IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT: THE HONOURABLE MR. JUSTICE A.V.RAMAKRISHNA PILLAI THURSDAY, THE 15TH DAY OF JANUARY 2015/25TH POUSHA, 1936 WP(C).No. 30107 of 2013 (K)

PETITIONER(S): ---- THE MANAGER, KOORIKUZHI A.M.U.P. SCHOOL, KOORIKUZHI, KAIPAMANGALAM, AND THRISSUR DISTRICT. BY ADVS.SRI.V.A.MUHAMMED SRI.M.SAJJAD SRI.V.RAJASEKHARAN NAIR RESPONDENT(S): ---------- THE STATE OF KERALA, REPRESENTED BY ITS SECRETARY TO GOVERNMENT, GENERAL EDUCATION DEPARTMENT, SECRETARIAT THIRUVANANTHAPURAM, PIN-695 001. BY ADV. SRI.K.A.JALEEL, ADDL. ADVOCATE GENERAL THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 04-11-2014, ALONG WITH WPC. 30789/2013 AND CONNECTED CASES, THE COURT ON 15-01-2015, DELIVERED THE FOLLOWING: msv/

WP(C).No. 30107 of 2013 (K) ---------- APPENDIX PETITIONER(S)' EXHIBITS ---------- EXT.P1: TRUE COPY OF THE G.O.(P) NO.199/2011/G.EDN. DATED 1-10-2011 OF THE GOVERNMENT. EXT.P2 : TRUE COPY OF THE G.O.(P) NO.313/2013/G.EDN. DATED 29.11.2013 OF THE GOVERNMENT. EXT.P3: TRUE COPY OF THE G.O.(MS) NO.154/2013/G.EDN. DTAED 3.5.2013 OF THE GOVERNMENT. EXT.P4: TRUE COPY OF THE G.O.(MS) NO.172/2013.G.EDN. DATED 20.05.2013 OF THE GOVERNMENT. RESPONDENT(S)' EXHIBITS: ---------- EXT.R1(a): ATRUE COPY OF THE COUNTER AFFIDAVIT FILED BY THE GOVERNMENT. EXT.R1(b): A TRUE COPY OF THE STATUS REPORT PUBLISHED BY MHRD. EXT.R1(c): ATRUE COPY OF THE G.O. (MS) 154/2013/G.EDN DATED 3.5.2013. EXT.R1(d): A TRUE COPY OF THE G.O.(MS) 172/2013/G.EDN DATED 20.5.2013. //TRUE COPY//

P.S.TO JUDGE Msv/

A.V.RAMAKRISHNA PILLAI, J

WPC Nos.30107, 30789, 30963, 31092, 31093, 31094, 31637 and 31605 of 2013 & WPC Nos.20, 1646, 4349, 4907, 5270, 6047, 6288, 6294, 6306, 6310, 6342, 6392, 6807, 6970, 7145, 7169,7273, 7290, 7399, 7455, 7458, 7572, 7594,7758, 7794, 8486, 9001, 9003, 9486 and 11051 of 2014

Dated this the 15th day of January, 2015

JUDGMENT

Under challenge in these writ petitions filed by the Managers of various aided schools in the State ranging from L.P. Schools to High Schools (they include minority and non- minority institutions) are certain orders issued by the Government in relation to the appointment of teachers in the private aided schools.

2. The issue raised in these writ petitions is whether the said government orders are in tune with the provisions of the Kerala Education Act, 1958 (hereinafter referred to as the 'Act'), the Kerala Education Rules (hereinafter referred to as the 'Rules') and the Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as the 'Central Act').

3. The controversial government orders are exhibited in these writ petitions in different chronological orders. The orders challenged are the following: a) G.O.(P) No.199/2011 dated 1.10.2011. b) G.O.(P) No.313/2013 dated 29.11.2013. c) G.O.(MS) No.154/2013/G.Edn. dated 3.5.2013. d) G.O.(MS) No.172/2013/G.Edn. dated 20.5.2013. e) G.O.(MS) No.3905/2013/G.Edn. dated 24.9.2013.

4. The main controversy in these writ petitions revolves around G.O.(P) No.199/2011 dated 1.10.2011 and G.O.(P) No.313/2013 dated 29.11.2013. There is yet another controversial order, viz., G.O.No.10/2010 dated 12.01.2010 which is the subject matter of few writ appeals now under consideration of a Division Bench of this Court.

5. In one of the writ petitions, i.e. in WPC No.31637 of 2013, G.O.(MS)No.3905/2013/G.Edn. dated 24.9.2013, by which the Government have brought private aided schools under the provisions of the Right to Information Act, 2005, is also challenged.

6. The Government by virtue of G.O.(P)No.199/2011 dated 1.10.2011 inter alia stipulated that the staff fixation 3 orders of 2010-2011 would be applicable for 2011-2012 and that no posts of additional division be filled up after 31.3.2011 except those posts which were vacant during 2010-2011. The further stipulation is that only those appointments made after 31.3.2011 in regular vacancies against promotion, death, retirement and resignation vacancies alone would be approved after 31.3.2011. The said order provided for filling up the vacancies of teachers by appointment from the teachers' bank. The said G.O. was not put to application except forming teachers bank as contemplated therein. However, later the Government issued G.O.(P) No.313/2013/Gen.Edn. dated 29.11.2013 practically in implementation of Ext.P1.

7. By G.O.(P) No.313/2013, the Government inter alia stipulated that staff fixation and fixation of division should be done notionally on the principles of the Central Act and that the additional vacancies should be filled up as provided under G.O.(P) No.199/2011 dated 1.10.2011.

8. The petitioners allege that the provision in the G.O. (P) No.199/2011 dated 1.10.2011 providing the same staff fixation pattern for the academic year 2010-2011, for the year 2011-2012, is against the provisions of Rule 12 of Chapter XXIII of the Rules which provides for fixation of staff strength every year depending upon the staff strength. According to the petitioners, the Government cannot, by way of an executive order in the aforesaid nature, prohibit appointment after 31.3.2011 which is directly in conflict with Section 11 of the Act empowering the managers to make appointment, subject to the rules and conditions laid down by the Government. They would also contend that the Government cannot insist the Managers to effect appointments from the teachers' bank as the same is against the right of the Manager to effect appointment as teachers under Section 11 of the Act and Rules.

9. In the counter affidavit filed by the State, they would contend that the source of power in issuing the impugned orders are to be traced to Section 13 of the Act and Rules 5A and 51A of Chapter XIV-A and Rule 6(viii) of Chapter V of the Rules. Another reason pointed out by the Government is that the Government had ordered a ban on appointments in additional vacancies from 2006/2007 onwards as per G.O.(P) No.317/2005/G.Edn. dated 17.8.2005, copy of which is produced as Ext.R1(a) along with the counter affidavit and this has been violated by many Managers which resulted in the issuance of G.O.(P) No.10/10 dated 12.1.2010. It was further contended that the Government has only made some restrictions for a short period for the sake of convenience. Therefore, the Government justified the impugned orders.

10. I have heard Mr.Kurian George Kannanthanam, Mr.K.Ramakumar and Mr.Babu Varghese; the learned senior counsel as well as Adv.Mr.George Poonthottam; Sri.V.A.Muhammed, M.R.Anison, Suraj.S., Dr.George Abraham, U.Balagangadharan, V.M.Kurian, P.J.Mathew, K.C.Santhosh Kumar, Vinoy Varghese Kallummoottil, Jiji Thomas Pambackal, Augustine Joseph and R.T.Pradeep; the learned counsel appearing for the petitioners. Mr.T.T.Muhamood, the Special Government Pleader to A.G.was also heard.

11. The provisions of G.O.(P) No.199/2011 which are under challenge are paragraphs 6(B) (i) to (vi), (ix) and (x) as well as paragraphs 7 and 8. Paragraph 6(B)(i) reads as follows:- 6B(i) For the academic year 2011-12 the staff fixation orders of 2010-11 would be applicable and will be fixed as the sanctioned posts in each school.

12. The learned counsel for the petitioners submit that paragraph 6B(i) is directly against Rule 12 of Chapter XIII KER. It was pointed out that the said G.O. does not propose to amend Chapter XXIII. 13. Rule 12 of Chapter XXIII reads as follows: Strength of teaching staff:- Subject to the availability of accommodation, the strength of teaching staff in each school be fixed by the Educational Officer in accordance with the above general provisions, once a year, after finalising the number of divisions based on the effective strength of the class as on the 6th working day from the re-opening date in June. The pupils' strength of all schools, both Government and Aided Schools, shall be verified by the Educational Officer or Officers authorised by the Director in this regard by visiting the schools in the State on a single day fixed by the Director for staff fixation purpose. A further verification of strength at higher level by the District Educational Officer, in the case of fixation of strength in Lower Primary and Upper Primary Schools and by the Deputy Director (Education) in the case of High Schools shall be done wherever additional divisions or additional staff are found necessary, after the one day verification conducted by the Educational Officers or Officers authorised by the Director, in this regard. In such cases, the final orders on fixation of staff shall be issued only on the basis of such re-verification of strength. The actual attendance on the date of visit of authorised persons plus five percent of the roll strength, not exceeding the roll strength of the each class, alone shall be reckoned as the effective strength of the school for fixing the number of divisions and the strength of staff. The staff sanctioned by the competent authority during the previous year shall continue till the 14th July of the succeeding year. The fixation of staff shall be finalised by the Educational Officer not later than the 15th July every year. The strength of Standard I as on the 6th working day after Vijayadasami Day shall be reviewed having regard to the provisions under sub rule (2) of Rule 4 of Chapter VI and the strength of the staff be re-fixed accordingly, if found necessary, Government may direct the Educational Officer to re-visit and re-fix the strength of teaching staff in schools where there has been undue shortage in attendance of pupils on the date of visit of the Educational Officer or the Officers authorised by the Director in this regard or the Higher Verification Officer or the Super check Officer due to natural calamities like flood, outbreak of epidemic, or other special reasons like agitations, strikes, accidents, death of prominent persons, local celebrations/festivals in the locality etc. Requests for re-visit should be accompanied by a certificate issued by the Headmaster explaining the reasons for the

fall in attendance and the veracity of the reasons adduced should ordinarily be supported by a report of the Tahsildar or Village Officer within whose jurisdiction the school is situated, or the Medical Officer in charge of the nearest Government medical institution, as the case may be. When such a re-visit is made by the Educational Officer or the Higher Verification Officer following the directions of the Government, the effective strength shall be worked out on the basis of the strength verified on re-visit made by the Educational Officer or the Higher Verification Officer, as the case may be, and orders shall be passed by such officer, but not granting a new division that was not in the staff fixation in the previous year. Explanation: (1) For the purpose of fixing the number of divisions, rule 23 of Chapter VI shall be applied. (2) Government may revise the date for reckoning the strength of the classes in any year if found necessary and the strength of the teaching staff shall be fixed in such an event on the basis of the number of divisions as on the date so fixed. The date so fixed shall be published in the Gazette. (3) In calculating the effective strength, fractions of half and above shall be rounded off to the next higher integer and fractions less than half shall be ignored. (4) Notwithstanding anything contained in these rules, the Govt. may if they are satisfied that the effective strength of any division or divisions in any school or schools generally is likely to have been diminished in any particular year by any reason whatsoever; the Govt. may direct that the Educational Officer may re-visit and re-fix the strength of teaching and non-teaching staff in schools from which according to the satisfaction of the Educational Officer concerned, substantial number of pupils have obtained Transfer Certificates and left the school, provided that no such re-visit or re-fixation shall be done after 31st of December each year." 14. It is evident from Rule 12 that staff strength as on the 6th working day of each academic year has to be fixed and that the actual strength on the date of visit plus 5% of the role strength 'alone' be reckoned as the effective strength for staff fixation. Therefore, I see valid force in the argument submitted by the learned counsel that the aforesaid G.O. is against Rule 12 Chapter XXIII of the Rules.

15. Paragraphs 6B(ii) of the G.O. dated 1.10.2011 reads as follows: "(ii) No filling up of posts of additional division shall be allowed after 31.3.2011, except for posts which have hither to not been filled up though allowed in the staff fixation orders of 2010-2011"

16. The petitioners attack paragraph 6B(ii) of the G.O. dated 1.10.2011 on the ground that it offends Chapter XXIII read with Section 11 of the Act.

17. Chapter XXIII deals with the method of fixation of Divisions and consequential posts. Rules 1 to 12 under Chapter XXIII mandates as to how the number of posts in each school has to be worked out. All the provisions are mandatory in nature. Section 11 gives power and right to make appointments to the Manager. It reads as follows: "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".

18. As rightly pointed out by the learned counsel for the petitioners, paragraph 6B(ii) also offends Section 26 of the Central Act which mandates that the total number of vacancies shall not be more than 10% of the sanctioned strength.

19. Section 26 of the Act reads as follows: Filling up vacancies of teachers - The appointing authority, in relation to a school established, owned, controlled or substantially financed by funds provided directly or indirectly by the appropriate Government or by a local authority, shall ensure that vacancy of teacher in a school under its control shall not exceed ten per cent of the total sanctioned strength."

20. Once the Rules have been framed, Section 11 of the Act does not enable the executive to issue orders contrary to the Rules. The impugned orders were issued by the State purportedly under its executive power. In this context, it is worthwhile to examine Article 154 of the Constitution which reads as follows: Art.154 - Executive Power of State :(1) The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution. (2) Nothing in this Article shall- (a) be deemed to transfer to the Governor any function conferred by any existing law on any other authority; or (b) prevent Parliament or the Legislature of the State from conferring by law functions on any authority subordinate to the Governor.

21. There cannot be any doubt that the expression 'executive power' comprises all acts necessary for the carrying on or supervision of the general administration of the State, including (i) a decision as to action and (ii) the carrying out of that decision. In the ultimate analysis, it comprises all

functions of the State which cannot be classed as legislative or judicial. [See Jayantilal Amratlal Shodhan v. F.N.Rana (AIR 1964 SC 648 at Page 655)].

22. If there is no enactment covering a particular subject, the Government can carry on administration by issuing administrative direction and instruction until the legislature makes a law in that behalf. However, the executive power ceases when legislation covers the field. This is the settled law. More over, executive action must be based on rule of law and restrictions imposed thereby must be reasonable. In order that the executive instructions have the force of statutory rules, it must be shown that they have been issued either under the authority conferred on the State Government by some statutes or under some provisions of the Constitution. That means, there is no inherent or autonomous law making power in the executive administration.

23. The next challenge is against para 6B(iii) of G.O.(P) No.199/2011/G.Edn. dated 1.10.2011 which reads as follows: "Other than the proviso (ii) above, only those appointments made after 31.3.2011 in regular vacancies due to promotion, resignation, death or retirement of the teachers in the posts sanctioned as per the staff fixation orders of 2010-11 will be approved in the Academic Year 2011-12."

24. The impact of the said restriction is that no fresh appointment could be made after 2011. This restriction also is bad on account of the reasons pointed out above.

25. Sub clauses (v) to (viii) of Paragraph 6B reads as follows, are also challenged by the petitioners: (v) Those appointments made against the additional division vacancies during the current academic year will be treated only as daily wages and their approval will be considered only during the academic year 2013-14. Details of such teachers shall be given from the school in a prescribed proforma to be specified by the Director of Public Instruction during the month of October itself. (vi) The additional divisions/posts will be worked out by the respective Assistant Educational Officers/District Educational Officers on the basis of actual verified strength already determined for 2011-12 or on the basis of revised strength to be submitted as in (iv) above, whichever is l ower. Thereafter Assistant Educational Officer/District Educational Officer shall notionally re-arrange the additional divisions/posts, if, eligible, reducing Pupil Teacher Ratio as 30:1 in classes up to IV standard and 35:1 in classes V to X. This ratio will be applicable to language teachers also. No additional post for 2011-2012 will be allowed

on the basis of this process since the posts are worked out only on notional basis, except for rearranging teachers specified in (viii) (a), (viii) (b) and (viii)(c). (vii) Each school will prepare a seniority list of claimants under various categories awaiting appointment in schools, including teachers thrown out during the period when protection benefit was not allowed and will publish the same in the Education Department website on or before 31.10.2011. Any claimant aggrieved by this can file an appeal and the same shall be considered in school wise sittings by the officers designated by Government and settled with verification of school records. No appeal shall lie against this decision taken in the presence of claimants, and managements. This process shall be completed before 30th November 2011. (viii) These posts/divisions, (identified notionally as in (vi) above) shall be filled up only in the following priority:- (a) from the list of Teachers working without salary. (3389) (Appendix I). These teachers shall be absorbed by the management which has appointed them itself. After absorbing such teachers the further appointments shall be as per viii(b) and (c) only. (b) At least one teacher from the Teachers Bank constituted as per para 6C of this order in each school. (c) Claimants from the seniority list specified in para (vii) above.

26. Though sub clauses (v) to (vii) were confined only to 2011 and 2012, they are also bad for the reasons pointed out above and clause (viii) is totally illegal.

27. Though clause 6C speaks about the formation of teachers' bank, it may not be illegal by itself. However, it becomes objectionable only when the other provisions compelled the Managers to fill up the vacancies by appointing teachers from the bank. The said compulsion is illegal for the following reasons: Firstly, it takes away the right of the individual Managers to keep a teacher appointed on probation. Secondly, it totally takes away the right of the Managers to make their own choices in the case of appointment of teachers in their schools. Thirdly, it takes away the statutory right of certain managements to make appointment to the posts which are permissible under the Rules.

28. As pointed out in the opening paragraph, the petitioners are Managers of various aided schools ranging from L.P. to High Schools and they include minority and non- minority management.

29. Mr.Kurian George Kannanthanam, the learned senior counsel appearing for the schools managed by the minority would further submit that the right of appointment and the right of choice are integral parts of the rights guaranteed under Articles 19(1) and 30(1). It is crucial to note that G.O.(P) No.199/2011/G.Edn. dated 1.10.2011 is not traceable to Article 19(6) which empowers the

State to impose restrictions on the right conferred under Article 19 (1)(g). Therefore this Court is of the view that the said G.O. is violative of Article 19(1)(g) and 30(1) of the Constitution of India as far as minority institutions are concerned.

30. The petitioners also attack clause IX(2) of G.O.(P) No.313/2013/G.Edn. dated 29.11.2013 which reads as follows:

"As per para 6B of the G.O. read as Ist paper above, it was ordered that the additional divisions/posts should be notionally re-arranged by reducing PTR as 1:30 for classes I to IV and 1:35 for classes V to X. It was also made clear that no additional posts will be sanctioned on the basis of this process since the posts are worked out only on notional basis. If any approved regular teacher on the basis of the staff fixation for the year 2010-2011 continuing in service is found excess due to the process stipulated supra, will be retained in vacancies if available by notionally applying the reduced PTR as 1:30 for classes I to IV and 1:35 for classes V to X. While applying 1:30, second division shall be notionally sanctioned, if the student strength exceeds 35, third division when strength exceeds 65 and so on. While applying 1:35, second division can be notionally sanctioned if the student strength exceeds 40, third division when the strength exceeds 75 and so on. If vacancies are available even after rearranging the excess teachers the protected teachers and retrenched teachers included in the teachers package shall be accommodated as per seniority. Notional fixation based on revised ratio is applicable only to aided schools for the limited purpose of rearrangement of excess teachers as stated above and teachers included in the Teachers Package. This notional fixation is not applicable to teachers appointed in leave vacancies. No additional posts shall be created or new appointment shall be done due to this process. No new appointments will be allowed in the vacancies due to retirement of these teachers who are notionally arranged. Corporate management schools will be treated as a single unit for the above purpose."

31. Clause IX(2) of the said G.O. says staff fixation would be done notionally in tune with the principles of the Central Act. According to the petitioners, notionally filling up is not possible because of Section 26 of the Central Act (see supra) which mandates filling up of posts and directs that no posts shall be kept vacant.

32. Here, it is profitable to quote Article 162 of the Constitution of India which states the extent of executive power of the State. It reads as follows: "Subject to the provisions of this

Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws: Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

33. The Central Act and the Rules framed thereunder have specifically prescribed the student-teacher ratio in the schools. The said Act is enacted by the Central Government as the subject matter of the said statute falls in the concurrent list in the 7th schedule of the Constitution of India. The Kerala Education Act, 1958 also occupies the same field and falls under the concurrent list in the 7th schedule. Therefore, both the statutes occupy the same subject. In such circumstances, wherever a harmonious construction is possible, the same should be adopted. However, if there is no possibility for harmonious construction, it is a well settled constitutional principle that the Central Statute will prevail over the State law.

34. Article 254 of the Constitution provides that the Act, Rules or Orders issued by the State Legislature/State Government, which is inconsistent/repugnant with the Central Legislation will be void to the extent of repugnancy. Article 254 reads as follows: "254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States-(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void."

35. The Apex Court has laid down the following principles of repugnancy in T.Barai v. Henry Ah Hoe [(1983) 1 SCC 177]. .....The predominance of the State law may however be taken away if Parliament legislates under the proviso to clause (2). The proviso to Article 254(2) empowers the Union Parliament to repeal or amend a repugnant State law even though it has become valid by virtue of the President's assent. Parliament may repeal or amend the repugnant State law, either directly, or by itself enacting a law repugnant to the State law with respect to the 'same matter'. Even though the subsequent law made by Parliament does not expressly repeal a State law, even then, the State law will become void as soon as the

subsequent law of Parliament creating repugnancy is made. A State law would be repugnant to the Union law when there is direct conflict between the two laws. Such repugnancy may also arise where both laws operate in the same field and the two cannot possibly stand together e.g. Where both prescribe punishment for the same offence but the punishment differs in degree or kind or in the procedure prescribed. In all such cases, the law made by parliament shall prevail over the State law under Article 254(1).

36. The further challenge of the petitioners is against clause X(ii), XI and XIV of G.O.(P) No.313/2013/G.Edn. dated 29.11.2013 which are as follows:- "X(ii) The resultant vacancies in Government schools shall be hereafter filled up with the excess teachers retrenched if any from Government schools or otherwise on daily wages. If in any aided schools, teachers are found excess even after rearranging as per clause IX above and is eligible for the Head teacher, the resultant vacancy shall be filled up with the teachers fund excess in that school. No new appointments other than as stated above shall be allowed in such vacancies." XI. Teachers Bank In case there are still surplus teachers after the exercise mentioned above, a Teachers Bank shall be created. As per para 6B(ii) & (v) of G.O. read as Ist paper above, the posts which were not filled up though allowed in the staff fixation orders of 2010-2011 were allowed to fill up only on daily wages and their approval will be considered only during the academic year 2013-2014. After completing the process of staff fixation as stipulated above, additional divisions shall be sanctioned after due verification of UID in respect of those schools by the DPI. All further appointments to be made by the aided and Government schools on the ground of additional divisions shall be based on school wise PTR as stipulated in G.O. read as 8th and 9th papers above and in aided schools, they shall be filled up by using the bank for the first vacancy and from the second vacancy onwards the school management will be free to make appointments, approval for which will be given by the DPI if otherwise eligible and qualified as per KER norms. For the purpose, a detailed statement showing how the vacancy has occurred as per the school wise PTR (Pupil-Teacher Ratio)and how the first vacancy has been filled from the Teachers Bank, should also be enclosed in the appointment order by the Manager. The Educational Officer should ensure the genuineness of the statements before giving approval for the appointment. When the details of teachers in the teachers bank is published Revenue districtwise in the website of DPI, the details regarding teachers belonging to Government schools and aided schools should be separately indicated. A permanent separate Teachers Bank shall be created

including all the specialist teachers on Revenue District basis. Appointments to additional division vacancies in aided schools shall be done only as per the procedures laid down in clause 7 & 8 in G.O.(P) No.199/11/G.Edn.dated 1.10.2011. XIV. As per the educational package approved vide G.O.(P) 199/11/G.Edn. dated 1.10.2011 in para 6B(x) read with para 6C(ii), it is clarified that no appointment shall be made in leave vacancy and teachers bank will provide the service of teachers to schools for filling up of leave vacancies. If appointments are made against any leave vacancies after 1.10.2011, the same can be approved on daily wage basis till the teachers bank is formally constituted and leave substitutes are made available from the bank. Hereafter, all leave vacancies shall be filled up from Teachers Bank only".

37. Clause X(ii) which deals with the vacancies after accommodating head teachers is illegal for the reasons pointed out in the preceding paragraph. By clause XI, the State is indirectly insisting on the extension of G.O.(P) No.199/11/G.Edn. dated 1.10.2011 in the future vacancies. Clause XIV prohibits appointment to leave vacancies, especially, by executive orders. It also says that appointment of leave vacancies shall be on daily wages and that regular appointments has to be only from the teachers' bank. This also is illegal for the reasons pointed out during the discussions in the foregoing paragraphs.

38. As already pointed out, the Government has no power to insist on any such condition because they are basically and fundamentally against the provisions contained in the Act and Rules. At the expense of repetition, it has to be stated that no executive orders would prevail over the statutory provisions.

39. It was strenuously argued by the learned Special Government Pleader that the petitioners are unable to prove that the orders issued by the State Government is inconsistent or repugnant with the Central Legislation.

40. The argument advanced by the learned Special Government Pleader that the impugned orders were issued in exercise of powers vested with the Government under Section 13 of the Act and Rules 5A and 51A of Chapter XIV (a) and Rule 6(viii) of Chapter V, is not acceptable as none of these provisions are applicable to the case on hand. The second reason that certain managements have violated the ban on appointments as per Ext.R1(a) and thus resulted in issuance of G.O.No.10/2010 is also not legally sustainable. If any Manager has violated the valid orders of the Government, then action should have been taken for disobedience as envisaged by law. The impugned orders cannot be a remedial measure for that.

41. In the counter affidavit, the State has taken a contention that the Managers can fill up the vacancies as notified by the Director.

42. As rightly pointed out by the learned counsel for the petitioners, the Director is not a functionary under the Act and Rules for the purpose of staff fixation or appointment. Moreover, the Director has only a power to notify limited vacancies. It is also crucial to note that the Director has no obligation to notify the vacancies during the particular time limit. Filling up of vacancies cannot be at the convenience of the Director.

43. The contention of the Government, that the impugned Government orders were made only for the purpose of some restrictions for a short period for the sake of convenience, is also not acceptable. The period of application of the executive officers which are repugnant to the Act and Rules has no force to stand even for a single moment.

44. A reading of the aforesaid two Government orders i.e. G.O.(P)No.199/2011/G.Edn. dated 1.10.2011 and G.O.(P) No.313/2013 dated 29.11.2013, it could be seen that the said orders are contrary to the provisions contained in the Central Act. Those orders were issued by the Government without properly appreciating the provisions contained in the central statute and the ground reality at implementation level. The Government have also not followed the provisions contained in the Act and the Rules while the aforesaid orders were issued. Under the provisions of the Rules, the Manager is the appointing authority. Under the provisions of the Rules, he occupies a pivotal position in the management of the private aided schools.

45. Mr.Ramakumar, the learned senior counsel for one of the petitioners would submit that the impugned orders are issued by the Government to overcome, in particular, the judgment of this Court in Nair Service Society v. State of Kerala and others (2013 (4) KLT 921). The Government cannot issue orders simply invalidating binding judgments of this Court without changing the law following which the judgment has been pronounced.

46. Now the question is whether the aforesaid impugned provisions could be severable. The said question can be answered only in the negative on a plain reading of the notification. Therefore, the entire orders have to go.

47. Every school may have its own reputation because of the type of teachers the Management chooses. As rightly pointed out by Mr.Kurian George Kannanthanam, sacrificing this right by the minority would not only be an in road into the rights guaranteed under Article 30(1), but also sacrificing the rights of the children who choose to be brought up in the atmosphere they are brought up now. The aforesaid impugned orders are bad for violation of Articles 19(1)(g) and 30(1) as far as

the Minority Institutions are concerned. They are also bad in law as they are contrary to the mandatory provisions under the Act and Rules as the rule making power of the executive by way of promulgating subordinate legislation cannot be exercised repugnant to the Rules. The Government orders are also bad in the eye of law on account of the repugnancy between the Central Act which is bound to prevail under the provisions of Article 254 of the Constitution of India.

48. As pointed out at the outset, in one of the writ petitions, i.e. in WPC No.31637 of 2013, G.O.(P) No.3905/ 2013/G.Edn. dated 24.9.2013, by which the Government have brought private aided schools also under the provisions of the Right to Information Act, 2005, is challenged. Mr.Ramakumar, the learned senior counsel appearing for the petitioners in that case pointed out that the provisions of the Right to Information Act, 2009 can be applicable only to a 'public authority' as defined under Section 2(h) of the Right to Information Act.

49. Section 2(h) of the Right to Information Act reads 'public authority' as follows: "public authority" means any authority or body or institution of self government established or constituted- a) by or under the Constitution; b) by any other law made by Parliament; c) by any other law made by State Legislature; d) by notification issued or order made by the appropriate Government, and includes any- (i) body owned, controlled or substantially financed; (ii) non-Government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government;

50. It is true that if an educational agency is a body substantially financed by the funds provided directly or indirectly by the State Government, the same would come within the definition of "public authority" in Section 2(h) of the Right to Information Act. It is also true that such an agency would come under the "public authority", if the same is held responsible and liable for the due and prompt observance and compliance with the terms and conditions imposed by the Government. It is for the aforesaid reasons that this Court in Lee V.S. and others v State of Kerala and others (2010(1) KHC 642(DB) has observed that aided private colleges are 'public authorities' coming within the meaning of Section 2(h) of the Right to Information Act. The legislature has consciously used the words "substantially 28 financed" in order to exclude the institutions receiving small financial supports from the Government.

51. However, going by the definition of private aided schools in the Act and the Rules framed thereunder and taking into consideration the manner in which the schools are functioning, they can never be brought under the definition of 'public authority' defined in the Right to Information Act. It

is true that private aided schools are receiving aids and subject to the control of the Government in certain matters. However, that by itself will not entitle the Government to enforce the provisions of the Right to Information Act against the private aided schools.

52. On a true and proper appreciation of the legal and factual position, the Government decision, as reflected in the G.O.(P) No.3905/2013/G.Edn. dated 24.9.2013 to bring the private aided schools under the purview of Right to Information Act, is not sustainable at all. Therefore, the said G.O. also has to go. In the result, the writ petitions are disposed of as under:-

a) It is hereby declared that G.O.(P) No.199/2011 dated 1.10.2011, G.O.(P) No.313/2013 dated 29.11.2013 and G.O.(P) No.3905/2013 G.Edn.dated 24.9.2013 are non est in the eye of law and the consequential executive orders issued in continuation of the said G.O.s are quashed. b) The respondents are directed not to implement the aforesaid Government orders in derogation of the Kerala Education Act and Rules made there under as well as under the Central Act.

Sd/- A.V.RAMAKRISHNA PILLAI JUDGE css/ true copy

P.S.TO JUDGE