the appointment or extension of service the Director or Officer authorised by the Director shall communicate to the Committee the reasons thereof. The whole emphasis has been made on the point that the Rules are statutory rules framed by virtue of Section 45 of the Act of 1963 and Rule 28 confers power upon the Committee to extend the service of teachers and other employees beyond the date of superannuation with the approval of the Director. On the basis of the aforesaid submission it is contended that the teachers have the statutory right that their case should be considered by the Committee for extension of their services beyond the age of superannuation i.e. 60 years of age and this right has been explicitly given to them when the statutory power is conferred upon the Committee to extend the service of the teachers. As such it is submitted that power which is to be exercised under Rule 28 of the said Rules cannot be exercised arbitrarily or capriciously and in the event the officer concerned does not approve any particular case for extension he shall refer the case to the Director. It is further submitted that in a case if the power for granting extension is not exercised reasonably and properly the aggrieved teacher has a legal right to move the High Court under the writ jurisdiction for enforcement of his legal right because that right is statutory in nature and cannot be taken away or whittled down by an Executive Notification or an Executive Order. The revised scale of pay has been recommended by the Second Pay Commission but the Second Pay Commission has no power and/or authority to recommend that the teachers must be retired at the age of 60 years without any extension of service and such recommendation is not a law and further such recommendation is inconsistent with and contrary to the statutory right conferred under Rule 28(1)(iii). It is further submitted that the State Government by successive Circulars bearing Circular No- 21 dated 12th September, 1952, Circular No. 46/Oct./53 dated 13th October, 1953, Circular No. 2/54 dated 18th January, 1954, Circular No. 3683(24) G.A. dated 3rd April, 1969, Circular No. 81-Edn.(B) dated 31st March, 1986 and even by the Circular No. 448-Edn.(P) dated 19th October, 1989 has given in conformity to the Statutory Rules by providing that the normal age of retirement of a teacher although is 60, it may be extended upto 65 on the strength of the orders passed by the State Government provided they are found physically fit and mentally alert.

11. Dr. Pal, the learned Counsel appearing for the respondents Nos. 2 to 8, submitted that the revision of pay scale has nothing to do with the age of retirement but the pay scale is revised vis-a-vis to the cost of living, and is

exclusively meant for economic benefit. He submitted that by an executive fiat the age of retirement cannot be reduced to 60 years by curtailing the statutory right for further extension of year by year upto 65 years. Emphasising the provision of Section 45 of the West Bengal Board of Secondary Education Act, 1963 as well as Rule 28(1) (iii) of the Rules for Management of Recognized Non-Government Institutions (Aided and Unaided), 1969, he submitted that under no circumstances the State Government has the right to reduce the age of retirement of teachers to 60 years from 65 years. He submitted that Annexure "A" to the writ petition is not at all of statutory character but it is purely an Executive Order and its two Clauses, i.e. Clauses 4 and 6 are violative of Article 14 of the Constitution. He also referred to the various circulars and explanations on the principle of Rule 28 with particular reference to one of dated 19th October, 1989 bearing No. 448-Edn.(P)/3E-2/89 issued by the Education Department, Primary Branch, Government of West Bengal, indicated that in continuation of the Government Order No. 81-Edn.(B) dated 31st March, 1986 that the teaching and non-teaching staff of Recognized Non-Government Education Institution in the State who enjoyed the benefit of extension of service on a year to year basis upto the age of 65 years prior to 1st April, 1981 on the strength of the order issued by the State Government in the Education Department may be allowed the said benefit subject to their possession of physical fitness and mental alertness and also subject to other conditions laid down in the Government Order quoted above Dr. Pal submitted that the retirement age of college teachers are also followed on the same pattern and another important submission made by Dr. Pal is that even in revised scale of pay without reduction of age the petitioner would be sufferers.

12. Dr. Pal dealing with the rule of construction relied heavily upon the well-settled rule of construction decided in the case of *Frederic Guilder Julius v. The Right Rev. the Lord Bishop of Oxford etc.* reported in 5 A.C. 214. According to him in this case where the object for which the power is conferred upon a statutory authority is for the purpose of enforcing the right which "subject can exercise, there is a duty cast upon the donee of the power to exercise it for the benefit of those who have the right, when required on their behalf According to him the words conferring the power are equivalent to the same that the donee must exercise it. Dr. Pal submitted that this decision of the Privy Council was followed by the Supreme Court in many cases and also cited the following cases :-(i) *Kalipada Chowdhury Vs. Union of India (UOI)*, ; (ii) *Punjab Sikh Regular Motor Service, Moudhapara Vs. The Regional Transport Authority, Raipur and Another*, ; (iii) *The Official Liquidator v. Dharti Dham (P) Ltd.* reported in 1977 SC 740 ; and (iv) *State (Delhi Admn.) Vs. I.K. Nangia and Another*, He also cited a decision reported in *The State of Mysore Vs. Padmanabhacharya etc.*, Apart from the above, further cases cited by the petitioners are (a) *Paluru Ramkrishnaiah and Ors. v. Union of India and Ors.* reported in ; (b) *Sri Venkata Seetaramanjaneya Rice and Oil Mills and Others Vs. State of Andhra Pradesh etc.*, ; and (c) *Central Inland Water Transport Corporation Limited and Another*

Vs. Brojo Nath Ganguly and Another, .

13. Mr. Saktinath Mukherjee, the learned Counsel appearing for the State of West Bengal, in a well-reasoned argument submitted that the only grievance of the petitioner is the alleged reduction in the so-called age of retirement and arbitrary introduction of limitation of age, and the exercise of option in favour of the new scale is alleged to be under influence of the initial increase in pay scale without taking into consideration the total effect thereof and even under duress. The writ of Mandamus is prayed not to change the age of retirement or reduce the age of retirement from 65 years to 60 years by the impugned Memo of 31st July, 1981 but to cancel and/ or withdraw the offending portion of the said Memo. Other prayers practically lead to the former one. There is no prayer for any relief in respect of the option admittedly exercised in favour of the new package scheme offered under the impugned Memo. Mr. Mukherjee submitted that the grounds of challenge, inter alia, are the existing provision for extension on yearly basis upto the age of 65 years beyond the age of superannuation at 60 years and the power of the Managing Committee to grant extension under Rule 28(1) (iii) of the Rules for Management of Recognized Non-Government Institutions (Aided and Unaided), 1969 are affected by the impugned Memo and this is an attempt on the part of the State Government to supersede the statutory provision by administrative direction. The determination of age of superannuation at 60 years is arbitrary and not based on rational basis and the classification into different age groups as on 1st April, 1981 is also not based on any intelligible differentia and is highly discriminatory. The learned Counsel submitted that the petitioners' allegation is that they would suffer substantial monetary loss in the event of exercise of option in favour of new package scheme even if such package scheme includes higher scale of pay. It is alleged by the petitioners that when the retirement age of college teachers has been increased to 65, there is no justification for the school teachers to retire at 60 and the exercise of option was due to the allurements with initial increase of pay and allowances without taking into consideration the total effect and such exercise of option cannot affect the petitioners' fundamental rights guaranteed under the Constitution.

14. Mr. Mukherjee submitted that a scrutiny of the allegations of the petitioners would reveal that the points relating to supersession of statutory provision by administrative instructions cannot justiciably be taken in the facts and circumstances of the case. According to him, the real dispute is with regard to the relevance of the principle in the facts and circumstances of the case. The petitioners nowhere said or even submitted that such determination of age of superannuation or the provision for extension thereof was made under any statutory provision but such statutory determination is ; conveniently assumed without any basis. He drew the attention of the Court to the various circulars relating to the age of superannuation and extension of service of teaching and non-teaching staff and submitted that upon examination of those circulars it would appear that there was nothing statutory about them. The said circulars were initially issued by the West Bengal Board of Secondary Education and

thereafter the matter was dealt with by the Government by issuing administrative circulars. The bunch of circulars are printed on pages 893 to 898 of the Headmasters' Manual, 7th Edition, January 1989. It is an admitted position by the petitioner that the age of superannuation at 60 years still continues to be so though there is no provision for extension of service beyond 60 years in the case of optees under the new terms and conditions. It is submitted that the impugned Memo "is not an imposition by the Government for any change. It provides that an optee either retains the existing scale of pay with the prevailing terms and conditions of service or opts for the new package scheme containing the revised scale with the new terms and conditions and it is for the individual teachers to choose or not to choose the proposed change. According to Mr. Mukherjee this means that the non-opting class of teaching and non-teaching staffs would continue to be on the old scale with old terms and conditions and would be governed by Rule 28(1)(iii) of the Rules of 1969. Mr. Mukherjee strongly emphasised that Rule 28 deals with procedure and procedure only and does not in any case confer any right to the teachers to get extension beyond 60 years. Rule 45(1) empowers the State Government to make Rules for carrying out the purpose of the West Bengal Board of Secondary Education Act, 1963 and Rule 45(2)(d) provide making Rules for the composition of the Managing Committee of the Institutions. Rule 28 empowers the Committee to extend the service of the teachers beyond the date of superannuation subject to the approval of the Director. The emphasis of the learned Counsel was that Sections 45(1) and 45(2) (d) relate only to the composition of Managing Committee of Institutions and as such the Rules are in the nature of subordinate legislation and cannot travel beyond the limits of the rule-making power set out in the Act. He stressed on the point that "administrative order may very well be modified and/or cancelled by any other administrative order. According to him the change takes effect according to the Memo of 31st July, 1981 because of an offer of acceptance and on no count by any imposition.

15. While dealing with the point that there is no rational basis for the alleged determination of the age of superannuation, Mr. Mukherjee while referring to the various circulars stated that the age of superannuation had all along been 60 years and the Government has retained the age of 60 years under the new package scheme. He referred to the recommendations of the Education Commission (1964-66), known as Kothari Commission, wherein the said Commission recommended that until provision for adequate pension is made the normal retirement age for teachers should be 60 years with extension upto 65 years provided the person is physically fit and mentally alert. Thereafter the Chattopadhyay Commission (1983-85) again went into the question and recommended that the age of retirement of school teachers whether in private or in Government service should be 60 years. He referred to paragraph 4 of the terms of reference to the Second Pay Commission wherein it is stated that the Commission would also examine the structure of emoluments and the condition of service of the teachers and non-teaching staff in State Government, sponsored

or aided schools and other institutions. The Pay Commission did consider and recommended that the retirement age of the teachers in the Government or non-Government service should be 58 years with extension upto the age of 60 years but not beyond that period. The State Government while fixing the age of 60 years for superannuation considered the recommendations of the Kothari and Chattopadhyay Commissions as well as those of the Second Pay Commission. He submitted that the stand of the petitioners is totally unreasonable as they are seeking to have all the benefits available to the Government employees but they would not agree to accept the age of retirement as application to the corresponding class of the employees of the State Government.

16. Dealing with the allegation of discrimination, Mr. Mukherjee referred to paragraph 5 of the Second Pay Commission's Report and submitted that how the Government has taken a liberal view of the matter and did not incorporate the new package scheme of 58 years at the age of superannuation with permission for two years extension as recommended by the Pay Commission. Most liberally the State Government allowed the age of 60 years as the age of superannuation even in the case of those who would opt for the new package scheme. A most rational rather than arbitrary approach was made by the Government. Dealing with the classification as explained in paragraph 5 of the Affidavit-in-Opposition, Mr. Mukherjee submitted that the Supreme Court has also approved such classification into different groups in the context of fixation of an age of retirement. He refuted the allegation of discrimination and submitted that the writ petition does not lay out any real foundation for the charge of determination and such a charge is not sustainable in view of the fact that the State has merely classified the employees into different groups for allowing them to have different periods of service with new package scheme. In fact, the learned Counsel wanted to bring home the point that no allegation of discrimination could be established by the petitioners and they miserably failed to point out the vice of discrimination. He submitted that the extension cannot be claimed as a matter of right or can create any cause of action.

17. In short, Mr. Mukherjee's argument devolved round the points that there is no case by the petitioners relating to fixation of pay scale or they have not challenged it in their prayer. The petitioners have the option to elect between 60 years of superannuation or extension till 65 years and there is no compulsion. The Government has not acted with malice and the petitioners have every right to retain the old scheme for themselves and they would not be a loser and the Government does not compel them to opt for the new one. He pointed out that Rule 28 is not meant for Government employees but for non-Government employees. Rule 28 has nothing to do with rule-making power as contained in Article 309 of the Constitution if read with Section 45(2) (d) of the West Bengal Board of Secondary Education Act. The Rules framed under the said Act is limited to clause (d) which relates to the composition, powers and functions of managing committees of Institutions. It is further contended on behalf of the State that Section 25 of the West Bengal Shops and Establishments Act, 1963 is at par with

Section 45 of the West Bengal Board of Secondary Education Act. Para 4 of the terms of reference of the Second Pay Commission has nothing to do with Rule 28(1) (iii) which is purely a procedural right and not a substantive right because this Rule 28 deals with power of the Managing Committee and not with conditions of service. According to Mr. Mukherjee it must be borne in mind that only the extension of service of the age of superannuation has been challenged in the writ application and its propriety and legality. There is no complain based on Article 14 of the Constitution. In this connection he drew the Pay Commission's Report on page 118 paras 21 and 22(2) which have already been referred to hereinbefore. He made much emphasis on the slabs of retirement of age and the pay package and submitted that no Circular was under any statutory rules but were all administrative Circulars with special methods in Circular No. 46 of 13th October, 1953;

18. Mr. Mukherjee during the course of his argument cited the following decisions in support of his contention :- (1) K. M. Bindra v. Union of India and Anr. reported in 1973(1) S.L.R. 1928; (2) Accountant General and Another Vs. S. Doraiswamy and Others, (3) Bishun Narain Mishra Vs. State of Uttar Pradesh and Others, (4) Budhan Choudhry and Others Vs. The State of Bihar, (5) State of Gujarat Vs. C.G. Desai and Others, (6) C. Sankaranarayanan, etc., etc. Vs. The State of Kerala, (7) K. Nagaraj and Others Vs. State of Andhra Pradesh and Another, ; (8) Tejinder Singh and Another Vs. Bharat Petroleum Corpn. Ltd. and Another, ; (9) State Bank of Bikaner and Jaipur and others Vs. Jag Mohan Lal, ; and (10) State of Assam and Another, etc. Vs. Basanta Kumar Das, etc. etc., . In addition to the aforesaid decisions he also cited (a) Sant Ram Sharma Vs. State of Rajasthan and Another, ; and (b) Cochin Devaswom Board, Trichur Vs. Vamana Shetty and Others, .

19. I have given my considerate thought to the facts of the case and the arguments advanced by the respective Counsels of the parties. The writ petition is mainly "directed against the "offending portion" keeping the age of retirement at 60 years but omitting the extension of service upto 65 years in the impugned Memorandum of 31st July, 1981. I have already quoted at the very beginning the "offending portion" which is so described in prayer (a) of the writ petition and is contained in Clause 6 of the impugned Memo. The basic submission of the petitioners is that the Rule 28(1)(iii) of the Management of Recognized Institutions (Aided and Unaided) Rules, 1969 is statutory in nature and provides for the age of superannuation of 60 years with extension year to year upto 5 years making a total of 65 years. The said Rule 28 (1)(iii) is quoted as under :-

"(i) In an Aided Institution the Committee shall subject to the approval of the Director, have the power -

* * * * (iii) to extend the service of teachers and other employees beyond the date of superannuation approval for such extension being thereafter sought for from the Director or any officer authorised by him ordinarily within a week from the date of decision of the Committee."

The Rules of 1969 have been framed by the State Government under the power conferred u/s 45 of the West Bengal Board of Secondary Education Act, 1963 and stand at par with the rule-making power u/s 25 of the West Bengal Shops and Establishments Act, 1963. A scrutiny of Section 45 of the W.B. Board of Secondary Education Act indicates that Rule 28(1) (iii) derives its source directly from Section 45(2) (d) of the Act which relates to the composition, powers and functions of Managing Committee of Institutions and Rule 28 also deals with powers of .Committee which means the Managing Committee of the Institutions. In all fairness it must be said that rule-making power conferred u/s 45 of the W.B. Board of Secondary Education Act is meant for the age of the non-government employees not serving under the Union or a State and as such does not come under the purview of Article 309 of the Constitution of India.

19a. Rule 28(1) (iii) as quoted hereinbefore does not specify in the least any date of superannuation or extension of service of teachers. The dispute centres round not on the age of superannuation of 60 years which is. accepted by both the sides but on the extension of service year by year upto 65 years on conditions as contained in the Rules. This extension of service of superannuated teachers derives its force though various circulars of the W.B. Board of Secondary Education right from 1952 to 1989 which the petitioners describe as statutory in character deriving its sanction from Section 45 and Rule 28. These circulars cannot be said to be of having any statutory sanction but are all executive orders and a benefit extended purely by executive orders may very well be taken away by executive fiat.

20. The Second Pay Commission set up by the Finance Department, Audit, Government of West Bengal, by Resolution dated 16th November, 1977 under the Chairmanship of Mr. A. J. A. Taiyab, former Chairman of . the Public Service Commission, West Bengal, was provided with certain Terms of Reference and Clause 4 thereof which is relevant for the purpose of this writ petition is quoted as under:-

"The Commission will also examine the structure of emoluments and the conditions of service of the teachers and non-teaching staff in State Government, Sponsored or Aided - (a) Schools upto Class XII standard"

It was also stated in the Terms of Reference that the Commission would make an estimate for the cost involved in implementing their recommendations and suggest measures for avoidance of wishful expenditure and also other measure of economy; and also the Commission would device its own procedure. The Pay Commission made in-depth study of the recommendation of the Education Commission of 1964-66, popularly known as Kothari Commission, where the said Commission recommended to put in its own word: "Until provision for adequate pension is made, it is desirable to provide for a higher age limit for retirement. We recommend that the normal retirement age for teachers should be 60 years; and there should be provision for extension upto 65 years provided the person is physically fit and mentally alert to discharge his duty efficiently." It must be

noted here that in 1983-85 another Commission was appointed which is popularly known as Chattopadhyay Commission and dealing with the age of superannuation of the teachers the Commission recommended that the retirement age of school teachers, whether in private or in government service, should be 60 years of age except when retirement is sought voluntarily.

21. The contention of the petitioners that under the Rules of 1969 the teachers have the statutory right that their case should be considered by the Committee for extension of their services beyond the date of superannuation of 60 years cannot be said to have been exclusively given to them when the power is conferred upon the Managing Committee to extend the services of the teachers beyond the date of superannuation on certain conditions with the approval of the Director. The Rule 28(1)(iii) has been construed by the petitioners as statutory in nature giving the legal right of extension year by year for 5 years making the total of 65 and according to them this statutory right cannot be taken or whittled away by an executive notification or order. The whole edifice of the argument has been built up on the Privy Council decision of *Frederic Guilder Julius v. The Right Rev. The Lord Bishop of Oxford* (5 A.C. 214) where Lord Blackburn held that "enabling words are always compulsory where they are words to effectuate a legal right". In fact the petitioners refer to the words of the Lord Chancellor Earl Cairns where His Lordship dealt with the words "it shall be lawful" as contained in the 3rd section of the Church Discipline Act. To quote the words of the Lord Chancellor : "The words it shall be lawful are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do.. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. Whether the power is one couple with a duty such as I have described is a question which, according to our system of law, speaking generally, it falls to the Court of Queen's Bench to decide, on an application for a mandamus. And the words "it shall be lawful" being according to their natural meaning permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power, to show in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation." Lord Penzance referring to various decisions said that the power conferred was one which was intended by the Legislature to be exercised ; and that although the statute in terms had only conferred a power the circumstances were such as to create a duty.. Lord Selborne held that the words "it shall be lawful" are "potential, and never (in themselves) significant of any obligation-" Lord Blackburn was of the view that the words "it shall be lawful" "are apt words to express that a power is given; and as, *Prima facie*, the

donee of power may either exercise it or leave it unused, it is not accurate to say that, *prima facie*, they are equivalent to saying that the donee may do it; but if the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power, to exercise it for the benefit of those who have that right, when required on their behalf." The Appeal was dismissed unanimously but the sum total of the Privy Council decision was that Their Lordships deliberated only upon a particular section of an Act which was known as the Church Discipline Act and which was conclusively a statutory provision and on that basis it was held that this section gives the Bishop complete discretion to issue or decline to issue a commission under his hand and seal to certain person charged with offence against the Laws Ecclesiastical. In the instant case of teachers I do not find any statutory power given to them to have the age 01 superannuation extended year by year upto 5 years under the authority of the West Bengal Board of Secondary Education Act or Rule 28(1) (iii) as framed thereunder and I fail to understand how this case of the House of Lords comes to the rescue of the petitioners.

22. On the principle of the aforesaid Privy Council decision at least four judgments of the Supreme Court have been cited by Dr. Pal to bring home the point that *Julius v. Bishop of Oxford* was followed in letter and spirit by the Supreme Court. Let me take those cases one by one. In *Kali Pada Chowdhury and Ors. v. Union of India and Ors.* (supra) a 5-Judge Bench led by Chief Justice B. P. Sinha while quoting from Maxwell on Interpretation of Statute said : "It is a well established doctrine, that when the power is coupled with a duty of the person to whom it is given to exercise it, then the exercise of the power is imperative." The Supreme Court then quoted the Privy Council with reference to Section 51 of the Income Tax Act, 1918 wherein Lord Phillimore observed with reference to the word "may" in that particular Section as follows :- "No doubt that the Section does not say that the authority "shall" state the case, it only says that it may and it is rightly urged that "may" does not mean "shall", only the capacity or power is given to the authority. But when a capacity or power is given to a public authority there may be circumstances which couple with the power a duty to exercise it, and where there is a serious point of law to be considered there does lie a duty upon the Revenue authority to state a case for opinion of the Court and if he does not appreciate that there is such a serious point, it is in the power of the Court to control him and to order him to state the case" AIR 1923 138 (Privy Council) In the case of *Punjab Sikh Regular Motor Service v. Regional Transport Authority* (supra) Rule 63 of the Central Provinces and Berar Motor Vehicles Rules, 1940 came under discussion in which the word "may" occurred and it was interpreted by the Supreme Court that in the context and the language of the Rule the word "may" though permissive in form; must be held to be obligatory and in this connection the Supreme Court quoted from *Julius v. Bishop* (supra) that "Enabling words are constituted as compulsory wherever the object of the power is to effectuate a legal right." The case of the *Official Liquidator v. Dharti Dham (P) Ltd.* (supra) deals with Sections 442 and

446 of the Companies Act, 1956. In this connection Their Lordships of the Supreme Court held that the word "may" use before "stay" in Section 442 really means "may" and not "must" or "shall" in such a context. In fact it is not quite accurate to say that the words "may", or by itself, acquires the meaning of "must" or "shall" sometimes. But at the same time the Court held that this word, however, always signifies a conferment of power. The Supreme Court made it clear that it is the context which can attach the obligation to the power compelling its exercise in a certain way and the context, both legal and factual, may impart to the power that obligatoriness. The last decision in the context is that of State (Delhi Admn.) v. I.K. Nangia and Anr. (supra) which deals, inter alia, with Section 17(2) of the Food Adulteration Act, 1954 and related to the interpretation of the word "may" which should mean "must" in the context. Here Their Lordships of the Supreme Court while quoting Julius v. Bishop observed that there can be no doubt that this implies the performance of a public duty, as otherwise, the scheme underlying the section would be unworkable. To further strengthen the argument the petitioners cited the decision in the State of Mysore v. Padmanabhacharya (supra) wherein by the amended Rule 294 (a) of Mysore Service Regulations, the normal age of retirement was fixed at 55 years with discretion to Government to extend the service of efficient Government servants beyond the age of 55 years and by Notification issued by the Education Department the retirement age was generally indicated as 58 years. The only question that was decided in this decision was whether the Rule comes within the proviso of Article 309 of the Constitution and it was held by the Supreme Court that it does not.

23. Apart from the aforesaid decisions the petitioners also relied upon the State of Haryana v. Shamsher Jang Bahadur (supra) where the Punjab Civil Secretariat (State Service Class III) Rules, 1952 was under consideration and it was held by the Supreme Court that any rule which affects the promotion of a person or relates to his conditions of service cannot said to be valid unless the same is approved by the Central Government according to "the States" Re-organisation Act, 1956 and in this case such approval was not obtained. The second point that was decided in this case is that the Government is not competent to alter the rules framed under Article 309" of the Constitution by means of administrative instructions. These questions do not arise in the instant case. Mr. Chatterjee referred to the famous case of Express Newspapers Pvt. Led. and Ors. v. Union of India and Ors. (supra) where the Supreme Court held that "Fraud on power voids the order if it is not exercised bona fide for the end design. There is a distinction between exercise of power in good faith and misuse in bad faith..... A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise." Their Lordships cited Lord Lindley to emphasise "that there is a condition implied in this as well as in other instruments which creates power, namely, that the power shall be used bona fide for the purpose for which they are conferred" (General Assembly of Free Church of Scotland v. Overtown 1904 AC 515). Their Lordships also quoted

Chief Justice Warrington from *Short v. Pool Corporation* that "No public body can be regarded as having statutory authority to act in bad faith or from corrupt motives, and any action purporting to be of that body, but proved to be committed in bad faith or from corrupt motives, would certainly be held imperative (1926 1 Ch. 66). In addition to the above Their Lordships cited Lord Denning and Lord Parker, CJ. from *Lazarus Estate Ltd. v. Beasley* (1956 (2) Q.B. 702 at pp. 712-13 and 722), Let it be stated that all the above English decisions were cited by the Supreme Court in the case of *S. Pratap Singh Vs. The State of Punjab*, . One wonders how Mr. Chatterjee finds any fraud or any mala fide act or design and how he comes to the conclusion that a power has been exercised maliciously by its repository with personal animosity towards the respondents. This decision is of no help to the petitioners. The decision in *Paluru Ramkrishnaiah and Ors. v. Union of India* (supra), so strongly referred to, centres round Article 309 and the contention that the executive instruction cannot override provision of Rule framed under the said Article, The case of *G. L. Verma v. State of M.P. and Anr.* (supra) also deals with the point that in administrative law the statutory rules would prevail over administrative instructions, and there is no conflict of opinion on the point. The decision cited on behalf of the petitioners reported in 1985 (2) SLR 337 (supra) where Articles 16, 22 and 311 have been discussed at length does not come to the rescue of the petitioners but on the facts of the case is off the mark. Mr. Chatterjee cited the case of *British Paints (India) Ltd. v. Its Workmen* (supra) with particular reference to its paragraph 5 in support of the petitioners but I think it directly acts as a healing balm to the sufferings of the respondents from the clutches of the petitioners. It will be worthwhile to quote this particular decision of the Supreme Court in favour of the respondents. I quote : "Considering that there has been a general improvement in the standard of health in this country and also considering that longevity has increased, fixation of age of retirement at 60 years appears to us to be quite reasonable in the present circumstances." Their Lordships further add : "But time in our opinion has now come considering the improvement in the standard of health and increase in longevity in this country during the last fifty years that the age of retirement should be fixed at a higher level and we consider that generally speaking in the present circumstances fixing the age of retirement at 60 years would be fair and proper....." I think the decision of the Supreme Court in *M/s. British Paints (India) Ltd.* closes any dispute and/or contention on behalf of the petitioners so far as the age of retirement is concerned and also puts a full stop to the plea of extension of service by 5 years on yearly-wise basis.

24. It is argued on behalf of the petitioners that the submissions by Mr. Mukherjee on behalf of the State of West Bengal as to the option for teachers to retire at the age of 60 years if they opt for the revised scale of pay, is in form of compulsion and was done under duress appears misconceived. It is contended by the petitioners that the revised scale of pay is given to eliminate hardships caused by the inflationary spiral and has got nothing to do with the age of

retirement or extension of service, of a teacher and the State Government cannot bargain with the teachers with the plea of option. In the light of the discussion herein-before made it must be said that there is no question of bargaining by the State Government and the option is to be taken as voluntary option and not by way of coercion or compulsion. Undoubtedly the revised scale of pay is to eliminate the economic hardships of the school teachers but certainly while extending the economic benefit the Government is within its bound to impose an age of retirement as a matter of policy. I think the Government of West Bengal is magnanimous enough not to accept in whole the recommendation of the Second Pay Commission as contained in Clause 5(iii) on page 461 as quoted hereunder:-

"Teachers of aided primary and secondary schools as also teachers of non-Government Polytechnics, Junior Technical schools and Training institutions for primary teachers now retire at the age of 60 years and there is provision for extension of their service upto the age of 65 years. These teachers, whether in Government service or in nonGovernment service, should retire at the age of 58; they may however, be given "extension" of service upto the age of 60 years but not beyond that. Shri Chanda suggests that this should be re-employment instead of extension."

So it appears from the recommendation of the Pay Commission that the Commission was of the view that the age of superannuation of a teacher should be 58 years and extension of further two years, but the State Government did not accept the recommendation of the Pay Commission and fixed the retiring age of teachers at 60 years.

25. While lucidly espousing the cause of the State Government Mr. Saktinath Mukherjee placed the decision of the Accountant General and Anr. v. S. Doraiswamy and Ors. (supra) in support of his contention that an administrative order can take away or whittled down the right given to the teachers for extension of service after the age of superannuation. If the said benefit of extension of service is given by an administrative order then the benefit extended by a previous administrative order can be taken away by a fresh administrative order. In the; aforesaid case of the Accountant General the issue at point was Paragraph 143 of Manual of Standing Orders issued by Comptroller and Auditor General as amended by correction slip, removing factor of weightage on the basis of length of service in determination of seniority. Their Lordships of the Supreme Court held that "Plainly, paragraph 143 in the Manual of Standing Orders remains throughout a departmental instruction and, therefore, could be amended by the departmental instruction contained in the correction slip issued by the Comptroller and Auditor General in 1956." The case of the petitioners is at the same footing as indicated above by the Supreme Court. While justifying the action of the State Government the learned Counsel referred the decision of C. Sankaranarayanan v. The State of Kerala (supra) wherein it was held that any aided school teacher opting to be governed by the Kerala Education Rules, 1959

is relegated to the position of Government school teacher whose age of superannuation is 55 years and thus cannot get the benefit of note to Rule 8 of Chapter XXVII which provides 60 years as age of superannuation for aided school teachers. This case relates to a teacher of an aided school opted to be governed by rules applicable to Government teachers in matters of superannuation. On this basis, the learned Counsel submits that there is nothing to prevent the petitioners not to opt for the new scheme or to remain under the old terms and conditions. Mere harping on the point that the right of extension after superannuation is given by a statutory rule which is sought to be amended by an administrative order does not by itself improve the case of the petitioners when there is no basis thereof. The Supreme Court decision in the case of *K. M. Bindra v. Union of India and Anr.* (supra) fully supports the case of the State Government that it can change conditions of service by administrative instructions if original conditions were also based on administrative instructions; and in tnc instant case he entire instructions as to the extension of the service of the superannuated teachers were based on administrative orders and/or instructions. It must be noted that the petitioners miserably failed to place any provision of law which takes away the power of the Government to increase or reduce the extension of service after attaining the age of superannuation. A pointed case which gives much weight to the contention of the State Government is that of *K. Nagaraj and Ors. v. State of Andhra Pradesh and Anr.* (supra) where Their Lordships of the Supreme Court not only justified as non-arbitrary and rational the reduction of age of retirement from 58 to 55 under Clause 10 of the Andhra Pradesh Public Employment (Regulation of Conditions of Service) Ordinance, 1983 vis-avis Articles 14 and 16 of the Constitution but added that "The reports of the various Commissions, show that the creation of new avenues of employment for the youth is an integral part of any policy governing the fixation of retirement age. Since the impugned policy is actuated and influenced predominantly by that consideration, it cannot be struck down as arbitrary or irrational." In my opinion this observation of the Supreme Court gives much force to the decision taken by the respondents and the new policy of superannuation at the age of 60 years was, no doubt, influenced by the consideration of the fact as referred to by Their Lordships. The Supreme Court in the case of *Tejinder Singh and Anr. v. Bharat Petroleum Corporation. Ltd. and Anr.* (supra) where the age of superannuation of officers of Bharat Petroleum Corporation was fixed at 58 years while that of clerks at 60 years and it was held not discriminatory. In the case of *State of Assam and Another, etc. Vs. Basanta Kumar Das, etc. etc.*, and several other decisions of the Supreme Court held that a Government servant has no right to continue in service beyond the age of superannuation and if he is retained beyond that age, it is only in exercise of the discretion of the Government. This matter related to the *State Bank of Bikaner and Jaipur (Officers'') Service Regulations, 1979* and it was held that beyond the age of superannuation no officer has right to remain in service unless his service is extended by the Bank and everything was left at the discretion of the Bank. It was further held by the Supreme Court that if the Bank considers that the

service of an officer is not required beyond superannuation, it is an end of the matter. It is no reflection on the officer and carries no stigma. The decision in the case of *Santa Rdrn Sharma v. State of Rajasthan and Ors.* (supra) where Their Lordships of the Supreme Court spelled their minds very clearly when they observed : "It is true that Government cannot amend or supersede statutory Rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed. In *Cochin Devaswom Board, Trichur v. Vamana Setti and Anr.* (supra) the Supreme Court very pointedly said that a person relying upon the plea of unlawful discrimination which infringes a guarantee of equality before the law or equal protection of the law must set out with sufficient particulars his. plea showing that between the persons similarly circumstanced, discrimination has been made which is founded on no intelligible differentia, Obviously the petitioners have failed to establish this criteria in the instant case. One more case is cited by Mr. Mukherjee as reported in *State of Gujarat Vs. C.G. Desai and Others*, to the effect that so long as the classification is reasonable and the persons falling in the same class are treated alike, there can be no question of violation of the constitutional guarantee of equal treatment.

26. I have discussed almost all the decisions cited by the learned Counsels of both the sides, and also added a few on my own. I am firmly of the view that the scale of justice tilts towards the State-respondents heavily save and except on one pertinent point which was projected pointedly by Mr. Chatterjee appearing for petitioner No. 1, the West Bengal Headmasters" Association, and not by Dr. Pal who was appearing for the rest of the petitioners including petitioner No. 8, the West Bengal Primary Teachers" Association. The specific submission of Mr. Chatterjee was in respect of the statutory amended Rule 4A of the Rules framed under clause (p) of subsection (2) of Section 66 of the Bengal (Rural) Primary Education Act, 1930. The Rule 4A is the new substituted Rule in place of the old one by Notification being G.O. No. 191-Edn. (P) dated 4th March, 1970 amending the Notification dated 25th July, 1940 issued by the Education Department, Primary Branch, and is quoted as follows :-

"4A-A teacher appointed by the Board may be retained in service upto the age of 60 years, but the Board may, if it thinks fit, grant thereafter extension of service of a teacher on a year to year basis upto the age of 65 years, provided the teacher continues to be physically fit and mentally alert."

27. The aforementioned extension of service in Rule 4A derives its route from Notification No. 4666-Edn. (G) dated 31st July, 1965 issued by the Education Department, General Branch, where a similar Rule 4A was inserted after Rule 4 by way of amendment u/s 66 of the Act of 1930. In a Memorandum No. 966-Edn. (P) dated 22nd September, 1969 issued by the Deputy Secretary, Education Department, "Primary Branch, on the age of teachers of Primary (including Junior Basic) Schools under District School Boards and various other managements, the

very first paragraph is to the following effect :-

"The undersigned is directed to say that at present a whole-time approved teacher of Primary (including Junior Basic) School under a District School Board may be retained in service upto the age of 60 (sixty) years, but the Board, may, if it thinks fit, grant re-employment to a teacher on a year to year basis upto the age of 65 (sixty-five) years, provided the teacher continues to be physically fit and mentally alert.....Necessary amendment in the rules framed under the provisions" of the Bengal (Rural) Primary Education Act, 1930 is being made separately."

28. And thereafter the aforesaid Notification dated 4th March, 1970, as it apparently appears, was issued by substituting a new Rule 4A" in place of the old Rule 4A under the provision of Section 66(2) (p) of the Bengal (Rural) Primary Education Act, 1930 by which the District School Boards set up under the Act of 1930 were to act in accordance with the new amended Rule 4A by giving extension of service year by year till the age of 65 years. I agree with the contention of Mr. Chatterjee that this is a statutory Rule which cannot be superseded by merely an administrative order such as the impugned Memo dated 31st July, 1981. Though the word "may" has been used in Rule 4A but in view of the discussion made hereinbefore of several decisions on the importance and interpretation of "may" and "shall", the statutory force of the said rule cannot be minimised. But at the same time Mr Chatterjee submitted that already a Notification has been made of a draft amendment of the said amended Rule 4A but the said, draft has not as yet been adopted or accepted and in the result the statutory provision of Rule 4A subsists. Perhaps, due to inadvertance, Mr. Mukherjee did not make any submission on this aspect of the case and as such there is no submission made by Mr. Chatterjee though Mr. Mukherjee was kind enough to give me the text of the amended Rule 4A which was not supplied by Mr. Chatterjee or his learned junior. The arguments of Mr. Mukherjee against the petitioner will get a halt so far Rule 4A relating to the extension of service of the teachers covered by the Bengal (Rural) Primary Education Act, 1930 is concerned. But if the proposed amendment as referred to by Mr. Chatterjee has been given effect to, then the State will have no difficulty to face. If the existing Rule 4A is allowed to stand then there will certainly be discrimination between persons belonging to one and the same group and that will be quite unconstitutional and against the principles of natural justice.

29. Now to conclude my judgment, in the light of the discussions hereinbefore made, I hold that there is no statutory provision regarding the age of superannuation of 60 years or the extension of service after the age of superannuation year by year upto 65 years. The age of superannuation of 60 years is based on practice followed under the administrative umbrella and such also is the position with regard to the period of extension of service upto 65 years. The State Government Is within its right to modify one administrative order by another administrative order. Rule 28 of the Management of Recognized

Non-Government Institutions (Aided and Unaided) Rules, 1969 framed under Sections 45(1) and 45(2) (d) of the West Bengal Board of Secondary Education Act, 1963 deals with powers of the Managing Committee and Rule 28(1) (iii) thereof does not deal with the age of superannuation or the period of extension of service after superannuation but simply lays down the procedure without conferring any right. I further hold that Rule 28(1) (iii) is purely procedural provision and does not confer any statutory determination of the age of superannuation or the extension of service beyond the date of superannuation. The Rules of 1969 framed u/s 45 of the Act of 1963" being in the nature of subordinate legislation cannot jump over and travel beyond the limits of the Rule-making power set out in the said Act. Neither Section 45(1) nor 45(2) (d) or Rule 28 or 28(1) (iii) ipso facto confers or empowers the Managing Committee to fix the age of superannuation or to fix a limit for the extension of service after superannuation. As I have said earlier there is no dispute on the age of superannuation at the age of 60 years but the dispute centres round the extension of service after superannuation year to year upto 65 years of which there is no provision in the Memo under challenge but such extension derives its force mainly and wholly from the various Circulars issued by the West Bengal Board of Secondary Education right from Circular No. 21 dated 12th December, 1952 and ending with two Circulars of the Education Department, Budget Branch, dated 31st March, 1986 which refers to the instant writ application while extending the facility of extension of service subject to the result of this writ petition and a Memo of 19th October, 1989 issued by the Education Department, Primary Branch, relating to the extension of service. I do not find that the Memo of 31st July, 1981 under question any way affects the fundamental rights of the petitioners guaranteed under Articles 14 and 16 of the Constitution. As I have said earlier, an administrative policy or instruction or order can be made or changed by the Executive without any formality *Union of India (UOI) and Others Vs. Majji Jangamayya and Others*, The Court cannot interfere with the formulation or change of administrative policy of the Government unless it violates provisions of the Constitution such as Article 14 which requires that even an administrative authority must act fairly and treat its employee equally (*S. L. Sachdev and Ors. v. Union of India and Ors.* AIR 1981 SC 411). One who challenges the validity of any statute on the ground that it contravenes Article 14 of the Constitution must be specific, clear and unambiguous in making allegations in that behalf and must show that the impugned order is based on discrimination and such discrimination is not referable to any classification which is rational and which is nexus with the object intended to be achieved by the said statute *Sri Venkata Seetaramanjaneya Rice and Oil Mills and Others Vs. State of Andhra Pradesh etc.*, . If judged on this principle there is no material before the Court that any discrimination has been made or Article 14 is violated. Where is the age of superannuation and where is the five-year period of extension of service, under which Act or Rules, upon which the petitioners are harping so much. The petitioners had to take refuge to the various administrative circulars to establish 60 years of retirement age and extension of service upto 65 years.

The facade built on sand is bereft of the required materials. The State Government, in my opinion, is not acting unfairly or treating the teachers unequally. The petitioners have failed to satisfy that their legal right has in any way been infringed. The State has taken a very reasonable attitude after considering the Report of the Second Pay Commission and it did not accept the recommendation of the Second Pay Commission which stipulated the retirement of the teachers at the age of 58 with extension upto 60 years but for the benefit of teachers the age of superannuation as appears from the Memo of 31st July, 1981 has been kept straight till 60 years with benevolent provisions of slabs of retirement age for those approaching superannuation and package deals for the others. One cannot "have the best of both the world" is the verdict of the Supreme Court in State of Gujarat Vs. C.G. Desai and Others, It is well settled that so long as the classification is reasonable and the persons falling in the same class are treated alike, there can be no question of violation of the constitutional guarantee of equal treatment (ibid). The reference of the petitioners to the college teachers is quite irrelevant as the Memo of 31st July, 1981 relates to the recommendation of the Second Pay Commission exclusively relating to the teachers of aided primary and secondary schools ; and also the college teachers and school teachers are not similarly placed persons but having different conditions of service and recruitment rules.

30. It has been submitted on behalf of the State of West Bengal that no teachers were compelled to give options under duress but the options were all voluntary. But even then the State is ready to allow the withdrawal of option made by the teachers either by mistake or otherwise or under the so-called duress. This is a generous gesture by the State and must be accepted.

31. I must be frank to point out that as a matter of principle the Court must not interfere with a policy decision of the Government if the same does not infringe any legal right of a citizen. It is for the Government to consider various factors including economic factor and growing unemployment problem while taking a policy decision with regard to the revision of pay-scale and age of retirement, and new avenues must be created to minimise the growing volume of educated unemployed.

32. In that view of the matter, the writ application is dismissed with the following direction : liberty is given to those teachers who have exercised options under the Memorandum No. 372-Edn.(B) dated 31st July, 1981 to cancel or revoke such options strictly within 30th June, 1990 and thereafter no such request shall be entertained by the State Government. The aforesaid Memorandum dated 31st July, 1981 shall not be operative in case of those primary teachers who are Covered by the Bengal (Rural) Primary Education Act, 1930 until the existing Rule 4A framed under the said Act of 1930 is suitably amended, and, if already amended, the Memorandum, of 31st July, 1981 shall be applicable to them as well with all its force. There will be no order as to costs.

33. Mr. Sundarananda Pal, the learned Advocate appearing for the petitioners,

prays for stay of the judgment. The prayer is allowed and the operation of my judgment is stayed till 31st May, 1990.