**IN THE HIGH COURT OF****KERALA**

W.P. (C) No. 2326 of 2010

Decided On: 11.03.2011

Appellants: **Manager, Eravannoor A.U.P. School and Ors.**
**Vs.**
Respondent: **State of****Kerala and Ors.**

**Hon'ble Judges/Coram:**
K.T. Sankaran, J.

**JUDGMENT**

**K.T. Sankaran, J.**

1. In majority of these Writ Petitions, the Petitioners challenge the validity of Clauses (v) and (vi) of GO.(P) No. 10/10/G Edn. dated 12-1-2010. The Petitioners therein contend that the Government Order is contrary to the provisions of the Kerala Education Act and Rules. In some of the said Writ Petitions, minority institutions contend that the aforesaid clauses of the Government Order are against the constitutional guarantee under Article 30(1) of the Constitution of India. Some other managements and teachers filed Writ Petitions (as shown below separately) to get the Government Order implemented.

The Writ Petitions challenging Clauses (v) and (vi) of G.O.(P) No. l0/10:

2. For the sake of convenience, the Government Order is extracted below:

ORDER

In the economy orders issued as per Government Order read as 1st paper above it was ordered therein that no new post will be created in Government/Aided Schools and Colleges. Considering the practical difficulties due to the non-sanctioning of posts in schools, the GeneralEducation Department has relaxed the economy orders as per Government Orders read as second to six and as per Government Order read as sixth paper above, it was inter alia ordered that restriction on appointment on additional vacancies will continue with effect from 2006-2007 academic year onwards. In spite of the Government Orders, several Managers had appointed teachers and non-teaching staff in additional division vacancies. Government have not approved such appointments. Considering the request from various quarters, Government have examined the matter in detail and have decided to lift the restriction imposed on the appointment with effect from 2006-2007 academic year subject to the following conditions:

(i) The appointments, made against additional division vacancies in Government/ Aided Schools from 2006-2007 can be approved as per the provisions in K.E.R.

(ii) The salary and allowance of the teachers and other staff so approved will be credited to the Provident Fund Accounts as and when it begins. No withdrawal from such Provident Fund Accounts will be allowed till 31-3-2015.

(iii) The concerned Educational Officers will revise the staff fixation orders, for the academic years 2006-2007,2007-2008,2008-2009 and 2009-2010 and sanction the posts that can be allowed. While sanctioning such posts, the concerned Educational Officers will take necessary steps to ensure the students' strength in each year and the Deputy Directors of Education should ensure its accuracy.

(iv) Before approving each appointments the concerned Educational Officers should ensure that vacancies are available and the appointees are possessing the required qualifications.

(v) For approving the appointments made in the additional divisions during the period from 2006-2007 to 2009-2010 in the aided schools, the Managers should execute an agreement in the stamp paper worth ? 50 duly witnessed by Notary to the concerned Educational Officers to the effect that they will appoint protected teachers/non-teaching staff equal to such appointees in all the arising vacancies in the schools from 2010-2011 onwards. The Educational Officers should submit a consolidated statement of such agreements to Government.

(vi) After appointing protected teachers/non teaching staff equal to the appointees in additional division vacancies during 2006-2007 to 2009-2010, the vacancies that arise as additional division vacancies in future should be filled up in the order of protected teacher and open recruit in the ratio of 1:1.

(vii) With regard to the appointment of protected teachers in 'new schools' ie., 'the schools started/upgraded after 1979', the orders relating to the appointment of protected teachers will be governed by the conditions in G.O.(P) No. l78/2002/G. Edn. dated 28-6-2002 and G.O.(P) No. 46/2006/G Edn. dated 1-2-2006.

2. The concerned Educational Officers should verify and approve the appointments made during 2006-2007 onwards in additional division vacancies subject to the above conditions without waiting for the appellate orders/revisions.

3. To comprehend the contentions raised by the Petitioners and the learned Advocate General, it is necessary to refer to some of the provisions of the Kerala Education Act, 1958(hereinafter referred to as the 'Act') and the Kerala Education Rules, 1959 (hereinafter referred to as 'KER').

4. The Act is intended to provide for the better organisation and development of educational institutions in the State. Section 3 of the Act provides that the Government may regulate the primary and other stages of education and courses of instructions in Government and private schools. The 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, specialeducation and for the training of teachers. Sub-section (3) of Section 3 states that the Government may, for the purpose of providing such facilities (a) establish and maintain schools; or (b) permit any person or body of persons to establish and maintain aided schools; or (c) recognise any school established and maintained by any person or body of persons. The expressions "aided school", "educational agency", "existing school", "minority schools", "private school", "recognised school" and "school" are defined in Section 2 of the Act. Section10 provides that the Government shall prescribe the qualification to be possessed by persons for appointment as teachers in Government and private schools. Section 11 of the Act, on which much reliance is placed, reads as follows:

11. Appointment of teachers in aided schools.--Subject to the rules and conditions laid down by the Government, teachers of aided schools shall be appointed by the managers of such schools from among persons who possess the qualifications prescribed under Section 10." Section 11 of theKerala Education Act, 1958, as it originally stood, provided that the Public Service Commission shall select candidates for appointment as teachers in Government and Aided Schools. Section 11, as it stands now, was substituted by Amendment Act 35 of 1960.

5. Chapter III of KER deals with Management of private schools. Rule 1 classifies private educational institutions into two categories, namely, (i) those under individual Educational Agency and (ii) those under Corporate Educational Agency. Rule 3 of Chapter III states that the management of every aided school may be vested by the Educational Agency in a person who shall be referred to as the Manager and who shall be responsible to the department for the management of the institution. Chapter v. provides for opening and recognition of schools. For opening a new school or for upgrading schools, an application should be submitted. The Government shall take a final decision in the matter. Rule 6 of Chapter v. states that every application shall be accompanied by the documents mentioned in that Rule. The document referred to in Clause (viii) of Rule 6 of Chapter v. is "an agreement duly executed by the Applicant to the effect that he is prepared to absorb qualified teachers/ non teaching staff who, after putting in service of 2 years and drawing 2 vacation salaries, have been retrenched from any of the Aided High Schools in the Education District or Aided Primary School in theEducation Sub- district in which the Applicant proposes to open/ upgrade the school". Clause (viii) was substituted by S.R.O. No. 510/2010 notified as per G.O.(P) No. 79/2010/ G. Edn., dated 25th May 2010, which reads:

An agreement duly executed by the Applicant to the effect that he is prepared to absorb qualified teachers/non teaching staff who are eligible for protection as per orders issued by Government from time to time and that any such orders shall form part and parcel of the agreement as if they were incorporated in the agreement.

6. Situations arose resulting in unexpected retrenchment of qualified teachers with long service from aided schools due to reasons beyond their control. The number of schools increased. Some of the schools became uneconomic. The number of recognised schools in the State, also increased considerably. Fall in student strength occurred and it was one of the reasons for retrenchment of teachers in aided sector. Withdrawal of recognition of schools, closure of uneconomic schools etc. were other reasons. The provisions in the Act and KER intended to cope up with these situations are Sections 13, Rule 6 (viii) of Chapter v. of the KER and Rule 5A of Chapter XIV A of the KER. Section 13 of the Act provides for absorption of teachers on retrenchment. Section 13 is as follows:

13. Absorption of teachers on retrenchment.-Where any retrenchment of teachers in any Aided School is rendered necessary consequent on orders of the Government relating to the course of studies of scheme of teaching or of such other matters, it shall be competent for the Government or the manager of an aided school to appoint such teachers in any Government School or Aided School, as the case may be.

7. Rule 5A of Chapter XTV A of the KER provides that "Qualified teachers who are retrenched by the opening of new schools or consequent on orders of Government relating to the course of studies or scheme of teaching or due to withdrawal of recognition of the school for any of the reasons specified in Rules 22, 22A or 23 in Chapter v. and consequent closure of the school shall be given preference for appointment to future vacancies in schools under the same Educational Agency or under other Educational Agencies. Rule 6 (viii) of Chapter V, KER is already referred to.

8. Apart from these statutory provisions, the Government issued various executive orders from time to time to accommodate retrenched teachers. These executive orders are popularly known as "protection orders".

9. Another provision which deals with protected teachers is Rule 51A of Chapter XTV A which provides for preference for appointment to future vacancies. Second proviso therein was added in 2005 making the first preference under the Rule to protected teachers.

10. The first protection order was G.O.(Ms. ) No. l04/69/G. Edn., dated 6-3-1969, in which the following among other provisions were made:

Government, after considering all aspects of the question are pleased to order that the lien of these teachers should be retained under the management of the aided schools in which they were working at the time of retrenchment. But they may be posted on a purely working arrangement in the next available vacancies of similar category arising in Government Schools in the same educational district. But before posting them on a temporary basis in Government Schools, controlling officers will verify that there are no vacancies in the same or other schools belonging to the management under which the teacher was working at the time of retrenchment. In the case of schools under corporate managements which have schools in a region or covering the entire State, the controlling officers should satisfy themselves that there are no vacancies under the corporate managements as a whole to absorb these teachers.... The retrenched teacher will be absorbed in the next vacancy arising in any of the aided schools under the management by whom he was appointed. The controlling officers will not approve any new appointments in the schools under these managements until and unless the retrenched hands are absorbed first. The retrenched teachers will not be entitled to salary and allowances for the period he is out of job. But as this may constitute a break in service the period during which he is out of job will be treated as eligible leave and leave on loss of pay.

11. In Form 27 issued under Rule 7 of Chapter XIV A of the KER, which contains the appointment order of a teacher, the Educational Officer has to certify that the appointment has been made after satisfying that no qualified retrenched teacher entitled to absorption is available.

12. After the issue of G.O.(Ms. ) No. l04/69/G Edn. dated 6-3-1969, various Government Orders were issued providing protection to retrenched teachers, namely, G.O.(Ms. ) No. 474/69, G.O.(P) No. 240/99, G.O.(P) No. 112/2001, G.O.(Ms. ) No. 83/88, GO. (P) No. 178/2002, G.O.(P) No. 403/2002, G.O.(P) No. 46/2006 etc. Various changes were made in the matter of implementation of the orders for 'protection', taking into account the representation of teachers, managers and service organisations.

13. Meanwhile, the Government issued GO.(P) No. 2278/99/Fin., dated 17-11-1999, G.O.(P) No. 994/2000/Fin. dated 30-6-2000 and GO.(P) No. 817/2001/Fin. dated 11-6-2001 imposing ban on creation of new posts in Government and Government Aided Schools and Colleges. The Government could do so in view of Rule 14 of Chapter XXIII, KER, which provides that "notwithstanding anything contained in these rules, if it is found necessary, Government may by orders extend any ban on creation of posts, retrenchment of staff etc., effected by them in Government Schools to Aided Schools". G.O.(P) No. 303/01 G. Edn, dated 5-10-2001 was issued to relax the economy measures in so far as it relates to teachers, by providing that all appointments of teachers in Government/Aided Schools up to 14-7-2001 will be approved if those are in accordance with the statutory provisions of KER. G.O.(P) No. 80/2002/G Edn., dated 27-4-2002 was issued providing for approval of appointment of teachers in Government/Aided Schools up to 29-10-2001. It was also provided therein that "hereafter, no new vacancies consequent on staff fixation shall be filled up without the prior approval of Government". Later the Government issued G.O.(P) No. 317/2005/G Edn., dated 17-8-2005, providing inter alia, the following: "(i) The Assistant Educational Officers/ District Educational Officers concerned will sanction additional divisions in Government/Aided Schools, eligible as per the provisions in the KER, for the year 2005-2006 and approve the appointments against those vacancies, if they are otherwise in order.... (ii) All appointments of Government/Aided Schools teachers made against regular additional division vacancies during 2004-2005 will also be approved, if otherwise eligible as per the provisions in the KER.

14. The Government Order in question, [G.O.(P) No. 10/10/G. Edn., dated 12-1-2010], was issued in these circumstances.

15. Heard Senior Advocate Sri K. Ramakumar, Sr. Advocate Sri Kurian George Kannanthanam, Sr. Advocate Smt. V.P. Seemandini, Sr. Advocate Sri Babu Varghese, Sri K.E. Hamza, Sri George Poonthottam, Sri John Joseph Vettikad, Sri George Abraham, Sri Mohammed Haneef, Sri Vinod Madhavan, Sri. Babu Karukapadath, learned Counsel for the Petitioners and the learned Advocate General Sri.C.P. Sudhakara Prasad for the Respondent. Also heard Sr. Advoate Sri N. Sugathan and Advocate Smt. P.V. Asha, who supported the Government Order.

16. The contentions raised by the parties are discussed under the "points" herein below:

Point No. 1:

The Petitioners contended that the Government Order is against Section 11 of the Act and Rule 3 of Chapter III, KER. Section 11 speaks of "conditions laid down by the Government". According to the Petitioners, these conditions could be as provided in the Act and KER. An executive order cannot be issued to lay down 'conditions'. Under Section 11 of the Act, the Manager is the authority to make appointment of teachers and that right cannot be divested by an executive order. As provided in Rule 3 of Chapter III, KER, the management of every Aided School is vested in the Manager. The Government Order in question makes inroads into the indefeasible right of the Manager to appoint teachers, according to the Petitioners. The Petitioner also contended that assuming the Government Order amounts to a 'condition', it would not be a 'condition' as contemplated in Section 11, since the condition under Section 11could be one relating to appointment, whereas the Government Order in question imposes condition for approving appointment already made. Conditions are laid down in Chapter XTV A, KER. If any 'condition' is to be imposed, it could only by statutory provisions. Executive Orders cannot override the statutory provisions. The Petitioners relied on Unninarayanan v. State ofKerala  : 2009 (2) K.L.T. 604 and Sasidharan Nair v. Ali : 2009 (3) K.L.T. 863 in support of this proposition. It is also contended that the purpose of the Government Order is to encroach upon the rights of private management.

17. The learned Advocate General submitted that the Government Order does not in any way offend the powers of the Manager to appoint teachers. The power to appoint teachers is subject to the provisions of the Act and KER. Section 11 provides for laying down 'conditions' and it could be done by the Government by issuing executive orders. He relied on 1975 K.L.T. 617, 1966 K.L.T. 1042, 1988 (2) K.L.T. 1024 and 1990 (1) K.L.T. 544 and the judgment in W.A. No. 202 of 1990.

18. It is well-settled that executive orders cannot override statutory provisions, [see Unninarayanan v. State of Kerala  : 2009 (2) K.L.T. 604; Sasidharan Nair v. Ali  : 2009 (3) K.L.T. 867].

19. In M.P. Lakshmi v. Assistant Educational Officer (1966 K.L.T. 1042 the teacher appointed passed S.S.L.C. on the the fourth chance. A Government Order stipulated that those who have taken more than three chances to pass the S.S.L.C. examination are not eligible for appointment. The Educational Officer declined approval on the basis of the Government Order. The teacher contended that the qualification cannot be prescribed by executive order, in the light of the expression "the qualifications prescribed under Section 10" occurring in Section 11when read along with the definition of the expression "prescribed" under Section 2(6) of the Act. Repelling the contention, Justice K.K. Mathew held:

I am not able to accept the interpretation suggested by counsel because Section 11 only says 'prescribed under Section 10', which might mean prescribed by rules or executive orders. The use of the expression 'prescribed under Section 10' in Section 11 does not inevitably lead to the conclusion that the expression 'prescribe' as used in Section 10 is intended to have the meaning ascribed to the word 'prescribed' in the definition clause. Section 2 of the Act begins by saying that in this Act, unless the context otherwise requires, the meaning given in the definition clauses to the words defined must be ascribed to them, wherever they occur. In the context in which the word 'prescribed' is used in Section 11 it can only mean as prescribed by rules or executive orders, if the word 'prescribe' in Section 10 means that.

20. In Radha v. District Educational Officer, Badagara and Ors. 1975 K.L.T. 617 the Division Bench held:

'Prescribed' has been defined in Section 2(6) of the Kerala Education Act as meaning prescribed by rules under the Act. But Section 2 itself states that the definition therein contained will apply only 'unless the context otherwise requires'. We do not think that we must understand the word prescribed in Note (i) to Rule 43 in Chapter XIV A as meaning that only prescribed by rules under the Act. The prescription in the general sense of the word by an executive order would be sufficient.

21. The judgments referred to above pertain to the interpretation of the expression "qualifications prescribed under Section 10" occurring in Section 11. In spite of the fact that the said expression contained the word "prescribed", this Court did not accept the contention that it could be prescribed only by rules. We are concerned with the expression "conditions laid down by the Government" occurring in Section 11. The word "prescribed" is not seen in that expression, though the word "prescribed" is used when it speaks of the qualifications. Therefore, it cannot be said that 'conditions' could be laid down only by Rules. Section 11speaks of "subject to the rules and conditions laid down by the Government". If the conditions could be laid down only by Rules, it was sufficient to say "subject to the rules laid down by the Government". This is a clear indication that 'conditions' could be laid down even by executive orders.

22. I am also not inclined to accept the contention raised by the Petitioners that though the 'condition' under Section 11 could be one relating to appointment, the Government Order in question imposes condition for approving appointment already made. Clause v. of the Government Order relaxes the conditions and states that for approving the appointments made in the additional divisions, the condition stipulated therein shall be followed. The Government Order also says: "In spite of the Government Orders, several Managers had appointed teachers and non-teaching staff in additional division vacancies". Conditions were laid down in the Government Orders issued earlier. Those Government Orders were seen violated by some of the Managers. Still, as a concession, certain conditions are laid down for approval of those illegal/irregular appointments. Appointments could be made by the Managers only subject to the rules and conditions laid down by the Government An appointment becomes fruitful only on approval of the appointment. I do not find any force in the contention that the conditions in the Government Order relate only to 'approval' and not to 'appointments'.

23. For the aforesaid reasons, I reject the aforesaid contention raised by the Petitioners.

Point No. 2:

24. Another ground on which the Petitioners challenge the Government Order is the following: There are three categories of Managers vis-a-vis the Government Order: (1) The Managers who had made appointments during the period of ban; (2) Managers who had honoured the ban, even though the sanctioned strength of students permitted appointment of teachers as per Rules; and (3) Minority managements coming under the aforesaid two categories. Even those Managers who honoured the ban cannot now make appointment of teachers of their choice, in view of Clauses (v) and (vi) of the Government Order. There cannot be any retrospective appointment. Thus, the Managers who honoured the ban stand to lose and those who violated the ban stand on a better footing, going by the Government Order in question.

25. The argument, on a first look, appears to be attractive. But if Clauses (v) and (vi) of the GO. are carefully considered, it can be seen that the argument is unsustainable. Clause (v) of the GO. stipulates that the Managers who made appointments in the additional divisions during 2006-2007 to 2009-2010 should execute an agreement to the effect that they will appoint protected teachers/non teaching staff "equal to such appointees in all the arising vacancies in the schools from 2010-11 onwards". Clause (vi) contemplates a situation after making such appointments of protected teachers. The vacancies that arise as additional division vacancies in future should be filled up "in the order of protected teacher and open recruit in the ratio of 1:1". Those Managers who honoured the ban and those who did not honour the ban are thus placed almost in the same level by such balancing process. Therefore, I reject the contention raised by the Petitioners in this regard.

Point No. 3:

26. The Petitioners contend that the Government Order in question offends Rules 43, 51A and 51 B of Chapter XIV A of the KER. The second proviso to Rule 51A specifically provides that the first preference under the Rule shall be given to protected teachers. The Government Order deals with appointments in additional division vacancies. Rule 43 deals with filling up of vacancies in any higher grade of pay by promotion of qualified hands in the lower grade. Moreover, the vacancy which arises on promotion of a qualified hand in the lower grade would be available and if it is to be filled by protected hands, the right to get promotion of the qualified candidate would not be affected. In so far as Rule 51 B is concerned, the right of the dependant of an aided school teacher dying-in-harness cannot be defeated by the Government Order in question. Moreover, the G.O. (P) No. 377/2001/G Edn. dated 28-12-2001 was issued clarifying that the condition regarding prior approval of Government for making appointments shall be applicable only to appointments against new division vacancies and that the vacancies against existing posts caused due to retirement, promotion, leave, death, resignation etc. can be filled up without prior sanction of Government. For the aforesaid reasons, I overrule the contention of the Petitioners on this point.

Point No. 4:

27. It is contended that the ban on creation of posts and appointment is contrary to sub-rules (3) and (5) of Rule 9 of Chapter III of the KER. Sub-rule (3) of Rule 9 provides that the Manager shall provide staff as per Rules issued under the Education Act and as per orders that may be issued from time to time by the Government and the Department. Sub-rule (5) casts a duty of the Manager to verify the staff position of the school in conformity with the number of class divisions sanctioned by the Department.

28. The Government Orders relating to ban on creation of posts have been referred to in paragraph 13 above. Clause (vi) in G.O.(P) No. 317/2005/G Edn. dated 17-8-2005 was challenged in W.P.(C) No. 273 of 2007 and connected Writ Petitions, which were dismissed as per the judgment dated 15-9-2009. It is stated that the aforesaid judgment became final.

29. Sub-rule (3) of Rule 5 of Chapter III itself provides that Manager shall discharge the function as per Rules issued under the Education Act and as per orders that may be issued from time to time by the Government and the Department in conformity with the provisions of the Act and the rules issued thereunder. Sub-rule (1) of Rule 9 of Chapter III states that the Manager shall be responsible for the conduct of the school strictly in accordance with the provisions of the Kerala Education Act and the Rules issued thereunder. He shall also abide by the orders that may be issued from time to time by the Government and the Department in conformity with the provisions of the Act and the rules issued thereunder. Rule 14 of Chapter XXIII, KER empowers the Government to extend the ban on creation of posts to aided schools. Section 7(2) of the Act provides that the manager shall be responsible for the conduct of the school in accordance with the provisions of the Act and the rules framed thereunder. It is also clear from Section 11 of the Act that the power of appointment conferred on the manager is subject to the rules and conditions laid down by the Government. Thus it clear that the duty of the manager under sub-rules (3) and (5) of Rule 9 of Chapter III of the KER is subject to the aforesaid provisions. Therefore, I reject the contentions of the Petitioners.

Point No. 5:

30. Sri John Joseph Vettikkad, the learned Counsel appearing for the Petitioner in W.P.(C) No. 4158 of 2010 submitted that the Petitioner therein has challenged the validity of Rule 14 of Chapter XXIII, KER. The counsel submitted that the validity of Rule 14 was not challenged in W.P.(C) No. 273 of 2007 and connected Writ Petitions. He submitted that if the power of the manager under Section 11 is to be taken away, it could be done only by amendment of the Act. It cannot be done by the Rules or by executive orders. It is also contended that Rule 14 of Chapter XXHI K.E.R. is contrary to power vested in the manager under Section 11 and therefore the rule is bad. The counsel also submitted that Rule 14 of Chapter XXIII also is against Rule 12 of Chapter XXIII and Rule 23 of Chapter VI, K.E.R.

31. In paragraph 28 of the counter-affidavit filed on behalf of the State, is stated as follows:

It is also respectfully submitted that the challenges against the Rule 14 of Chapter 23 of KER is also totally unfounded. The Kerala Education Act and Rules contain a special pattern for division of responsibilities between the management and Government. The State has taken up responsibility of the payment of salaries to the teachers for the effective supervision and development of the Educational Institutions. The powers conferred on the managements of the institutions are also made subject to Government directions and orders. This is done for balancing the different interest of the persons running the institutions and the State paying their employees. In that exercise the Government is compelled to observe certain financial restraint. It was as part of such financial restraint that the Government had imposed the ban on public services. As held by this Hon'ble Court in W.R (C) No. 35543/07 the Government can exercise the power to decide which vacancies are to be filled up and which are not be filled up. Moreover, this Hon'ble Court in W.P.(C) No. 273/07 had considered all these contentions against the introduction of ban and had rejected the same upholding the power of the Government. The above judgment has attained finality and as of now the power of the Government to ban appointment for a specific period is beyond any dispute.

32. Section 11 of the Act gives power to a manager to appoint teachers only "subject to the rules and conditions laid down by the Government". Rule 14 of Chapter XXIII is also such a rule as contemplated in Section 11. Therefore, Rule 14 of Chapter XXIII would certainly be within the Rule making power of the Government under Section 36 of the Act. The power of the Manager under Section 11 of the Act to appoint teachers is not an absolute or unbridled power. The Manager of an aided school cannot appoint a teacher as he likes, by infringing the Rules and conditions laid down by the Government. The power of appointment is regulated by "the rules and conditions" laid down by the Government. The expression "rules and conditions laid down by the Government" in Section 11 is attributable to appointment and not exclusively to the "qualifications", since in Section 11 specific mention is made to Section 10 while dealing with "qualifications". As regards "qualifications" of teachers as well, the Rules will apply, since Section 10 says that "the Government shall prescribe the qualifications to be possessed by persons for appointment as teachers in Government and private schools". I am not inclined to accept the contention raised by the Petitioner that power of the manager under Section 11 can be restricted only by an amendment of the Act and not by Rules or executive orders. Rule 14 of Chapter XXIII contains a non obstante clause, namely, "notwithstanding anything contained in these rules". It is relevant to note that in Rule 2 of Chapter XXIII, K.E.R., the wording of the non obstante clause is: "notwithstanding anything contained in any other rule in this Chapter". Thus it is clear that the non obstante clause in Rule 14 of Chapter XXIII covers the KeralaEducation Rules as a whole and it is not restricted in its application to the rules in Chapter XXIII. In view of the non obstante clause in Rule 14 of Chapter XXIII, the contention raised by the Petitioner that the said rule offends Rule 12 of Chapter XXIII and Rule 23 of Chapter VI, K.E.R. is also without substance.

Point No. 6:

33. The Petitioners contended that Rule 6 (viii) of Chapter v. was amended by the KeralaEducation (Amendment) Rules, 2010, whereby the liability of the managers have been enhanced. If the amended provisions are applied retrospectively, it would seriously affect the rights of the Managers. The Kerala Education (Amendment) Rules, 2010 came into force on 25th May 2010. The Government Order [GO.(P) No. 10/10] was issued on 12-1-2010. In the Writ Petitions, the validity of the Government Order dated 12-1 -2010 is challenged. Therefore the question of validity of the amendment introduced by the Kerala Education (Amendment) Rules, 2010 need not be considered in these Writ Petitions and it is left open.

Point No. 7:

34. The minority educational institutions have raised a contention that the Government Order in question is violative of Article 30(1) of the Constitution of India. The decisions of the Supreme Court in Rev. Fr. W. Proost and Ors. v. The State of Bihar and Ors. : A.I.R. 1969 S.C. 465, D.A.V. College, Jullunddur v. The State of Punjab and Ors.  : A.I.R. 1971 S.C. 1737, The Ahmedabad St. Xavier's College Society v. State  : (1974) 1 S.C.C. 717, N. Ammad v. Manager, Emjay High School  : (1998) 6 S.C.C.674, Board of Secondary Education and Teachers Training v. Director of Public Instructions, Sagar and Ors.  : (1998) 8 S.C.C. 555, Brahma Samaj Education Society v. State of West Bengal 2004 (2) K.L.T. 742 (S.C.), Malankara Syrian Catholic College v. Jose 2007 (1) K.L.T. 22 (S.C.) and the decisions of this Court in V. Rev. Mother Provincial and Ors. v. State of Kerala and Ors. 1969 K.L.T. 749, State of Kerala and Anr. v. The Corporate Management of Schools of the Archdiocese of Changanacherry 1970 K.L.T. 232, Joseph Kachappilly v. State of Kerala 1997 (2) K.L.T. 740; and Kurian Lizy v. State of Kerala  : 2006 (4) K.L.T. 264 were relied on by the Petitioners. The learned Advocate General cited the decisions in SindhiEducation Society and Anr. v. Chief Secretary, Government of NCT of Delhi and Ors. : (2010) 8 S.C.C. 49, T.M.A. Pai Foundation and Ors. v. State of Karnataka and Ors.  : (2002) 8 S.C.C. 481, Fr. Mathew v. State ofKerala 1978 K.L.T. 763, Rev. Kuriakose and Ors. v. State of Kerala and Ors. 1980 K.L.N. 443and Balan v. State of Kerala and Ors. 1981 K.L.T. 242.

35. In T.M.A. Pai Foundation v. State of Karnataka  : (2002) 8 S.C.C. 481, the Supreme Court held:

135. We agree with the contention of the learned Solicitor-General that the Constitution in Part III does not contain or give any absolute right. All rights conferred in Part III of the Constitution are subject to at least other provisions of the said Part. It is difficult to comprehend that the framers of the Constitution would have given such an absolute right to the religious or linguistic minorities, which would enable them to establish and administer educational institutions in a manner so as to be in conflict with the other Parts of the Constitution. We find it difficult to accept that in the establishment and administration of educational institutions by the religious and linguistic minorities, no law of the land, even the Constitution, is to apply to them.

136. Decisions of this Court have held that the right to administer does not include the right to maladminister. It has also been held that the right to administer is not absolute, but must be subject to reasonable regulations for the benefit of the institutions as the vehicle ofeducation, consistent with national interest. General laws of the land applicable to all persons have been held to be applicable to the minority institutions also - for example, laws relating to taxation, sanitation, social welfare, economic regulation, public order and morality.

137. It follows from the aforesaid decisions that even though the words of Article 30(1) are unqualified, this Court has held that at least certain other laws of the land pertaining to health, morality and standards ofeducation apply. The right under Article 30(1) has, therefore, not been held to be absolute or above other provisions of the law, and we reiterate the same. By the same analogy,-there is no reason why regulations or conditions concerning, generally, the welfare of students and teachers should not be made applicable in order to provide a proper academic atmosphere, as such provisions do not in any way interfere with the right of administration or management under Article30(1).

138. As we look at it, Article 30(1) is a sort of guarantee or assurance to the linguistic and religious minority institutions of their right to establish and administer educational institutions of their choice. Secularism and equality being two of the basic features of the Constitution. Article 30(1) ensures protection to the linguistic and religious minorities, thereby preserving the secularism of the country. Furthermore, the principles of equality must necessarily apply to the enjoyment of such rights. No law can be framed that will discriminate against such minorities with regard to the establishment and administration of educational institutions vis-a-vis other educational institutions. Any Law or Rule or Regulation that would put the educational institutions run by the minorities at a disadvantage when compared to the institutions run by the others will have to be struck down. At the same time, there also cannot be any reverse discrimination. It was observed in St. Xavier's College case at SCR p. 192 that: (S.C.C.p.743,para 9)

'The whole object of conferring the right on minorities under Article 30is to ensure that there will be equality between the majority and the minority. If the minorities do not have such special protection they will be denied equality.'

In other words, the essence of Article 30(1) is to ensure equal treatment between the majority and the minority institutions. No one type or category of institution should be disfavoured or, for that matter, receive more favourable treatment than another. Laws of the land, including Rules and Regulations, must apply equally to the majority institutions as well as to the minority institutions. The minority institutions must be allowed to do what the non-minority institutions are permitted to do.

36. After referring to the relevant decisions, the Supreme Court in Malankara Syrian Catholic College v. Jose 2007 (1) K.L.T. 22 (S.C.), held thus:

19. The general principles relating to establishment and administration of educational institution by minorities may be summarized thus:

(i) The right of minorities to establish and administer educational institutions of their choice comprises the following rights;

(a) To choose its governing body in whom the founders of the institution have faith and confidence to conduct and manage the affairs of the institution;

(b) To appoint teaching staff (Teachers/Lecturers and Head-masters/Principals) as also non-teaching staff; and to take action if there is dereliction of duty on the part of any of its employees;

(c) To admit eligible students of their choice and to set up a reasonable fee structure;

(d) To use its properties and assets for the benefit of the institution;

(ii) The right conferred on minorities under Article 30 is only to ensure equality with the majority and not intended to place the minorities in a more advantageous position vis-a-vis the majority. There is no reverse discrimination in favour of minorities. The general laws of the land relating to national interest, national security, social welfare, public order, morality, health, sanitation, taxation etc. applicable to all, will equally apply to minority institutions also.

(iii) The right to establish and administer educational institutions is not absolute. Nor does it include the right to maladminister. There can be regulatory measures for ensuring educational character and standards and maintaining academic excellence. There can be checks on administration as are necessary to ensure that the administration is efficient and sound, so as to serve the academic needs of the institution. Regulations made by the State concerning generally the welfare of students and teachers, regulations laying down eligibility criteria and qualifications for appointment, as also conditions of service of employees (both teaching and non-teaching), regulations to prevent exploitation or oppression of employees, and regulations prescribing syllabus and curriculum of study fall under this category. Such regulations do not in any manner interfere with the right under Article30(1).

(iv) Subject to the eligibility conditions/qualifications prescribed by the State being met, the unaided minority educational institutions will have the freedom to appoint teachers/Lecturers by adopting any rational procedure of selection.

(v) Extension of aid by the State, does not alter the nature and character of the minority educational institution. Conditions can be imposed by the State to ensure proper utilization of the aid, without however diluting or abridging the right under Article 30(1).

37. In Rev. Kuriakose and Ors. v. State of Kerala and Ors. 1980 K.L.N. 443, the minority educational institutions challenged the validity of Rule 6 (viii) of Chapter v. of the KER. They contended that the agreements which they were compelled to execute were hit by Article30(1) of the Constitution of India. The Division Bench repelled the contention of the managements and held:

It must be remembered that the form of application is common to minorities and non-minorities and there can be no case at all that in the case of nonminorities this would, in any way, be objectionable. If this did not apply to minorities or the minorities were not willing to absorb the protected teachers and they were not obliged to do so they could have very well stated so. It cannot be said that they answered this unsuspectingly in ignorance of their fundamental right under Article 30(1)assuming that such fundamental right would entitle them to obtain sanction for upgrading/opening schools without agreeing to absorb protected teachers and nonteaching staff. As we have already pointed out in this State there has been keen awareness of the rights of the minorities and the minorities have been approaching this Court whenever there has been a threat or invasion to their fundamental right. The Applicants executed agreements undertaking to absorb protected teachers and non-teaching staff. By this they gained an advantage in that their applications were sanctioned. Perhaps their applications might have been sanctioned even otherwise because of the need for opening or upgrading schools in that area. It is equally possible that the State might have opened schools in that area or the Petitioners might not have received preference in the matter of opening schools in that area. By reason of the order of the Government the Petitioners obtained the advantage of getting sanction for opening/upgrading schools. That advantage they are seeking to retain while they are seeking to escape from the obligations undertaken by them in the agreement. It is a situation where third party interests are affected. Teachers and non-teaching staff thrown out after a fairly reasonable period of service could be protected by the State opening new schools which would not be objectionable if there is justification for opening such schools in that area. It may be that non-minorities with equal claim might have been preferred had it not been for this condition. It is sufficient to say that having obtained advantage by reason of consenting to absorb the protected teachers and non-teaching staff it may not now be fair to seek relief from this Court to avoid the consequences of the agreement entered into by the Petitioners on the plea of viation of the minority rights under Article 30(1) of the Constitution of India.

38. In Balan v. State of Kerala 1981 K.L.T. 242, it was held that Rule 6 of Chapter V, KER is mandatory.

39. In Sindhi Education Society and Anr. v. Cliief Secretary, Government of NCT of Delhi and Ors.  : (2010) 8 S.C.C. 49, the Supreme Court held that Clause (1) of Article 30 of the Constitution of India is not absolute but subject to reasonable restrictions which, inter alia, may be framed having regard to the public interest and national interest of the country.

40. The managements executed agreements as provided in Rule 6 of Chapter V, KER. They got the advantage of opening schools or upgrading the same. Having got the advantage, the managements are not entitled to contend that the Government Order in question, which is intended to give protection to the retrenched teachers, is violative of Article 30(1) of the Constitution of India. The minority managements cannot claim that they are immune from the provisions of the KER. They cannot be heard to say that the Government Orders issued from time to time, which apply to all the aided managements alike, should not apply to them. There is no case for the minority managements that no teacher appointed by them would be benefited by the Government Order in question. The minority managements cannot contend that teachers appointed by them, who were subsequently retrenched, should be absorbed only by non minority managements in their schools or by the Government in the Government schools. The allegation made in the counter-affidavit that many of the additional division vacancies were filled up by the managements, including minority managements, not by absorbing protected teachers but by fresh hands, is to taken note of in this context. The right conferred under Article 30(1) of the Constitution of India cannot be claimed to the detriment of non minority institutions. The minority institutions could claim only equal rights along with non minority institutions. The liability arising out the acts of the managements is to be shouldered by them and there can be no exception to minority managements.

41. For the aforesaid reasons, I am not inclined to accept the contention of the Petitioners on this aspect of the case.

Point No. 8:

42. The Petitioners contended that the Government Order in question is violative of the fundamental right guaranteed under Article 19(1)(g) of the Constitution of India. The State takes the stand that the restrictions imposed are reasonable restrictions.

43. In the counter-affidavit filed by the State, the following averments have been made:

It is submitted that Section 9 of the Act deals with the payment of salary to the teachers in aided schools. It says that the Government shall pay the salary of all teachers in aided schools direct or through the Headmaster of the school. It is submitted that the Government offer financial assistance to the aided schools by way of direct payment of salaries and pensions to teaching and non teaching staff. Grants are also given for the maintenance and for meeting some of the non salary revenue expenditure. The financial burden of State exchequer on account of this direct payment to private school has become very heavy. Studies reveal that 56% of the revenue expenditure on secondary education of the State Government is towards assistance to private secondary educational schools. It is also important to note that during the year 2008-2009, one third of the total expenditure of the State Government towards salary was spent for meeting the salary expenditure of aided educational institutions. The above facts are submitted only for the purpose of highlighting the financial commitment incurred by the Government for the proper running and maintenance of the educational institutions.

For a long time the absorption of retrenched teachers has been projected as the sole obligation of the Government. No doubt the Government is committed to the social obligation of protecting those teachers who are thrown out from schools for factors beyond their control. No doubt the Government has sympathy for them. It was in materialization of the above social objective that the Government issued orders from time to time from 1969 onwards for offering protection to the retrenched teachers. This by itself does not take away the statutory obligation of the managers to afford job and security to the teachers, who are thrown out from the institutions they worked. By the various orders issued for affording protection, the Government has only contributed for fixing some norms and standards for the appointment of these teachers. While issuing such orders the Government was only giving shape to the spirit and intent of the statutory provisions mandating absorption of retrenched teachers. It could be stated in clear terms that there is no single provision in theKerala Education Act and Rules which compels the Government to give appointment to a teacher retrenched from an aided school. But it has been presented as if the sole responsibility to give job and security to these teachers is on the Government. It is once again submitted that there is no statutory mandate that requires the Government to issue orders for protection of thrown out aided school teachers, but there are clear statutory mandate to the managers to accommodate these retrenched teachers, irrespective of the fact that whether they belong to same educational agency or a different educational agency.

The Government has not done any injustice either to the management or to the teachers. If any protected teacher is available the managements are legally bound to absorb them in the vacancies that arise in their schools. It may kindly be noted that the statutory mandate in Rule 5 A of Chapter XIV A and in Rule 6 (viii) of Chapter v. is more rigorous than the orders of protection issued by the Government. Hence even if the relevant Government Order is not there, the additional vacancies which arise in these aided schools are liable to be filled up by protected teachers. But it was disregarding the statutory provisions and the rights of the retrenched teachers that the managements have been filling up these vacancies in the past many years. Hence this has resulted in an enormous increase in the number of protected teachers, who are left without reappointment. The statement regarding status of protected teachers during 2008-2009 is submitted here with for perusal of this Hon'ble Court.

1. Total number of protected teachers .. 3083

2. Retained in parent schools on account of various concession granted .. 987

3. Deployed in Government schools .. 1456

4. Deployed in other aided schools .. 339

5. Undeployed .. 301

From the above table it may be seen that the total protected teachers deployed in aided schools is only 339 whereas in Government schools it is 1456.

44. The above averments and the data furnished in the counter-affidavit clearly indicate the factual position and they prove the hollowness of the contentions put forward by the Petitioners. In the facts and circumstances mentioned above, it is idle to contend that the Government Order in question is violative of the fundamental right of the Petitioners under Article 19(1)(g) of the Constitution of India.

Point No. 9:

45. The Petitioners raised a contention that even going by the counter-affidavit, there are only 301 undeployed protected teachers. The Petitioners state that there are about one thousand aided schools in the State. For accommodating 301 protected teachers, it was not necessary to impose stringent conditions as imposed in Clauses (v) and (vi) of the Government Order. It is pointed out that the data furnished in the counter-affidavit reflects the state of affairs during 2008-2009. As on 31-3-2010, many of the protected teachers might have retired from service. It is submitted that if the position as on 31 -3-2010 is taken into account, the whole exercise made by the Government may prove to be futile.

46. It is also submitted that going by the Government Orders, protection is available to only those teachers who were appointed before 14-7-1997. The Petitioners apprehend that the idea behind the Government Order is to provide protection to teachers appointed after 14-7-1997 as well on the basis of the pressure exerted by the Teachers' Organisations. There is no material to presume that the intention of the Government is to do so. It is not necessary to consider this contention in these Original Petitions. I leave open the said contention.

Point No. 10:

47. The Petitioners also raised a contention that if a Manager is compelled to appoint a protected teacher, his right under Rules 2, 3 and 6 (c) of Chapter XIV A of KER will be lost. Rule 2 provides that the appointment of qualified hands shall be deemed acting till they are confirmed. Rule 3 states that initial appointment of qualified teachers shall be on probation. Rule 6 (a) states that teachers appointed under Rule 3 shall be on probation for a total period of one year on duty within a continuous period of two years. Rule 6 (c) provides that "if the work of the probationer is found to be unsatisfactory at any time before the expiry of the period of probation or where such period of probation is extended, the manager may, with the approval of the Educational Officer, by order either terminate the probation and discharge him from service or in case probation has not been extended, extend the period of probation after giving him a reasonable opportunity of showing cause against the action proposed to be taken against him."

48. I do not think this contention merits acceptance. Even the first Government Order on protection of teachers, namely, GO. (Ms. ) No. 104/69 dated 6-3-1969 states that the lien of the retrenched teachers should be retained under the management of the aided schools in which they were working at the time of retrenchment. Protection would be available only to teachers who have two years' service. Therefore, declaration of probation of the teacher does not arise before, or vest in, the Manager of the aided school in which the retrenched teacher is deployed.

Point No. 11:

49. The learned Advocate General raised a contention that as per the Government Order, the Managers were granted some advantages and at the same time, some obligations were also created. When advantages and obligations are provided by the same Order, the Managers cannot challenge the obligations and at the same time enjoy the advantages. The learned Advocate General submitted that in such circumstances, the Managers cannot invoke Article226 of the Constitution of India. He relied on the decision of the Division Bench in Rev. Kuriakose and Ors. v. State of Kerala and Ors. (s) (relevant portion is quoted while dealing with Point No. 7 above). I am inclined to accept the contention of the learned Advocate General.

Point No. 12:

50. The learned Advocate General raised an objection that in the Writ Petitions, the affected parties, namely, the protected teachers are not made parties and therefore the Writ Petitions are not maintainable. I have answered, on the merits, the contentions raised by the parties. Therefore, I do not think it is necessary to consider this contention.

Some thoughts:

51. Rule 5 A of Chapter XIV A provides that qualified teachers who are retrenched in the circumstances mentioned in the rule shall be given preference for appointment to future vacancies in schools under the same Educational Agency or under other Educational Agencies. The source of power for making this rule is from Section 13 of the Act. Section 13 of the Act would apply where (a) retrenchment of teachers in any aided school is rendered necessary; (b) such necessity occurs consequent on orders of the Government relating the course of studies of scheme of teaching or of such other matters. In such cases, it shall be competent for the Government or the Manager of an aided school to appoint such teachers in any Government school or aided school, as the case may be. Rule 5 A, Chapter XTV A applies where qualified teachers are retrenched: (a) by the opening of new schools; or (b) consequent on orders of Government relating to the course of studies or scheme of teaching; or (c) due to withdrawal of recognition of the school for any of the reasons specified in Rules 22, 22A or 23 of Chapter v. and consequent closure of the school. In such cases, the retrenched teachers shall be given preference for appointment to future vacancies in schools under the same Educational Agency or under other Educational Agencies. The causes for retrenchment which are not specifically mentioned in Section 13, but which find a place in Rule 5 A of Chapter XIV A, could be attributed to the expression "such other matters" occurring in Section 13. Section 13 would appear, on the wording, to be an enabling provision while Rule 5 A of Chapter XIV A is imperative. The agreement required to be executed under Rule 6 (viii) of Chapter v. of KER is one expressing the preparedness of the Applicant to "absorb" retrenched teachers. The second proviso to Rule 51A of Chapter XIV A, KER provides that the first preference under the rule shall be given to "protected teachers". Such preference is for "appointment". The expression "protected teacher" is not defined in the Act or in the KER. Such expression occurs in the various executive orders. Going by the executive orders, protection will be available only for teachers who were appointed before 14-7-1997. What about Section 13 of the Act and Rule 5 A of Chapter XIV A, K.E.R ` Could the benefit thereunder be restricted only in favour of teachers appointed before 14-7-1997 ` The second proviso to Rule 51A of Chapter XIV A, KER refers to "protected teachers". Is the benefit thereunder restricted to the "protected teachers" coming under the various executive orders alone? Could the category of teachers coming under Section 13 of the Act and Rule 5A of Chapter XIV A, KER also claim the benefit under the second proviso to Rule 51 A of Chapter XIV A ` The various executive orders relating to protection speaks of "deployment" of protected teachers. The protected teacher on deployment retains the lien in the parent school. What about the teachers who are "absorbed" in terms of the agreement under Rule 6 (viii) of Chapter V, K.E.R. and those who are appointed under Section 13 of the Act or Rule 5 A of Chapter XTV A, KER` Do they also retain the lien in the parent school? Is their absorption or appointment a temporary affair insofar as the Manager is concerned? Though the Kerala Education Rules are voluminous and though the executive orders are innumerable, one would find no clear answer to these questions. What about the Educational Officers who are expected to implement the provisions of the Act, Rules and Orders ` Would they be able to apply the law uniformly to all concerned ? Do not the complexity of KER and the various Government Orders make the whole system of administration in the educational sector clumsy and uncertain? Would the Managers be able, without getting expert legal advice, to take any decision in these complicated matters? Even Judges and lawyers would find it difficult to resolve these complicated questions. If so, what would be the position of Teachers, Managers and Educational Officers ? At least some people may be able to take advantage of this situation and get some favourable unmerited orders, quite to the detriment of the opposite parties. Filing of large number of Writ Petitions by teachers and Managers before the High Court is the result of these state of affairs. I think it is high time to streamline the Rules and Orders, making things certain, clear and unambiguous.

Conclusion in the Writ Petitions challenging Clauses (v) and (vi) of G.O.(P) 10/10:

52. For the aforesaid reasons, I reject the contentions raised by the Writ Petitioners. The Writ Petitions are, accordingly, dismissed. No order as to costs.

The Writ Petitions for implementing G.O. (P) 10/10 [W.P.(C) Nos. 31346 of 2009, 6960, 8560, 8570, 8701, 11971, 20540, 20877, 21116, 22288, 23464, 23779, 24913, 25073, 20620, 29128, 30461, 30462, 30499, 32293, 33241, 33814, 34785, 34798, 34956, 34960, 34997, 35021, 36086, 36124, 37149, 37508, 37833, 37883 & 37987/10]

Since the Writ Petitions challenging Clauses (v) and (vi) of G.O. (P) 10/10 dated 12-1-2010 were dismissed, necessarily, the Government Order requires to be implemented. The Government and the Educational Officers concerned shall take appropriate action in the matter and shall deal with the cases of the Petitioners appropriately. The Original Petitions are disposed of accordingly.