

Madras High Court

R.Kannan vs The Government Of Tamilnadu on 4 June, 2014

THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:04.06.2014

Coram

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

W.P.Nos.5516 & 5517 of 2011

and

M.P.Nos.2, 2, 3 & 3 of 2011

W.P.No.5516/2011:

R.Kannan

... Petitioner

Vs.

1.The Government of Tamilnadu,
Rep. By its Secretary,
School Education Department,
Fort St. George, Chennai 600 009.

2.The Director of School Education,
DPI Buildings, College Road,
Chennai 600 006.

3.The Chief Educational Officer,
Madurai District.

4.R.Parameswari,
District Inspector of Physical Education,
in charge, Madurai.

(R.4 substituted as per order dt. 18.4.2013
in M.P.No.1/13 in W.P.5516/2011)

5.The Joint Director of School Education,
(Higher Secondary) DPI Buildings,
College Road, Chennai 600 006.

6.P.Murugesan

(R-6 impleaded as per order dt.19.11.2012
in M.P.1 of 2012 in W.P.5516/2011)

... Respondents

W.P.No.5517 of 2011:

M.Mani ... Petitioner
Vs.

1.The Government of Tamilnadu,
Rep. By its Secretary,
School Education Department,
Fort St. George, Chennai 600 009.

2.The Director of School Education,
DPI Buildings, College Road,
Chennai 600 006.

3.The Chief Educational Officer,
Kancheepuram District.

4.G.Murthy
District Inspector of Physical Education,
In charge, Kancheepuram.

(R.4 substituted as per order dt. 18.4.2013
in M.P.No.1/13 in W.P.5517/2011)

5.The Joint Director of School Education,
(Higher Secondary) DPI Buildings,
College Road, Chennai 600 006. ... Respondents

Common PRAYER: Petition filed under Article 226 of the Constitution of India praying for issuance

For Petitioners : Mr.Chandrasekaran
For M/s.T.Sundaravadanam

For Respondents 1 to 3 & 5 : Mr.V.Subbiah
Special Government Pleader

For 4th Respondent : Not Ready No appearance

For 6th Respondent
(in W.P.No.5516/2011) : Mr.Naveenkumar Murthi

COMMON ORDER

The Petitioners have preferred the instant Writ of Certiorarified Mandamus in calling t

2.The Long Germane Facts

:

(i)The Writ Petitioners were initially appointed to the post of Physical Education Teachers after completing B.A., B.P.Ed., and joined the service on 06.01.1984 and 17.04.1985 respectively in the Government Higher Secondary Schools Dhaniyamangalam, Madurai District and Keeranallur, Kancheepuram District.

(ii)The Petitioner in W.P.No.5516/2011 from the year 2007 onwards is working in the present School as Physical Education Director Grade II taking classes for Plus one and Plus two Higher Secondary Students. The Petitioner in W.P.No.5517/2011 joined the Government Higher Secondary School, Iyyampettai, Kancheepuram District during the period 1986 to 1996 and later worked in Government Girls Higher Secondary School, Kancheepuram from 1996 to 2006. From the year 2006 onwards, he is working in the present School as Physical Education Director Grade II taking classes for Plus one and Plus two Higher Secondary Students. Both the Petitioners are eligible for the post of Regional Inspector of Physical Education (Men and Women) (herein after referred as RIPE) now renamed as District Inspector of Physical Education (herein after referred as DIPE), Madurai District and Kancheepuram District and they are now looking after in addition to the original post of Physical Education Director Grade II.

(iii)According to the Petitioners, the post of RIPE was established exclusively for persons who are working as Physical Education Director - Grade II in the Higher Secondary Schools. But the Respondents 1 and 2 decided to fill up the vacant posts 25 + 6 posts only with the Physical Education Director Grade I Officers as per G.O.Ms.No.159, School Education Department, dated 10.07.2009.

(iv)The 2nd Respondent, in letter dated 29.11.2010, instructed all the Regional Chief Educational Officers to send the proposal of the Physical Education Director Grade I alone to the combined cadre post of District Inspector of Physical Education on or before 16.12.2010 and based on the said letter, the Chief Educational Officers throughout the State sent their proposals excluding the Physical Education Director Grade II persons for the promotional post of District Inspector of Physical Education.

(v)Even though the Physical Education Director Grade I and Physical Education Director Grade II are treated as equal, they were not included in the promotion panel. Furthermore, the promotional post of 'DIPE' is basically based on the field work and it requires the knowledge of practical experiences and it is not merely functioning as desk work. The entire Physical Education Director Grade II officers are promoted from the entry level post of Physical Education Teacher who are experienced with more practical and technical sound knowledge than the Physical Education Director Grade I officers most of them are direct recruits whose qualifications are U.G. Degree of B.A./B.Com./B.Sc. with M.P.Ed., qualification and the Physical Education Director Grade II are possessing with U.G. Degree of B.A./B.Com./B.Sc. with B.P.Ed., qualification both are equal category and similar work and qualified to handle only the Higher Secondary Classes.

(vi)The 1st Respondent/Government of Tamil Nadu, all of a sudden, issued G.O.Ms.No.159, School Education Department, dated 10.07.2009 directing the 2nd Respondent to fill up the District Inspector of Physical Education post formerly Regional Inspector of Physical Education with the Physical Education Director Grade I officers for 6 posts only. Further, one clause was reserved by mentioning that Physical Education Director Grade II officers the incumbents those who are working as Regional Inspector of Physical Education employees are in total of 25 posts shall be permitted to continue till they get their promotion or till they retire from the posts or till they vacate the post. But the 2nd Respondent now is intended to appoint Physical Education Director Grade I

alone as District Inspector of Physical Education throughout the State by relieving the Physical Education Director Grade II officers those who are holding the post of RIPE. The Petitioners are looking after the Regional Inspector of Physical Education, Madurai District, Kancheepuram and Thiruvallur District and they should have been permitted to continue in the present post till their retirement or till their next promotion. However, the 2nd Respondent instructed his subordinate Officer viz., the Joint Director of School Education (Higher Secondary) to pass orders by appointing Physical Education Director Grade I officers and to relieve the Grade II officers from the post of RIPE.

(vii)The Government Order in G.O.Ms.159, School Education Department, dated 10.07.2009 was challenged before this Court by the Physical Education Teacher and Physical Directors Association in W.P.No.16958 of 2009 and the same was dismissed on 15.11.2010 on the ground that the Writ Petition filed by the Association is not maintainable. Some of the other Physical Education Director Grade II officers filed W.P.No.1358 of 2009 to consider their case for promotion of the Regional Inspector of Physical Education before coming to conclusion by filling up the post with the Physical Education Director Grade I officers in transfer post and the same was disposed of on 15.11.2010 with a direction to the 1st Respondent to consider the case of the Physical Education Director Grade II officers within 10 days from the date of receipt of copy of the order.

(viii)The Petitioners and other similarly placed individuals made representations on 10.12.2010 to consider their case. However, they filed Writ Petitions and interim injunction was granted by this Court on 29.12.2010. Subsequently, it was rejected on 18.01.2011 by the Joint Director of School Education (Higher Secondary) and not by the 2nd Respondent. In fact, this Court had specifically directed the 2nd Respondent to pass orders on the representation submitted by the Physical Education Director Grade II officers in W.P.No.1358 of 2010 dated 15.11.2010.

(ix)The 2nd Respondent instructed the Regional Chief Educational Officers of 31 Districts to furnish the list of Physical Education Director Grade I officers alone for filling up the entire vacant posts exclusively with them and denied their request to permit them and like others till they vacate the post and they are eligible for promotion to the post of Regional Inspector of Physical Education. The 2nd Respondent, without following the norms and principles of natural justice and without passing orders on the representation dated 10.12.2010, appointed the Physical Education Director Grade I officers on 23.12.2010 allegedly to the 20 Districts in violation of the orders passed in W.P.No.1358 of 2010 dated 15.11.2010.

(x)The 5th Respondent, without following the actual directions, issued in the Government Order dated 10.07.2009 and without even waiting till the 2nd Respondent passes appropriate orders on the representations sent by the Physical Education Directors Grade II officers, the 2nd and 5th Respondents proceeded further with the preparation of the panel for the post of District Inspector of Physical Education, only with the Physical Education Director Grade I as transferable post excluding the feeder category Physical Education Director Grade II post which is illegal, unlawful, against the principles of natural justice and also against the proposition of policy of appointment to the Class-I as per Special Rules for the Tamil Nadu Higher Secondary Educational Service. The Physical Educational Director Grade II and the promotion post RIPE are appointed as per Tamil

Nadu School Education Subordinate service vide G.O.Ms.No.753, Education dated 15.07.1985 which is still in force and at present without setting aside the aforesaid G.O.

(xi)After the present G.O.Ms.No.159, School Education Department dated 10.07.2009 [which came to be passed without setting out any principle for reservation for the feeder category] brought the Physical Education Director Grade I and DIPE into combined cadre and thereafter, it restrained the Physical Education Director Grade II officers to get appointed as DIPE. The ratio of 50 : 50 had to be followed if the posts are brought as combined cadre as Special Rules for the Tamil Nadu Higher Secondary Educational Service and at present, the DIPE was upgraded towards Class I. Then the post of DIPE should be filled with 50% towards transfer of posts and rest of 50% shall be felt with promotion. At present, the ratio was not followed, which was an illegal and an unlawful one.

(xii)The Petitioners made representations on 23.12.2010 to the 2nd Respondent to restrain from appointing the Physical Education Director Grade I as District Inspector of Physical Education, leaving them as Physical Education Director Grade II officers. The 2nd Respondent in a hurried manner wanted to complete the process and appointment of Physical Education Director Grade I as District Inspector of Physical Education throughout the State for 20 posts on or before 31.12.2010. At present, there are 31 posts of the District Inspector of Physical Education with 11 Physical Education Director Grade II officers are already working in the posts prior to 23.12.2010 and the remaining posts were also looked after by the Physical Education Director Grade II officers as additional charge since they are qualified to hold the posts.

(xiii)The Petitioners names were not sent by the Chief Educational Officer to the 2nd Respondent and their names were not included in the panel, since they were working as Physical Education Director Grade II officers even though they were holding the Regional Inspector of Physical Education as additional posts. If the Physical Education Director Grade I were surplus, they were to be appointed in DIPE. In the present case, most of the persons were transferred from the Physical Education Director Grade I who were already working in the Higher Secondary Schools and thereby caused vacuum in the original post and appointed to the post of DIPE which virtually left the Higher Secondary School Students without any guidance.

(xiv)As per G.O.Ms.No.528, School Education (A1) Department, dated 31.12.1997, the post of Headmasters of High School was made as the feeder category post for the District Education Officer where in the posts were shared by a ratio of 75% for the seniority basis and the remaining 20% by Direct Recruitment and the 5% from the aided school. For the post of DEO, the Government Order is dated 31.12.1997 and there is no specific Government Order for filling up the post of Regional Inspector of Physical Education now termed as District Inspector of Physical Education as promotional post and all these days, it was allocated to the Physical Education Director Grade II officers since it is the promotional post to the Physical Education Director Grade II officers and it is the transferable post to the Physical Education Director Grade I officers.

(xv)The Petitioner along with another Physical Education Director Grade II officer filed W.P.Nos.30008 and 30009 of 2010 before this Court and on 29.12.2010, this Court was pleased to grant interim injunction restraining the Respondents 1 and 2 from proceeding further with the

promotional panel list and appointing the Physical Education Director Grade I officers alone as Regional Inspector of Physical Education (now renamed as District Inspector of Physical Education). However, this order was communicated to the Respondents 30.12.2010 through telegram and on 04.01.2011 a letter through registered post was sent along with the order copy to the Respondents 1 and 2. Subsequent to the grant of interim order by this Court on 29.12.2010 in M.P.Nos.1 and 1 of 2010 in W.P.Nos.30008 and 30009 of 2010 restraining the Respondents 1 and 2, on 13.01.2011 one P.Rajappa and K.Devaki with the appointment orders dated 23.12.2010 and took charge from them stating that they were appointed to the post which was given to them by way of additional charge by the 2nd Respondent.

(xvi)The Petitioners were reliably given to understand that the 5th Respondent issued appointment orders to P.Rajappa and K.Devaki by antedating as 23.12.2010 as if the order was passed before the interim order passed by this Court on 29.12.2010 and to evade from the clutches of interim order. Thereafter, the 4th Respondent in an unusual manner issued the relieving order and also formally asked the Petitioner in W.P.No.5516 of 2011 to vacate the office from the said post on 13.01.2011 without issuing a relieving order to her. The proceedings dated 23.12.2010 issued by the 5th Respondent/Joint Director of School Education (Higher Secondary), Chennai clearly reveal that the post occupied by P.Rajappa and K.Devaki were continued till 04.01.2011 and 12.01.2011 in their old posts as Physical Education Director Grade I at Government Higher Secondary School, Virudhunagar and Regional Inspector of Physical Education (Women), Chennai.

(xvii)The Petitioners' counsel issued legal notice dated 14.01.2011 to the Respondents to comply with the directions of the order passed by this Court in M.P.Nos.1 and 1 of 2010 in W.P.Nos.30008 and 30009 of 2010 on 29.12.2010. However, it was not done and therefore, they filed Contempt Petition No.296 of 2011 and while it was pending, the Respondents 1 and 2 filed petition to vacate the order of interim injunction and the Writ Petitions itself were came to be dismissed on 25.02.2011 on the ground that the G.O.Ms.No.159, School Education Department dated 10.07.2009 was in force and as per the Government Order, only the 5th Respondent had proceeded further with the appointment of the 4th Respondent.

(xviii)The Respondents 1 and 2 had grabbed the promotional post of Physical Education Director Grade II officers without allocating any provision for the Physical Education Director Grade II officers in ratio manner nor had specially created post similar as like that of Deputy, Additional or Assistant posts to the District Inspector of Physical Education. The appointment of the 4th Respondent as per order dated 23.12.2010 by the 5th Respondent was not proper. Without providing any alternate post to the Physical Education Director Grade II officers for the post of Physical Education Director Grade II officers which was the only promotion post and the same was taken away and given to the Physical Education Director Grade I officers alone is an arbitrary one. As such, the G.O.Ms.No.159, School Education Department (Me.Ni.Ka.2), dated 10.07.2009 passed by the 1st Respondent is unlawful and unconstitutional one. Therefore, the consequential appointment order dated 23.12.2010 issued to the 4th Respondent (in both the Writ Petitions) by the 5th Respondent and the order dated 18.10.2011 issued by the 5th Respondent are arbitrary and an illegal one.

3.The Counter Averments of Respondents 1 to 3 and 5:

(i)The posts of Regional Inspector of Physical Education were created in the School Education Department for inspection of the Physical Education activities in Government and aided High Schools and Higher Secondary Schools. These posts of Regional Inspector of Physical Education were borne on the Tamil Nadu Educational Subordinate Service, later renamed as Tamil Nadu School Education Subordinate Service as per G.O.Ms.No.753 Education, dated 16.07.1985 and classified as Class-VI. Further, a degree in Physical Education of any University in the State or a Degree of equivalent standard is prescribed as the qualification for Direct Recruitment to the post of Regional Inspector of Physical Education.

(ii)The Plea that the Regional Inspector of Physical Education was established exclusively for the persons who are working as Physical Education Director Grade-II, in the Higher Secondary Schools is not correct. As a matter of fact, the Higher Secondary Education Scheme was introduced in the State of Tamil Nadu only from the academic year 1978-79 whereas the Regional Inspector of Physical Education posts were in existence even prior to this. A policy decision was taken by the Government to appoint District Inspector of Physical Education replacing the existing Regional Inspectors of Physical Education [Men] and [Women] who are in the cadre of Physical Director Grade-II with a view to revamp the Physical Education to take up the Inspection of Physical Education activities of all the Schools and to develop the Physical Education.

(iii)With a view to implement the above mentioned policy decision, orders were issued by Government as per G.O.(Ms).No.159, School Education [HS2] Department dated 10.07.2009, which run as follows:

1.The nomenclature of the post of Regional Inspector of Physical Education (Men) and Regional Inspectress of Physical Education (Women) has been changed as a single post as District Inspector of Physical Education. The Director of School Education is directed to appoint one District Inspector of Physical Education for each district.

2.Due to administrative reasons, the existing [25] incumbents working as Regional Inspectors of Physical Education in the cadre of Physical Director Grade-II shall continue in those posts till they vacate the posts on account of their retirement or promotion. The Director of School Education is permitted to appoint Physical Director Grade-I as District Inspector of Physical Education by re-deployment, whenever these posts become vacant.

3.When 25 Regional Inspectors of Physical Education [in Grade-II] were appointed as District Inspectors of Physical Education for 25 Districts, then for the remaining six Districts, the Director of School Education may be permitted to fill up these posts from Physical Director Grade-I by redeployment.

(iv)Pursuant to the issuance of G.O.Ms.No.159, dated 10.07.2009 instructions were issued to all the Chief Educational Officers calling for certain particulars for filling up the District Inspectors of Physical Education posts. Indeed, the Physical Education Director Grade - I and Physical Education

Director Grade II are appointed as follows:

Category Qualification as prescribed in the relevant rules Scale of pay Classes to which appointed Physical Director Grade-I [i]A M.P.Ed. Degree of a University in the State or a degree or equivalent standard or [ii]A degree equivalent to M.P.Ed. Degree Rs.933-34,800+4800 +1 & +2 Standards Physical Director Grade-II [i]A degree in Physical Education of any University in the State or a degree of equivalent standard [ii]Must have passed Account Test for Subordinate Officers Part-I Rs.9300-34,800+4600 6-10th Standards Thus, it is evident that the posts of Physical Education Director Grade-I and Physical Education Director Grade-II are not treated as equal and the contra contention of the petitioners is not a correct one.

(v)The posts of Regional Inspectors of Physical Education and Physical Education Director Grade-II are borne on the Special Rules for the Tamil Nadu School Educational Subordinate Service vide G.O.Ms.No.753 Education dated 16.07.1985. The posts of Physical Education Director Grade-I are borne on the Tamil Nadu Higher Secondary Educational Subordinate Service Rules, vide G.O.Ms.No.720 dated 28.04.1981. As such, both these two posts are distinctly different. Also, it is categorically stated in G.O.Ms.No.159, dated 10.07.2009 vide para 3(2) that the existing 25 incumbents working as Regional Inspector of Physical Education in the cadre of Physical Education Director Grade-II shall continue in these posts till they vacate the post on account of retirement or promotion. Pursuant to this, names of persons who are possessing M.P.Ed., qualification and working as Physical Education Director Grade-I in Government Higher Secondary Schools were called for from the Chief Educational Officers vide Na.Ka.No.73605/W3/S2/2010, dated 09.12.2010 for being posted as District Inspector of Physical Education.

(vi)The Petitioner (R.Kannan) in W.P.No.5516/2011 is working as Physical Director Grade-II in Government Higher Secondary School, Perambalur, Madurai District. Since the post of Regional Inspector of Physical Education [Men] and [Women] Madurai District fell vacant, he was placed in additional charge of the post of RIPE [Men] and [Women], Madurai. This was only a temporary administrative arrangement for the interregnum period until a regular incumbent was posted in that place. Therefore, he cannot claim seniority in Regional Inspector of Physical Education post.

(vii)The Petitioners earlier filed Writ Petition in W.P.No.1358 of 2009 praying for issuance of Writ of Mandamus in directing the Respondents 1 and 2 therein to consider their representations dated 18.12.2008 and consider the Physical Directors belonging to Grade II for the post of Regional Inspector of Physical Education as was the practice. This Court, on 15.11.2010, in W.P.No.1358 of 2010, in paragraph 3, had observed the following:

Considering the limited submission of the counsel for the petitioners without expressing any opinion on merits, the petitioners are permitted to submit a representation to the first respondent individually within a period of ten days from the date of receipt of a copy of this order. On receipt of the same, the first respondent shall consider it and pass orders on merits and in accordance with law and expeditiously as possible. The Writ petition is disposed of accordingly. No costs .

(viii) Pursuant to the order of this Court, dated 15.11.2010 in W.P.No.1358 of 2009, the petitioners were informed through O.Mu.No.118485/W3/S2/2010 dated 18.01.2011 that in view of the conversion of the post of Regional Inspector of Physical Education as District Inspector of Physical Education in terms of G.O.Ms.No.159, School Education Department, dated 10.07.2009 and as these posts were ordered to be held by the Physical Director Grade-I, the request to consider them for being posted as District Inspector of Physical Education could not be complied with inasmuch as they were working as Physical Education Teachers and that the post of Regional Inspector of Physical Education held by the persons borne on the Tamil Nadu School Educational Subordinate Service who were drawing a pre-revised scale of Rs.5500-10500 be upgraded to that of District Inspector of Physical Education and may be paid higher scale of pay.

(ix) With a view to streamline the Physical Education wing in the School Education Department, it was decided by the Government that to enhance the development of Physical Education and inspection of all kinds of schools, to appoint District Inspector of Physical Education for each District. Out of 31 Districts in the State at present Regional Inspectors of Physical Education were appointed in 25 Districts only. The posts of Regional Inspector of Physical Education is presently filled up from among the qualified and eligible Physical Directors Grade-I in Government Higher Secondary Schools.

(x) The post of Physical Director Grade-II is borne on the Tamil Nadu School Educational Subordinate Service vide the Special Rules where of were issued G.O.Ms.No.753, Education dated 16.7.1985. According to these Rules, the post of Regional Inspectors of Physical Education and Physical Directors are classified under category Class VI and Physical Education Teachers are classified under category (2) of Class VI. The post of Regional Inspector of Physical Education is filled up by considering the persons working as Physical Education Teachers in Government High Schools and Higher Secondary Schools based on the State vide seniority and eligibility, whereas the post of Physical Directors and Physical Directresses in Higher Secondary Schools are borne on the Tamil Nadu Higher Secondary Educational Service, the Special Rules thereof were issued in G.O.Ms.No.720, Education dated 28.04.81.

(xi) It is specifically ordered vide 3 (2) of G.O.Ms.159, dated 10.07.2009 that due to administrative reasons the existing incumbents of Physical Director Grade-II who were holding the posts Regional Inspector of Physical Education in 25 Districts, may be allowed to continue till they vacate the post on account of retirement or promotion and further, when any vacancy arises in future such posts may be filled up by appointing Physical Director Grade-I by re-deployment as District Inspector of Physical Education. It is further ordered therein vide para 3(3) that after appointments of 25 Regional Inspector of Physical Education in each District, persons in Grade-I Physical Directors may be appointed by re-deployment. Placing an incumbent, holding a regular post in a category and placing additional charge of another post as a temporary measure as stop-gap arrangement would not confer any right on him on the post put on additional charge. As such, the Petitioners could not claim for being appointed as District Inspector of Physical Education.

(xii) There is no specific G.O. for filling up the posts of Regional Inspector of Physical Education (now formed as District Inspector of Physical Education as promotional posts). The District

Inspectors of Physical Education were appointed in six Districts by re-deployment. However, the regular incumbents holding the post the Regional Inspector of Physical Education in 11 Districts were allowed to continue as such. In so far as the Regional Inspector of Physical Education posts in Kancheepuram and Madurai Districts are concerned, no regular Regional Inspector's of Physical Education were holding these posts but the Physical Director Grade I were posted as additional in charge of the post of Regional Inspector of Physical Education as a temporary measure. Hence in all 20 District Inspector of Physical Education in the cadre of Physical Director Grade-I were appointed by re-deployment.

(xiii) In W.P.No.30008/2010 and W.P.30009/2010 were filed by M.Mani and R.Kannan (Writ Petitioners in W.P.Nos.5516 & 5517/2011) respectively before this Court seeking the relief of Mandamus in restraining the Respondents therein from appointing Physical Education Director Grade-I officers alone in the post of District Inspector of Physical Education and this Court was pleased to grant interim injunction on 29.12.2010 and later on 25.02.2011, the Writ Petitions came to be dismissed holding there were no merits in these Writ Petitions.

(xiv) The 4th Respondents viz., P.Rajappa and K.Devaki (in both the Writ Petitions) working as Physical Director General-I were posted as District Inspector of Physical Education and consequently the Writ Petitioners (viz., R.Kannan and M.Mani), who were holding as additional charge of the post of Regional Inspector of Physical Education, were relieved. In W.P.Nos.30008 and 30009 of 2010, this Court has held that so long as the rule provides that the Petitioners will have a chance for being considered for the post and merely because the Government has taken a different set of rules for promoting only cadre who are permanently holding the post higher than the Petitioners, this will not result in arbitrary decision. The Government is also justified with sound reasons for the introduction of new decisions and policy cannot be found fault with.

4. The Original 4th Respondents, in both the Writ Petitions, got superannuated from service on 31.05.2012 respectively and in their places, one R.Parameswari, District Inspector of Physical Education/In charge, Madurai and G.Murthy, District Inspector of Physical Education /In charge, Kancheepuram took charge and functioning in the said posts, were substituted by virtue of the orders passed by this Court on 18.04.2013 in M.P.Nos.1 and 1 of 2013 in W.P.Nos.5516 & 5517 of 2011. However, no counters were filed on their behalf.

5. The Counter Averments of 6th Respondent:

(i) He is presently serving as Physical Director Grade-I in Government Girls Higher Secondary School, Cuddalore Old Town. He joined the service in the year 1997 as Physical Director Grade I. He had rendered almost 15 years of meritorious and unblemished service. His next avenue of promotion is the post of District Inspector of Physical Education for which he is eligible both in terms of merit and seniority. A policy decision was taken by the Government to appoint District Inspector of Physical Education replacing the existing Regional Inspectors of Physical Education [Men] and [Women] who are in the cadre of Physical Director Grade-II with a view to revamp the Physical Education to take up the Inspection of Physical Education activities of all the Schools and to develop the Physical Education. Therefore, with a view to implement the aforesaid policy decision, orders

were issued by the Government in terms of G.O.(Ms) No.159, School Education [HS2] Department, dated 10.07.2009.

(ii)The 1st Respondent and the other Petitioner filed Writ Appeals in W.A.No.347 and 348/2012 as against the order dated 25.02.2011 in W.P.Nos.30008 & 30009 of 2010 passed by the Learned Single Judge and obtained an order of interim stay without impleading the proper and necessary parties. After filing of vacate stay petition by the Government, he filed the impleading petition in the Writ Appeals and the Hon'ble Division Bench was pleased to dispose of the Writ Appeals with a direction that the Writ Petitions itself be heard finally.

(iii)By passing the Government Order as aforesaid, there is a change in the policy of the Government as regards the appointment of District Inspectors of Physical Education whereby it was stated in the Government Order that the persons who belong to Grade I category shall have more experience and seniority compared to persons who belong to Grade II category. Further, right to get promotion is not a fundamental right and the Hon'ble Supreme Court has held that it is the prerogative of the State to change the policy governing promotion and this cannot be subject to judicial review.

(iv)The policy decision taken by the Government shall benefit a number of meritorious persons who belong to Grade-I cadre and due to the pendency of the Writ Petitions, more than 20 posts of District Inspectors of Physical Education are remaining unfilled. The entire exercise of passing the Government Order is absolutely legal, justifiable and tenable in law. Also that, no legal or constitutional rights of the Petitioners are violated.

Petitioners' Contentions:

6.The Learned Counsel for the Petitioners contends that the impugned G.O.Ms.No.159, School Education (Me.Ni.Ka.2.) dated 10.07.2009 passed by the 1st Respondent and the consequential orders dated 23.12.2010 and 18.01.2011 passed by the 5th Respondent are illegal, arbitrary and unconstitutional one and assuch, the same is liable to be set aside in limini.

7.According to the Learned Counsel for the Petitioners, the G.O.Ms.No.753, Education dated 15.07.1985 passed by the 1st Respondent framing the Special Rules for Tamil Nadu Educational Subordinate Service providing the Physical Education Director Grade II and RIPE posts are combined cadre and the said Government Order is still in force and the Physical Education Director Grade II officers are posted as RIPE as per G.O. and the said order is not superseded by any other Government Order till date. Under these circumstances, the present G.O.Ms.No.159, School Education Department, dated 10.07.2009 converting the RIPE into DIPE and retaining the post of DIPE to Physical Education Director Grade II officers is an illegal and unlawful one and in this regard, he refers to Section 48 of the Tamil Nadu School Educational Subordinate Service, Rule 3 under the head Appointment and Class VI speaks as follows:

Class VI -

1.Regional Inspectors of Physical Education and Physical Directors

- (i) promotion from among the Physical Educational Teachers; or
- (ii) Transfer from any post in the service on an identical scale of pay; or
- (iii) Promotion from any post on the service on a lower scale of pay; or
- (iv) Recruitment by transfer from any other service;
- (v) If no qualified and suitable candidate is available for appointment by methods (i) to
- (vi) Above, by direct recruitment.

2. Physical Education Teachers

- (i) Direct recruitment; or
- (ii) Promotion from any post on the service on a lower scale of pay; or
- (iii) Transfer from any post in the service on an identical scale of pay; or
- (iv) Recruitment by transfer from any other service.

8. Advancing his arguments, the Learned Counsel for the Petitioners strenuously submits that the 2nd Respondent/Director of School Education, Chennai has preferred only Physical Education Director Grade I officers to fill up the post of District Inspector of Physical Education post by transfer, since it is now become as combined cadre. Added further, the plea of the Petitioners is that if it is transferable post the ratio of 50:50 has to be followed as per the Special Rules for the Tamil Nadu Higher Secondary Educational service and the said ratio has not been followed in the instant case.

9. Proceeding further, the Learned Counsel for the Petitioners contends that there is no difference between the Physical Education Director Grade I officers and the Physical Education Director Grade II officers and the only qualification is of Master Degree in Physical Education and they were recruited directly without adequate experience and the Physical Education Director Grade II were promoted from the Physical Education Teacher posts. Moreover, the practice of filling up the post of District Inspector of Physical Education with the Physical Education Director Grade-I officers alone in an arbitrary manner and without considering the Physical Education Director Grade II officers (which is in the same field with equivalent cadre) were neglected.

10. Yet another submission of the Learned Counsel for the Petitioners is that the case of the Respondents is that the Physical Education Director Grade II officers are not much qualified and do not have the ability to handle the Physical Education Director Grade I officers when they were appointed to the post of District Inspector of Physical Education is absolutely a false one, in view of the fact at present 11 Physical Education Director Grade II officers are now holding the post of the

District Inspector of Physical Education posts, if they are qualified to hold at present, then the question of disqualification in future does not arise for future appointments.

11.The Learned Counsel for the Petitioners projects an argument that in respect of each promotional post category, the proper ratio should have been applied in between the Physical Education Director Grade I officers and the Physical Education Director Grade II officers for filing up the posts of District Inspector of Physical Education in the absence of filing up the posts without any ratio is an unlawful and unconstitutional and the action of the Respondents 1 and 2 cannot be justified in any manner whatsoever.

12.Apart from the above, the Learned Counsel for the Petitioners submits that the 5th Respondent/Joint Director of School Education, Chennai passed the final orders on 18.01.2011 to the representation dated 10.12.2010 in terms of the directions issued by this Court on 15.11.2010 in W.P.No.1358 of 2010 after filling up the post of District Inspector of Physical Education on 23.12.2010 or afterwards and which itself clearly shows that the 5th Respondent had not applied his mind on merits and mechanically read out the contents in the G.O. and passed an order without genuine interest to consider the case of the Petitioners and as such, the said order is a predetermined one.

13.Continuing further, the Learned Counsel for the Petitioners contends that as per G.O.Ms.No.528, School Education (A1) Department, dated 31.12.1997, the post of Headmasters of High School, who had completed only as B.T. Assistant which was made as the feeder category post for the District Educational Officer (DEO) where in the posts, were shared by a ratio of 75% for the seniority basis with combined list of Headmasters working in High Schools those who completed B.Ed., with scale of pay (6500 175 13500) along with the Headmasters working in the Higher Secondary Schools those who completed M.Ed. With scale of pay (8500 275 14050) and the remaining 5% from the aided school for the post of DEO the Government Order dated 31.12.1997 and the said DEO has the power and duty to control the entire schools including the Headmasters of the Higher Secondary Schools.

14.It is represented on behalf of the Petitioners that in fact, during the year 2010 the High School Headmaster personnels who were appointed as PA to CEO and the dispute arose between High School and Higher Secondary School Headmasters and to sort out the difference and to accommodate the Higher Secondary School Headmaster personnels a new and additional post for PA to CEO was created by the Respondents 1 and 2 and without following the same anomaly the present posts of DIPE was filled up.

15.The Learned Counsel for the Petitioners contends that the action of the Respondents 1 and 2 in not considering the Petitioners to the post of DIPE is in violation of Article 14 and 16 of the Constitution of India. Added further, it is the stand of the Petitioners that there are five vacancies in the post of DIPE in Vellore, Salem, Tiruvannamalai, Dindigul and Ramanathapuram Districts and the 5th Respondent passed orders on 23.12.2010 appointing 20 District Posts and in the said order, five persons had not joined their posts and they are kept vacant.

16.The Learned Counsel for the Petitioners submits that without amending the Special Rules for Tamil Nadu Higher Secondary Educational Service, the impugned G.O.Ms.No.159, School Education (Me.Ni.Ka.2) dated 10.07.2009 cannot be pressed into service by the Respondents 1 to 3 and 5.

17.The Learned Counsel for the Petitioners refers to Section 37 (2)(b)(i) of the Special Rules For the Tamil Nadu Higher Secondary Educational Service [G.O.Ms.No.720, Education, dated 28th April 1981], under the caption 'Appointment' which runs as follows:

(b)(i) Vacancies arising in Class I of the service shall be filled up so as to ensure that the proportion of appointment in the service in the said class by recruitment by transfer and by promotion shall be 50 : 50. and submits that in the instant case, the ratio of 50 : 50 for filling up the vacancy arising in Class I of the service was not followed.

18.The Learned Counsel for the Petitioners cites the decision of the Hon'ble Supreme Court in K.Kuppusamy and another V. State of T.N. and others, (1998) 8 Supreme Court Cases 469, wherein in paragraph 3, it is observed and held as follows:

.The short point on which these appeals must succeed is that the Tribunal fell into an error in taking the view that since the Government had indicated its intention to amend the relevant rules, its action in proceeding on the assumption of such amendment could not be said to be irrational or arbitrary and, therefore, the consequential orders passed have to be upheld. We are afraid this line of approach cannot be countenanced. The relevant rules, it is admitted, were framed under the proviso to Article 309 of the Constitution. They are statutory rules. Statutory rules cannot be overridden by executive orders or executive practice. Merely because the Government had taken a decision to amend the rules does not mean that the rule stood obliterated. Till the rule is amended, the rule applies. Even today the amendment has not been effected. As and when it is effected ordinarily it would be prospective in nature unless expressly or by necessary implication found to be retrospective. The Tribunal was, therefore, wrong in ignoring the rule.

19.The Learned Counsel for the Petitioners relies on the decision in Dr.Ms.O.Z. Hussain v. Union of India, 1990 (Supp) Supreme Court Cases 688, wherein it is held as follows:

Promotion is a normal incidence of service. There is no justification why while similarly placed officers in other ministries would have the benefit of promotion, the Non-medical 'A' Group scientists in the establishment of Director General of Health Services would be deprived of such advantage. In a welfare State, it is necessary that there should be an efficient public service and, therefore, it should have been the obligation of the Ministry of Health to attend to the representations of the Council and its members and provide promotional avenue for this category of officers. It is, therefore, necessary that on the model of rules framed by the Ministry of Science and Technology with such alterations as may be necessary, appropriate rules should be framed.

20.He also seeks in aid of the decision of the Hon'ble Supreme Court in State of Tripura and others v. K.K.Roy, (2004) 9 Supreme Court Cases 65, at special page 67 and 68, wherein in paragraphs 6 and 7, it is observed as follows:

.It is not a case where there existed an avenue for promotion. It is also not a case where the State intended to make amendments in the promotional policy. The appellant being a State within the meaning of Article 12 of the Constitution should have created promotional avenues for the respondent having regard to its constitutional obligations adumbrated in Articles 14 and 16 of the Constitution of India. Despite its constitutional obligations, the State cannot take a stand that as the respondent herein accepted the terms and conditions of the offer of appointment knowing fully well that there was no avenue of appointment, he cannot resile therefrom. It is not a case where the principles of estoppel or waiver should be applied having regard to the constitutional functions of the State. It is not disputed that the other States in India Union of India having regard to the recommendations made in this behalf by the Pay Commission introduced the scheme of Assured Career Promotion in terms whereof the incumbent of a post if not promoted within a period of 12 years is granted one higher scale of pay and another upon completion of 24 years if in the meanwhile he had not been promoted despite existence of promotional avenues. When questioned, the learned counsel appearing on behalf of the appellant, even could not point out that the State of Tripura has introduced such a scheme. We wonder as to why such a scheme was not introduced by the Appellant like the other States in India, and what impeded it from doing so. Promotion being a condition of service and having regard to the requirements thereof as has been pointed out by this Court in the decisions referred to herein before, it was expected that the Appellant should have followed the said principle.

7. We are, thus, of the opinion that the respondent herein is at least entitled to grant of two higher grades, one upon expiry of the period of 12 years from the date of his joining of the service and the other upon expiry of 24 years thereof.

21. That apart, the Learned Counsel for the Petitioners brings it to the notice of this Court of the decision in *Malwinder Singh Mali V. Punjabi University, Patiala* reported in 2000 (1) L.L.N. 720 at special page 723, wherein in paragraph 6, it is observed and held as follows:

! .The other prayer made in the writ petition is for quashing the order by which the services of the petitioner were terminated and the term of his extension curtailed till 31.12.1998. We find merit in this grievance of the petitioner. It has time and again been laid down by this Court that the services of an ad hoc/temporary employee can be terminated only on account of unsatisfactory work or if the post is not available or when a regularly selected candidate becomes available for appointment. The services of an ad hoc employee cannot be terminated without any reason when the post continues to exist and the University itself has re-advertised the same to fill it up on regular basis. An ad hoc employee cannot be allowed to be replaced by another ad hoc employee or by some one on officiating basis as that would smack of arbitrariness. Some good reason has to be stated for terminating the services of an ad hoc - temporary employee. The University being a statutory body is a 'State' for purposes of Article 12 of the Constitution and every action of it should be guided by public interest and if it is shown that the exercise of power is arbitrary, unjust or unfair, the same will have to be struck down. We see no reason why the services of the petitioner should have been terminated when the post was available and the University having granted extension to his tenure had to curtail the same when the Syndicate decided in the same very meeting that the post be filled up and it constituted a selection committee for the purpose. In the circumstances, the petitioner has

a right to continue as a Public Relations Officer on ad hoc-temporary basis till the University makes a regular selection. Since the services of the petitioner were terminated without assigning any valid reason the same is held to be illegal and arbitrary and is hereby quashed. The view that we have taken finds support from the judgments of this Court in Rajni Bala's case (supra) and Balwan Singh's case (supra).

22. Also, he refers to the decision of the Hon'ble Supreme Court in Keshav Narayan Gupta and others V. Jila Parishad, Shivpuri (MP) and another, (1998) 9 Supreme Court Cases 78 at special page 80, wherein in paragraph Nos.3 to 5, it is held as follows:

. It is contended by the appellants, that although appointments were termed as temporary or ad hoc, they were regularly appointed and continued in service for 7 years. Hence, they should be considered as permanent employees. Their services could not have been terminated as was purported to be done. The appellants rely upon certain resolutions passed by the District Panchayat, Shivpuri, under which the Panchayat had sought the Collector's sanction for giving regular appointments to the appellants. No such sanction was, however, given by the Collector.

4. According to the appellants there were no rules prescribing procedure for appointments to these posts and the only requirement was that the approval of the Collector should be obtained. The Resolution of 22-1-1987, however, provides that until rules are framed for appointment or promotion, the appointments should be made by following the general procedure approved by the Collector. There should be a Selection Committee in which the President/his representative should also be included. In the present case appointments were made by the Secretary of the Panchayat concerned. It does not seem as if any applications were invited for these posts. The approval of the Collector was not obtained for any regular appointment. Initially, only temporary appointments for limited periods were sanctioned by the Collector. When the Panchayat passed resolutions seeking regular appointment for these appellants, the approval of the Collector was not given to such regular appointment. Therefore, in any view of the matter it would be difficult to consider their appointments as regular.

5. We, therefore, do not see any reason to take a view different from the view taken by the High Court. It is, however, submitted by the learned counsel for the appellants that these appellants have worked for 12 years by now and there are no complaints regarding their service. Hence, if any regular appointments are made, the cases of the appellants should also be considered by waiving, if necessary, the age bar. We see some force in this contention. We, accordingly, direct that when regular appointments to the posts at present occupied by the appellants are made, the cases of the appellants will also be considered along with the other applicants by waiving the age bar in the case of the appellants, if necessary. Until such regular appointments are made the appellants will continue to function on an ad hoc basis as of now. With these directions the appeals are dismissed. Submissions of the Respondents 1 to 3 and 5:

23. Conversely, it is the contention of the Learned Special Government Pleader for the Respondents 1 to 3 and 5 that the posts of Regional Inspector of Physical Education were created in the School Education Department for inspection of the Physical Education activities in Government and aided

High Schools and Higher Secondary Schools and indeed, the RIPE posts were borne on the Tamil Nadu Educational Subordinate Service and later renamed as Tamil Nadu School Education Subordinate Service in terms of G.O.Ms.No.753 Education, dated 16.07.1985 and classified as Class-VI.

24.The Learned Special Government Pleader for Respondents 1 to 3 and 5 submits that a Degree in Physical Education in any University in the State or a Degree of equivalent standard was prescribed as the qualification for Direct Recruitment to the post of RIPE and further that, the Higher Secondary Education Scheme was introduced in State of Tamil Nadu only from the academic year 1978-79 but the RIPE posts were in existence even in before that.

25.The main plea taken on behalf of the Respondents 1 to 3 and 5 is that the policy decision was taken by the Government to appoint DIPE replacing the existing Regional Inspectors of Physical Education (Men and Women) who are in the cadre of Physical Director Grade-II with a view to revamp the Physical Education to take up the inspection of Physical Education activities of all the schools and to develop the Physical Education.

26.Expatiating his contentions, the Learned Special Government Pleader for Respondents 1 to 3 and 5 submits that to implement the policy decision of the Government, orders were issued in G.O.Ms.No.159, School Education (HS2) Department, 10.07.2009 and in fact, by the said G.O. the nomenclature of the post of Regional Inspector of Physical Education (men) and RIPE (Women) was changed as a single post as District Inspector of Physical Education and the Director of School Education is directed to appoint one District Inspector of Physical Education for each District. Furthermore, due to the administrative reasons, the existing 25% incumbents serving as RIPE in the cadre of Physical Director Grade II shall continue in those posts till they vacate the posts on account of their retirement or promotion. The Director of School Education is permitted to appoint Physical Director Grade I as District Inspector of Physical Education by re-deployment, whenever these posts become vacant.

27.The Learned Special Government Pleader for Respondents 1 to 3 and 5 brings it to the notice of this Court that the G.O.Ms.No.159, School Education dated 10.07.2009, also speaks of the fact that when 25 Regional Inspectors of Physical Education (in Grade-II) were appointed as DIPE for 25 Districts, then for the remaining six Districts, the Director of School Education may be permitted to fill up these posts from Physical Director Grade I by redeployment.

28.The Learned Special Government Pleader for Respondents 1 to 3 and 5 vehemently submits that the qualification prescribed for the post of Physical Director Grade- I is mentioned (i) A M.P.Ed. Degree of a University in the State or a degree of equivalent standard or (ii) a degree equivalent to M.P.Ed., degree and with a basic pay of Rs.9300 - 34,800 + Rs.4,800 and that they would be appointed +1 and +2 standards whereas the qualification prescribed for Physical Director Grade-II is (i) a degree in Physical Education of any University in the State or a degree of equivalent standard; and (ii) Must have passed account test for subordinate officers Part-I with a scale of pay of Rs.9,300/- - 34,800/- + 4,600/- and they would be appointed to classes 6th to 10th standards and therefore, these two posts are not equal.

29.The Learned Special Government Pleader for Respondents 1 to 3 and 5 contends that the Rule amendment issue is pending with the State Government.

30.Finally, it is the stand of the Respondents 1 to 3 and 5 that the post of RIPE is filled up by considering the persons working as Physical Education Teachers in Government High Schools and Higher Secondary Schools based on the State wide seniority and eligibility, whereas the post of Physical Directors and Physical Directresses in Higher Secondary Schools are borne on the Tamil Nadu Higher Secondary Educational Service, the Special Rules thereof issued in terms of G.O.Ms.No.720, Education dated 28.04.1981.

31.The Learned Special Government Pleader for Respondents 1 to 3 and 5 cites the order of this Court dated 15.11.2010 in W.P.No.16958 of 2009 (between The Physical Education Teacher and Physical Directors Association, Nagapattinam V. The State Government of Tamil Nadu, rep. By its Principal Secretary, Department of School Education, Chennai and another), wherein it is held that the Petitioner Association has no locus standi to file the present writ petition and resultantly, dismissed the Writ Petition without expressing any opinion on merits of the case without costs.

32.Also, he brings it to the notice of this Court that the order dated 25.02.2011 passed by this Court in W.P.Nos.30008 and 30009 of 2010 whereby and whereunder in paragraph No.6, it is observed as follows:

.it is at this stage the two petitioners filed the Writ Petition before this Court being W.P.No.1358 of 2009 seeking for a direction to dispose of their representation dated 18.12.2008. Obviously the said representation was sent before the Government Order was issued in G.O.Ms.No.159, School Education Department dated 10.07.2009. This Court without going into the merits of the case by order dated 15.11.2010 directed the respondents to dispose of the petitioners' representation. It is pursuant to the said direction, by order dated 29.11.2010, the Tamil Nadu School Education Director declined the case of the petitioners and informed them that as per the policy decision taken by the Government and issued in the form of G.O.Ms.No.159, School Education Department dated 10.07.2009, the post of District Physical Education Inspector was filled up from the post of Physical Education Director Grade-I. It is not clear as to how the petitioner can challenge the said order without there being any corresponding right on their favour. The posts are entirely created by executive orders and the necessary statutory rules have not been framed and if they are framed, the policy decision of the State Government was to have only Physical Education Directors Grade I for being considered for the post of Director Physical Education Inspector and it cannot be found fault with because in the counter affidavit they have clearly stated that the Supervisory post will involve supervising cadres, who are having one grade above the persons like the petitioners. Such state of affairs if allowed to continue will result in anarchy and complex problems and cannot be slightly brushed aside. So long as the Rule provides the petitioner will have a chance for being considered for the post. Merely because the Government has taken a different set of Rules for promoting the only cadre, who are admittedly holding the post higher than the petitioner, this will not result in arbitrary decision. The Government is also justified with sound reasons for the introduction of the new policy. This Court sitting in Article 226 of the Constitution cannot find fault with the policy decision taken by the State Government. It is not as if the petitioners are holding a regular post of

Regional Physical Education Inspectors. In respect of those incumbents, the Government has safeguarded their continuance till they vacate their office. Therefore, there is no vested right of any person being affected by the impugned communication. The Writ Petitions are bereft of legal reasons and misconceived and accordingly the Writ Petitions stand dismissed. Contentions of the 6th Respondent (in W.P.No.5516 of 2011):

33.The Learned Counsel for the 6th Respondent submits that in Writ Appeal Nos.347 and 348 of 2012, the Petitioners had not impleaded the proper and necessary parties.

34.According to the Learned Counsel for the 6th Respondent, the policy decision of the Government cannot be challenged in a casual manner by the Petitioners unless the decision taken by the Government is an unconstitutional one. Moreover, the Government is justified for introduction of new policy and in fact, right to get promotion is not a fundamental right as per decision of the Hon'ble Supreme Court in Hardev Singh V. Union of India, (2011) 10 SCC 121. Also, in the aforesaid decision at page 128, in paragraph Nos.25 and 26, it is observed as follows:

5.In our opinion, it is always open to an employer to change its policy in relation to giving promotion to the employees. This Court would normally not interfere in such policy decisions. We would like to quote the decision of this Court in Virender S.Hooda V. State of Haryana [(1999) 3 SCC 696 : 1999 SCC [L&S] 824] where this Court had held in para 4 of the judgment that : [SCC p.699]When a policy has been declared by the State as to the manner of filling up the post and that policy is declared in terms of rules and instructions issued to the Public Service Commission from time to time and so long as these instructions are not contrary to the rule, the respondents ought to follow the same.

26.Similarly, in Balco Employees' Union V. Union of India [[2002] 2 SCC 333] it has been held that a court cannot strike down a policy decision taken by the Government merely because it feels that another policy would have been fairer or wiser or more scientific or logical. It is not within the domain of the court to weigh the pros and cons of the policy or to test the degree of its beneficial or equitable disposition.

35.He also banks on the decision of the Hon'ble Supreme Court in State of Gujarat v. Arvindkumar T.Tiwari, [2012] 9 SCC 545 at special page 550, whereby and whereunder, in paragraph No.12, it is observed and held as follows:

2.Fixing eligibility for a particular post or even for admission to a course falls within the exclusive domain of the legislature/executive and cannot be the subject-matter of judicial review, unless found to be arbitrary, unreasonable or has been fixed without keeping in mind the nature of service, for which appointments are to be made, or has no rational nexus with the object[s] sought to be achieved by the Statute. Such Eligibility can be changed even for the purpose of promotion, unilaterally and the person seeking such promotion cannot raise the grievance that he should be governed only by the rules existing when he joined service. In the matter of appointments, the authority concerned has unfettered powers so far as the procedural aspects are concerned, but it must meet the requirement of eligibility, etc. The court should therefore, refrain from interfering,

unless the appointments so made, or the rejection of a candidature is found to have been done at the cost of fair play , good conscience and equity .

36.The Learned Counsel for the 6th Respondent takes an emphatic plea that the Government/an Employer can alter the eligibility condition in the existing rules and when it is changed on account of policy decision to the benefit of eligible persons the same cannot be found fault with, because of the simple fact that there is no element of arbitrariness involved in the subject matter in issue.

Discussions:

37.At the out set, it is to be pointed out that the Petitioners, on an earlier occasion, filed W.P.Nos.30008 and 30009 of 2010 seeking the relief of Mandamus restraining the Respondents 1 and 2 therein from appointing Physical Education Director Grade I officers alone in the post of Regional Inspector of Physical Education.

38.This Court, on 25.02.2011 passed a common order in the said Writ Petitions, inter alia, holding that this Court sitting in Article 226 of the Constitution cannot found fault with a policy decision taken by the State Government and further opined that it is not as if the Petitioners are holding a regular post of Regional Physical Education Inspectors and in respect of those incumbents, the Government safeguarded their continuance till they vacate their office and consequently came to the conclusion that there is no vested right of any person being affected by the impugned communication and accordingly, dismissed the Writ Petitions.

39.Being aggrieved against the common order dated 25.02.2011 passed by this Court in W.P.Nos.30008 and 30009 of 2010, the Petitioners filed W.A.Nos.655 and 656 of 2012 and this Court, on 04.04.2012, in M.P.Nos.1 and 1 of 2012 in W.A.Nos.655 & 656 of 2012, granted an order of interim stay. Subsequently, M.P.Nos.1 and 1 of 2012 (Stay Petitions) were dismissed for non-prosecution on 27.01.2014. Also, the Vacate Stay Petitions filed by the Government viz., M.P.Nos.1 and 1 of 2013 were closed, in view of the dismissal of the Stay petitions. Later, the Petitioners filed M.P.Nos.1 and 1 of 2014 to restore the Stay Petitions viz., M.P.Nos.1 and 1 of 2012 in W.A.Nos.655 & 656/2012 and this Court, on 27.02.2014, restored the Miscellaneous Stay Petitions viz., M.P.Nos.1 and 1 of 2012.

40.In this connection, it may not be out of place for this Court to make a significant mention that the Writ Petitioners filed W.A.Nos.347 & 348 of 2012, as against the Interlocutory Order passed by the Learned Single Judge in M.P.Nos.2 & 2 of 2011 in W.P.Nos.5516 & 5517 of 2011 dated 15.11.2011 whereby and whereunder, the interim order of Status Quo was not extended and directed the posting of the Writ Petitions for final hearing in third week of December, 2011 because of the prima facie view that the issue involved in these Writ Petitions were covered by the common order in W.P.Nos.30008 & 30009 of 2010 dated 25.02.2011. This Court, on 18.07.2012, while passing the common final Judgment in W.A.Nos.347 & 348 of 2012, opined that it was fit and proper that the Writ Petitions itself (viz., W.P.Nos.5516 & 5517 of 2011 praying for calling of the records pertaining to G.O.Ms.No.159, School Education Department (Me.Ni.Ka.2), dated 10.07.2009 and the orders of the 5th Respondent dated 23.12.2010 and 18.01.2011 respectively and to quash the same) were

decided on merits and accordingly directed the placing of the Writ Petitions before the appropriate Bench for final hearing and disposal, after two weeks and resultantly, disposed of the Writ Appeals.

41.It is true that in Service Law, there cannot be any Service Rule which would convince and satisfy every individual Employee. As a matter of fact, the validity of the Service Rule is to be gauged by taking into account whether it is just, fair and reasonable and benefit large section of Employees, as opined by this Court.

42.A closer reading of the proviso appended to Article 309 of the Constitution of India, without any ambiguity points that rules framed thereunder would apply so long as a statute and rules or any other subordinate legislation governing the conditions of service are not made or not otherwise governing the field. Indeed, the rules framed under Article 309 of the Constitution do have a binding effect.

43.It is to be remembered that mere executive instructions are not rules made under Article 309 of the Constitution. However, this rule is subject to certain exceptions. It is not unreasonable for an Executive Authority to take recourse to the administrative instructions during interregnum as per decision of the Hon'ble Supreme Court in T.Cajee V. U.Jormanik Siem and another, AIR 1961 (Vol.1) SC 276.

44.Moreover, in the absence of statutory rules, the Government has power to lay down principles through administrative instructions. In this connection, it cannot be forgotten that it is not obligatory in terms of proviso to Article 309 of the Constitution to make rules of recruitment, etc. before a service can be constituted for a post to be filled or created, in the considered opinion of this Court.

45.At this juncture, this Court aptly points out the decision of the Hon'ble Supreme Court in Union of India V. K.P.Joseph and others, AIR 1973 Supreme Court 303, wherein it is held as follows:

To say that an administrative order can never confer any right would be too wide a proposition. There are administrative orders which confer rights and impost duties. It is because an administrative order can abridge or take away rights that Courts have imported the principle of natural justice of audi alteram partem into this area.

46.This Court worth recalls and recollects the decision of the Hon'ble Supreme Court in B.N.Nagarjun and others V. State of Mysore and others, AIR 1966 Supreme Court 1942, wherein it is held as follows:

The words 'shall be as set forth in the rules of recruitment of such service specially made in that behalf, in R. 3 of Mysore State Civil Services (General Recruitment) Rules, 1957 do not imply that till the rules are made in that behalf no recruitment can be made to any service. It is not obligatory under proviso to Art. 309 of the Constitution to make rules of recruitment, etc. before a service can be constituted or a post created or filled. Secondly the State Government has executive power, in relation to all matters with respect to which the Legislature of the State has power, to make laws. It

follows from this that the State Government will have executive power in respect of Sch. 7, List II, Entry 41, State Public Services. There is nothing in the terms of Art. 309 of the Constitution which abridges the power of the executive to act under Article 162 of the Constitution without a law. AIR 1955 SC 549.

Rules usually take a long time to make various authorities have to be consulted and it could not have been the intention of R.3 to halt the working of the public departments till rules were framed. AIR 1961 SC 276.

47. Generally speaking, in Service matters, in the absence of rules administrative directions are recorded as enforceable one. Even an employee can seek enforcement of his right before a Court of law under office memorandum and examine his case on merits. Also that, administrative instructions are always to be considered as supplementary and they operate in an area where there is a gap in the rule of course, such instructions cannot supplant the statutory rules.

48. Article 309 of the Constitution is merely an enabling provision and it does not impose any duty to legislate or to make rules nor in the absence of such legislation or rules, do they fetter power of any State Government to exercise its executive power in relation to its services, as per decision A.Laxmandas and others V. The State of Madhya Pradesh and others, AIR 1970 Madhya Pradesh 189.

49. It is to be noted that the Hon'ble Supreme Court, in the decision Ramesh K. Sharma and another V. Rajasthan Civil Services and others, AIR 2001 Supreme Court 362 at page 363, has observed that 'The term 'Service Rule' does not necessarily mean rules framed in exercise of power under proviso Article 309 of the Constitution of India but also includes administrative order in the absence of such rules'.

50. That apart, the administrative instructions or circulars to fill up the gap in statutory rules and regulations can only be issued by the authority which had competency to make rules and regulations as per decision Parameshwar Prasad V. Union of India and others, AIR 2001 Supreme Court 2982.

51. Further, in the decision of the Hon'ble Supreme Court in State of Gujarat V. Akhilesh C. Bhargava and others, AIR 1987 Supreme Court 2135, wherein in paragraph 6, it is observed as follows:

.It is not disputed that the circular of the Home Ministry was with reference to the Indian Police Service (Probation) Rules. We have not been shown that these instructions run counter to the rules. It is well settled that within the limits of executive powers under the Constitutional scheme, it is open to the appropriate Government to issue instructions to cover the gap where there be any vacuum or lacuna. Since instructions do not run counter to the rules in existence, the validity of the instructions cannot be disputed. Reliance has been placed in the courts below on the constitution Bench Judgment of this Court, and which reported in [1968] 1 SCR 111 (Sant Ram Sharma v. State of Rajasthan and anr.) where Ramaswami J. speaking for the Court stated thus:

" We are unable to accept this argument as correct. It is true that there is no specific provision in the Rules laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principles to be followed in promotions of the officers concerned to selection grade posts. It is true that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.

52.As regards the 'Judicial Review', it is to be pointed out that the same is not directed against a decision, but directed against the 'Decision Making Process', as opined by this Court. An order of act can be looked into at from the point of view as to whether the same suffers from mala fide or the same is irrational or vitiated and passed on extraneous factors.

53.At this juncture, this Court cites the decision of the Hon'ble Supreme Court in Asif Hameed and others V. State of Jammu and Kashmir and others, AIR 1989 Supreme Court 1899, at special 1900, wherein it is, inter alia, held that '... The State Government in its executive power, in the absence of any law on the subject, is the competent authority to prescribe method and procedure for admission to the medical colleges by executive instructions'.

54.One cannot ignore a very vital fact that posts of Regional Inspectors of Physical Education and Physical Education Director Grade-II are borne on Special Rules for the Tamil Nadu School Educational Subordinate Service in terms of G.O.Ms.No.753, Education dated 16.07.1985 whereas the post of Physical Education Director Grade-I posts are borne on Tamil Nadu Higher Secondary Educational Subordinate Service Rules by virtue of G.O.Ms.No.720, Education dated 28.04.1981. As such, these two posts are distinctly different. As a matter of fact, the post of Regional Inspectors of Physical Education and Physical Directors are classified under category Class VI and Physical Education Teachers are classified under category (2) of Class VI. Only with a view to streamline the Physical Education Wing in School Education, the Government decided to enhance the development of Physical Education and inspection of all kinds of Schools, to appoint District Inspector of Physical Education for each District. Further, in view of the conversion of the post of RIPE as District Inspector Physical Education in terms of G.O.Ms.No.159, School Education Department, dated 10.07.2009, these posts were ordered to be held by Physical Director Grade-I and the request of the Petitioners were not acceded to inasmuch as they are serving as Physical Education Teachers. Also that, the post of Regional Inspector of Physical Education held by the persons borne on the Tamil Nadu School Educational Subordinate Service who had drawing a pre-revised scale of pay of Rs.5,500 10,500/- were upgraded to that of District Inspector of Physical Education and are to be paid higher scale of pay.

55.Moreover, the Petitioners were holding regular posts in a category and by placing them additional charge of another posts as a transitory nature would not confer any right on them. On that count also, they cannot stake claim for being appointed as District Inspector of Physical Education. Further, the impugned G.O.Ms.No.159, School Education Department, dated 10.07.2009 speaks of introduction of new policy in connection with the Physical Education Administrative

Reforms and decided to inspect all schools, to improve the Physical Education, to reform the inspection of the Physical Education and as per that one District Physical Education Examiner would be appointed for each and every District etc. The said policy decision cannot be said to be an unreasonable, irrational, arbitrary or unfair one, in the considered opinion of this Court. It is needless for this Court that the power to make Rules by the Competent Authority carries with it the power to amend them. It cannot be gainsaid that in the G.O.Ms.No.159, School Education Department, dated 10.07.2009, the 2nd Respondent/Director of School Education was directed to send action plan separately in order to make the appropriate amendments in the Special Rules, in terms of the orders issued in paragraph 3 mentioned therein. Furthermore, the 'Rule Amendment Issue' is pending with the State Government. Viewed in that perspective, the orders of the 5th Respondent dated 23.12.2010 and 18.01.2011 do not suffer from any material irregularity or patent illegality in the eye of law. Consequently, the Writ Petitions fail.

56.In the result, the Writ Petitions are dismissed, leaving the parties to bear their own costs. Consequently, connected Miscellaneous Petitions are closed.

04.06.2014 Index :Yes Internet :Yes Sgl To

1.The Government of Tamilnadu, Rep. By its Secretary, School Education Department, Fort St. George, Chennai 600 009.

2.The Director of School Education, DPI Buildings, College Road, Chennai 600 006.

3.The Chief Educational Officer, Madurai District.

4.The Joint Director of School Education, (Higher Secondary) DPI Buildings, College Road, Chennai 600 006.

M.VENUGOPAL,J.

Sgl ORDERS IN W.P.Nos.5516 & 5517 of 2011 04.06.2014