IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE SMT. JUSTICE P.V.ASHA

MONDAY, THE 14TH DAY OF AUGUST 2017/23RD SRAVANA, 1939

WP(C).No. 30167 of 2016 (U)

PETITIONER(S):
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1. SABU MATHEW,
   HEADMASTER,
   ST.AUGUSTINE'S HIGH SCHOOL,
   RAMAPURAM, KOTTAYAM DISTRICT,
   RESIDING AT KANAMKOMPIL HOUSE,
   NEELOOR P O,
   PIN-686651.

2. K J MATHEW,
   HEADMASTER,
   ST.MARYS HIHG SCHOOL, TEEKOY,
   KOTTAYAM DISTRICT,
   RESIDING AT KIZHAKKETHURUTHIYIL HOUSE,
   EDAMATTOM P O, PALA,
   PIN-686588.

3. JOSEPH V T,
   HEADMASTER,
   SEA VIEW ESTATE UPPER PRIMARY SCHOOL,
   PARATHANAM, KOTTAYAM DISTRICT,
   RESIDING AT VETTIKKAL HOUSE,
   PARAPPALLY P O,
   PALA, PIN-686578

4. ABRAHAM P G,
   HEADMASTER, ST.PETERS HSS, ELANJI,
   KOTTAYAM DISTRICT,
   RESIDING AT PALLIPPARAMBIL HOUSE,
   KOTHANALLUR P O, PIN-686632.

5. THOMAS SEBASTIAN,
   HEADMASTER,
   ST.JOHNS HS, KURUMANNU, KOTTAYAM DISTRICT,
   RESIDING AT MOONNANAPPALLI HOUSE,
   THIDANADU PO, PIN-686123.

6. CHINNAMMA MATHEW,
   H S A (SOCIAL SCIENCE),
   ST.JOHNS HS, KURUMANNU,KOTTAYAM DISTRICT,
   RESIDING AT PADINJARAYIL HOUSE,,
   THUDANANGAD P O, PALA, PIN-685587

WP(C).No. 30167 of 2016 (U)
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7. JOSE SEBASTIAN K,
PHYSICAL EDUCATION TEACHER,
ST.JOSEPHS HS, VILAKKUMADAM, KOTTAYAM DISTRICT.,
RESIDING AT KUMPLANKAL HOUSE, CHURCH ROAD,
PRAVITHANAM, P O, PIN-686651.

BY ADVS.SRI.SIJI ANTONY
SRI.P.M.JOSEPH

RESPONDENT(S):
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1. STATE OF KERALA,
REPRESENTED BY THE PRINCIPAL SECRETARY TO GOVERNMENT,
FINANCE DEPARTMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM, PIN-695001.

2. THE SECRETARY TO GOVERNMENT,
EDUCATION DEPARTMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM, PIN-695001.

3. THE DIRECTOR OF PUBLIC INSTRUCTIONS,
THIRUVANANTHAPURAM, PIN-695001.

4. THE ACCONTANCE GENERAL (A & E)
KERALA, THIRUVANANTHAPURAM, PIN-695039.

BY SENIOR GOVERNMENT PLEADER SRI BIJOY CHANDRAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 14-08-2017, ALONG WITH WPC.30330/2016 AND CONNECTED CASES THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.V.

WP(C).No. 30167 of 2016 (U)

APPENDIX

PETITIONER(S)' EXHIBITS

EXHIBIT P1	TRUE COPY OF THE EMPLOYEE DATE SHEET OF THE IST PETITIONER.
EXHIBIT P2	TRUE COPY OF THE EMPLOYEE DATA SHEET OF THE 2ND PETITIONER.
EXHIBIT P3	TRUE COPY OF THE EMPLOYEE DATA SHEET OF THE 3RD PETITIONER
EXHIBIT P4	TRUE COPY OF THE STATEMENT OF FIXATION OF PAY AND DATA SHEET OF THE 4TH PETITIONER
EXHIBIT P5	TRUE COPY OF THE EMPLOYEE DATA SHEET OF THE 5TH PETITIONER
EXHIBIT P6	TRUE COPY OF THE RELEVANT PAGES OF SERVICE BOOK OF THE 6TH PETITIONER
EXHIBIT P7	TRUE COPY OF THE EMPLOYEE DATA SHEET OF THE 7TH PETITIONER
EXHIBIT P8	TRUE COPY OF THE ORDER ISSUED BY THE IST RESPONDENT DTD 9/5/2016
EXHIBIT P9	TRUE COPY OF THE ORDER ISSUED BY THE IST RESPONDENT DTD 5/8/2015
EXHIBIT P10	TRUE COPY OF THE ORDER ISSUED BY THE IST RESPONDENT DTD 6/8/2015
EXHIBIT P11	TRUE COPY OF THE JUDGMENT PASSED BY THIS HON'BLE COURT IN WPC NO 20495/2013 DTD 23/7/2014.
EXHIBIT P12	TRUE COPY OF THE JUDGEMENT IN WA NO 377/2015 DTD 23/2/2015
EXHIBIT P13	TRUE COPY OF THE JUDGMENT IN SLP (C)NO 19441/2015 DTD 20/7/2015.

RESPONDENT(S)' EXHIBITS NIL

/TRUE COPY/

K.V. P.S. TO JUDGE

P.V.ASHA, J.

W.P(C) Nos.30167/2016, 24017/2016, 27438/2016, 30330/2016, 30368/2016, 30575/2016, 32425/2016, 34321/2016, 35823/2016, 35868/2016, 39076/2016, 40033/2016, 57/2017, 2055/2017, 3685/2017, 4433/2017, 6232/2017, 13153/2017, 17124/2017 & 22495/2017

Dated this the 14th day of August, 2017

JUDGMENT

The orders issued by the Government on 09.05.2016 and 05.08.2016 are under challenge in all these writ petitions, filed by retired and serving teachers of aided Schools and aided Colleges, who claim their prior service rendered in aided schools/colleges including provisional and broken spells of service along with their regular service in aided Schools/colleges. As a common issue is arising for consideration, all these writ petitions were heard together and are disposed of by this common judgment.

2. Petitioners in W.P(C).No.2055 of 2017, 3685/2017, 35868/2016, 34321/2016, 35823/2016, 6232/2017, 30368/2016, 22495/2017, 13153/2017 and 17124/2017 are retired teachers of LP/UP/High School/Higher Secondary School, who had worked in aided

schools in broken spells as leave substitutes. Petitioners in W.P(c). Nos.24017, 27438, 39076 of 2016 and 4433/2017 are retired teachers of private colleges, who have worked in aided schools.

3. The contention of the petitioners is that these Government orders are issued, in order to circumvent the judgment 23.7.2014 in W.(C). No.20495/2013, which was already upheld by the Division Bench by its judgment dated 23.2.2015 in W.A.No.377/2015 and by the Apex Court in S.L.P.No.19441 of 2015 dismissing the same on 20.7.2015 after the judgment was implemented reckoning the broken spells of service of the petitioner therein in aided Schools for pension.

4. The judgment in W.P(C).No.20495 of 2013 (hereinafter referred to as 'Joseph's case'), relied on by the petitioners (produced as Ext. P11 in W.P.(C) No. 30167 of 2016) is rendered in a case where the petitioner retired from service on 31.03.2008, while working as Selection Grade Lecturer in an aided College. The judgment in Writ Appeal and that of the order in SLP are produced in that case as Exts.P12 and P13 respectively. The service rendered by him in an aided college in different spells on temporary basis for 4 years and 10 months in 3 spells was counted for pension without raising any objection;

but his aided school service for 5 years 3 months and 13 days in eight spells was not counted for pension. This Court held that by virtue of Rule 14E of Part III KSR read with Statute 5 (1) of Chapter II of Kerala University First Statute 1976, the prior service rendered by the petitioner therein in aided school was liable to be counted towards qualifying service along with the service in aided college. As the broken spells of aided College service was already counted for qualifying service without any objection, this Court found no justification for denying him the benefit of aided School service, which is provided in Rule 14E of Part III KSR. In the judgment in the Writ Appeal, the Division Bench held that the aided school temporary service would also fall within Rule 14E of Part III Kerala Service Rules. Subsequent to the dismissal of the SLP, the judgment was implemented by the Government by issuing G.O(Rt) No.7194/2015/Fin dated 6.8.2015. The Government orders -G.O.(P) No.66/16/Fin dated 9.5.2016 and G.O.(P) No.113/16/Fin dated 5.8.2016 (Ext P8 and P9 in W.P.(C) No. 30167/2016) were issued thereafter. In Ext.P8 order dated 9.5.2016, the Government stated that provisions contained in the Kerala Education Act, Kerala Education Rules and University Statutes confer authority on the Government to put restrictions with respect to functioning of the aided schools/colleges. Teaching and non teaching staff of aided schools/colleges do not come under Public Services Act and all the benefits enjoyed by the State Government employees are not applicable to them; under Rule 10 of Part III KSR, service of an employee does not qualify for pension unless he is appointed, his duty is regulated and paid by the Government or under conditions determined by the Government. It is only because direct payment system was introduced and in the light of Rule 11 of Part III KSR that the aided schools teachers who have opted for parity with Government teachers are granted retirement benefits under rules in Chapter XXVII(B) of Kerala Education Rules, as in the case of Government service. As per Rule 14E (a) &(b) of Part III KSR, the regular full time aided school/college service of Government employees prior to their entry in Government service qualifies for pension. Under sub rule c of Rule 14E, the regular full time Government service of an aided school/college service prior to their entry in aided school/college service qualifies for pension. But there is no corresponding provision for counting prior service in between aided schools and colleges. It is further stated that the order passed in compliance with the judgment in the case of Sri A.J.Joseph shall not be treated as a precedent. Paragraph 5 , which is the operative portion of the order reads as follows:

> "*5. Since there is no mobility of personnel between aided institutions, the Government have examined the matter in detail and are pleased to issue orders as follows:*
>
> *(i) aided College service of aided School staff prior to entry in aided school service shall not be counted for pension along with aided School service and vice versa.*
>
> *(ii) Provisional aided school/college service of regular full time aided School staff prior to their entry in regular aided school service shall not be counted for pension with full time regular aided School service.*
>
> *(iii) The orders shall have retrospective effect from 24.01.1968; cases already settled will not be reopened.*
>
> *(iv) Necessary amendment to the relevant rule in Part III KSRs will be issued separately."*

5. Ext.P9 order dated 05.08.2016 was issued when the Accountant General sought a clarification from the Government as to the service rendered in aided College in leave vacancies of the regular aided college staff for computation of pension. Accordingly para 5(ii) of the order dated 9.5.2016 was therefore modified as follows:

> "regular/broken spells including leave vacancy of aided School/aided College service of regular aided School/aided College staffs shall not be counted for pension with full time regular aided School/aided College service."

6. The contention of the petitioners is that no amendment is brought about to Part III KSR or to Rule 14E so far. Moreover an executive order cannot have any retrospective effect.

7. The contention of the respondents in the counter affidavit is that broken spells of service in leave vacancies cannot be counted for pension. No claim for pension is admitted as per Rule 4 of Part III KSR,

when an employee is appointed for limited period only or for specific duty on completion of which he is to be discharged. Therefore, if one is appointed only for a limited period, he cannot have any claim for pension. The broken periods of temporary service in aided schools before his continuous service in aided schools cannot be therefore counted for pension. As per Rule 10 of Part III KSR, service of an employee does not qualify for pension unless he is appointed, his duty is regulated and paid by Government or under conditions determined by Government. Most of the petitioners are having broken periods of service in aided schools in leave vacancies before their continuous regular service. When the appointment in leave vacancies is not regularised it cannot be treated as qualifying service for pension. The aided school teachers are entitled to pensionary benefits as in the case of Government servants. At the same time, Rule 14(E)(a) of Part III KSR is applicable only to regular aided school service. It is their further case that the orders impugned in this writ petition which are issued on 9.5.16 and 5.8.16 are only clarifications to the existing statutory rule and not an order issued with retrospective effect. In aided schools and aided colleges, the teaching and non teaching staff are appointed by management and salary and pensionary benefits are given by the Government. In case the period of service of those who work against leave vacancies are reckoned for pensionary benefits, it would pave the way for creating leave vacancies after ensuring the minimum pension, creating financial burden for Government. It is their further contention that the Division Bench had in the judgment in **Alizuamma v. Accounts Officer**: 2013(4) KLT 53, held that service in leave vacancy cannot be counted for pension. Counter affidavits also point out that the aided school/college services rendered by the petitioners are for short spells and in different schools in leave vacancies. Therefore, it is stated that the broken spells of services rendered by the teachers in different aided institutions cannot be reckoned towards qualifying service.

8. The claim of the petitioners is that when aided school service put in by Government employees prior to entry in Government service, can be counted, the prior service of petitioners in aided School, before their entry in regular service in aided School/aided College can be counted for pension in the light of the provisions contained in Rule 14E of Part III KSR read with Rule 3 of Chapter XXVII B of KER/Statute 5 of Chapter II of Kerala University first statute, as held by this Court in the judgment in Joseph's case (supra). Sri.Joseph had worked in several broken spells in

aided college as well as aided schools. Objection was against aided school service alone. They are seeking a declaration that teachers of aided school/aided colleges are entitled to get their temporary/broken spells of service including that in leave vacancies in aided School for pensionary benefits. Relying on the judgment of the Apex Court in **Chairman, Railway Board v. C.R Ranganadha & Others** [1997 (6) SCC 623], it is argued that there cannot be any retrospective effect for executive orders and provisions in statute cannot be amended by issuing executive orders.

9. I heard the learned Counsel appearing for the petitioners in all the cases and Sri. C.M.Suresh Babu, the learned Special Government Pleader.

10. In Joseph's case (supra), this Court has already held that the broken spells of service in aided School can be reckoned for pension in the case of those who retired from aided college, as in the case of teachers of Government colleges, in the light of Rule 14 E of Part III KSR read with Statute 5 of Kerala University first Statute. Similar is the case with those who worked on regular basis in aided Schools, after rendering service in aided school, in the light of Rule 3 of Chapter XXVII B of KER. The impugned orders are issued referring to the implementation of the judgment

in Joseph's case. Therefore, the question to be considered in these cases is whether the Government is right in issuing executive orders, that too, with retrospective effect, to withdraw the benefits already ordered towards the aided school service rendered by the teachers before rendering regular service in aided schools. Further question is whether the service rendered in broken spells of service in different schools in leave vacancies/short term vacancies with considerable break in service is liable to be counted towards qualifying service and whether Rule 14E takes in all these short spells of service in leave vacancies also for the purpose of granting pensionary benefits for aided school teachers.

11. In the impugned orders Government say that, there is a provision for reckoning Government service prior to aided school/aided college service; but there is no corresponding provision to reckon the service rendered in aided Colleges and Schools for short spells and there is no mobility between aided Colleges and aided schools and vice versa. In this context, it is necessary to examine the following provisions.

12. Provisions in Part III KSR are made applicable to aided School teachers, as per Rule 3 of Chapter XXVII B of K.E.R, which read as follows:

> "The rules on retirement benefits including family pension and death-cum- retirement benefits and all the conditions for the grant of these benefits applicable to Government Servants as laid down in Part III, Kerala Service Rules as amended from time to time shall mutatis-mutandis apply to the teachers governed by the rules in this Chapter."

As far as teachers of aided Colleges are concerned, the relevant provision relating to their retirement benefits is Statute 5 of Chapter II of Kerala University First Statute 1976, in respect of those under the Kerala University. In the case of those in M.G University also, the very same provision applies, by virtue of Section 99 of MG University Act, which makes the provisions in the Statutes of Kerala University Statutes applicable until statutes/rules are framed for the University. Statute 5 provides that the teachers retiring from service at the age of 55 shall be entitled to receive the same retirement benefits as are admissible to Government college teachers.

13. The most relevant provision for the purpose of this case is Rule 14 E of Part III KSR, which reads as follows:

> **[14E.** (a) Aided School Service put in by Government employees prior to entry in Government service qualifies. Takes effect from 24th January 1968.]
>
> [(b) Aided private college service, both teaching and non-teaching, of Government employees prior to their entry in Government service shall qualify for pensionary benefits, subject to the following conditions, namely:—
>
> i)The actual period of regular full time service rendered from the date of actual introduction of Direct Payment System in the aided private college shall be counted.
>
> ii)Service rendered prior to the introduction of Direct Payment System in any aided private college shall be counted only for the period of those incumbents who have been paid salary under grant-in-aid scheme introduced with effect from 1965.
>
> iii)In cases of resignation of the appointment in private college service for the purpose of taking up appointment in Government, break, if any, between the private college service and the Government service shall not exceed the joining time admissible under the service rules, plus public holidays. Service prior to resignation

for other purposes shall not be counted.

iv)The Government contribution if any, to their Provident Fund Account in respect of their aided private college service shall be refunded to Government.

v)The Management's share of contribution if any in Provident Fund Account in respect of aided private college staff shall be credited to Government. In such cases, a certificate in the following form shall be recorded in the Service Book by the Head of Institution in which the incumbent had worked duly countersigned by the Head of the Department.

"Certified that the Governments'/Managements' share of contribution with interest thereon which should otherwise have gone to the employee has not been/shall not be paid to him/her but has been/shall be credited to Government."

The certificate regarding the crediting of Managers' contribution is not necessary when contributions are to be paid back to the Management under rules.

vi)For counting the aided private college service, a certificate in the following form shall be recorded in the Service Book by the Head of the Institution in which the incumbent had worked duly countersigned by the Head of the Department.

"Service has been verified with reference to the initial records such as attendance registers, acquittance rolls, pay bills etc., and is qualifying for pension."

(c) Regular full time Government service of aided private college staff and aided private school staff prior to their entry in aided private college service and aided private school service shall be counted for pension for such service.]

[Note 1:-*Service in unaided school in erstwhile Travancore-Cochin area which acceded to the Private Secondary School Scheme, put in by Government School Teachers, prior to entry into Government service, whose service in aided school is allowed to count for pension under the above Rule will also qualify for pension.*

This Note shall be deemed to have come into force with effect from 24th January 1968 [G.O. (Rt.) 1855/72/S. Edn. Dated 23rd June 1972 read with G.O. (Rt.) 1014/84/G.Edn., Dated 29th March 1974)

[Note *2:-The benefit of the above rule shall be admissible to all the teachers who retired on or before the 24th day of January, 1968 and were alive on the 7th day of January, 1983.]*

GOVERNMENT DECISIONS

1. Both teaching and non-teaching service in aided schools put in by Government employees prior to their entry into Government service will count for pension. This benefit is also admissible to Government employees other than teachers.

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3. In cases of resignation of the appointment in aided school service for the purpose of taking up Government appointment, break, if any, between the aided school service and the Government service should not exceed the joining time admissible under the service rules plus public holidays. Service prior to resignation for other reasons will not count.

4. The Government contribution, if any, to their Provident Fund Account in respect of their aided school service shall be refunded to Government.

5. The Manager's share of contribution in Provident Fund Account in respect of aided school service also shall be refunded to Government. In such cases, a certificate in the following form shall be recorded in the Service Book by the pension sanctioning authorities [or Heads of Departments:—]

"Certified that the Government's/ Manager's share of contribution with interest thereon which should have othenuise gone to the employee has not been/ will not be paid to him/her but has been/will be credited to Government."

The certificate regarding the crediting of Manager's contribution is not necessary when contributions are to be paid back to the Managers under rules.

6. For counting the aided school service a certificate in the following form shall be recorded in the Service Book by the pension sanctioning authorities [or Heads of Departments:—]

"Service has been verified with reference to the initial records such as attendance registers, acquittance rolls, pay bills, etc., and is qualifying for pension."

[6A. For recording the certificates as in Government Decisions 5 and 6 above certificates duly countersigned by the District Educational Officer can be relied upon. In such cases it should also be recorded that, the certificate is as per Letter No............... dated.................... of the D.E.O................ (place). In cases where the service in the aided schools have been entered in the Service Book under proper authentication, further certificate to that effect is not necessary.]

[7. In the case of aided school service sandwiched between Government service, the qualifying service for pension should be calculated from the date of first entry in Government service and the entire period including the sandwiched aided school service should be reckoned for pension subject to recovery of CPF benefits, if any, received by them.

The above orders are applicable only to persons governed by Kerala Service Rides and who retire/die while in service on or after 14th November 1966.]

[8 (i). The benefit of counting periods of break as per Note 3 below Rule 31, Part III, Kerala Service Rules will be allowed in cases where the appointment before the break was not provisional or for limited period and the break was due to reduction of staff strength of the institution.

(ii) In cases not covered by (i) above the actual period of service excluding the periods of break will be reckoned for qualifying service.

(iii) In cases covered by (i) above the certificate that termination of appointment was due to reduction of staff strength of the institution should be countersigned by the pension sanctioning authority.] s[or Heads of the Departments:—]"

Rule 10 and 11 of Part III KSR read as follows:

"10. The service of an employee does not qualify for pension unless he is appointed, his duties regulated, and paid by the Government or under conditions determined by the Government.

11. Notwithstanding the provisions of Rule 10, the Government may,

(1) declare that any specified kind of service rendered shall qualify for pension; and

(2) in individual cases, and subject to such conditions as they may think fit to impose in each case, allow service rendered by an employee to count for pension."

Rule 11 of Part III KSR empowers Government to declare any kind of service as qualifying service, even by issuing executive orders. In the case of aided School service, that is made pensionable by incorporating a provision itself in Rule 14E of KSR Part III, providing that aided school service prior to entry in service qualifies. Thus the aided School service rendered by Government School teachers can be counted for pension under Clause (a) of Rule 14E of Part III KSR. When the provisions in Rule 14 E in KSR is applied to aided School teachers by virtue of Rule 3 of Chapter XXVII B of KER and Statute 5 of Chapter II of Kerala University first Statute in the case of aided College teachers, the service rendered by such teachers in aided Schools are liable to be counted irrespective of the nature of appointment/service rendered, irrespective of the provisions like Rule 4 of Part III KSR or the provisions in KER relating to probation or increment. Rule 3 of Chapter XXVII B of KER read with Clause (a) of Rule 14E of Part III KSR, will therefore enable the aided School teachers to get their prior service counted.

14. The expression “aided school service” occurring in Clause (a) of Rule 14E is in no way qualified in any manner in Rule 14E. It does not say that broken spells of service cannot be reckoned for pension. It does not say that the said service should not be in leave vacancy. The direct application of sub rule (a) is on Government teachers/employees. It is

pertinent to note that the only condition to reckon aided school service, mentioned in clause (a) for pension is that the educational officers shall certify that service as pensionable.

15. Note 8 to Rule 14E is relevant in this context. Clause (i) of that note provides for the counting of period of breaks as per Note 3 to Rule 31. The condition is that the service before and after the break should not be provisional or for limited period; the break should have occurred by reduction of staff strength of the institution and the certificate mentioned in decision no.6A should be countersigned by the pension sanctioning authority or heads of department. Clause (ii) provides that in cases not covered by clause (i), actual period of service will be counted. Rule 31 provides for counting of interruptions in the service of an employee where it is specifically provided in the rules or ordered by competent authority and recorded in the service book. Note 3 thereof provides that where the period of interruption exceeds one year the benefit of reckoning the period of such interruption in service shall be restricted to the period he was actually in service prior to the date of the interruption. Decision no.8 provides that in order to count the break in service/period of interruption, the service rendered should not be provisional and it should be due to reduction of staff

strength. In this context govt decision no.8 below Rule 14E and Rule 31 and its Note 3 are relevant which read as follows:

Decision no.8 below Rule 14E:

> "8(i): The benefit of counting periods of break as per Note 3 below Rule 31, Part III, Kerala Service Rules will be allowed in cases where the appointment before the break was not provisional or for limited period and the break was due to reduction of staff strength of the institution.
>
> (ii) In cases not covered by (i) above the actual period of service excluding the periods of break will be reckoned for qualifying service.
>
> (iii) In cases covered by (i) above the certificate that termination of appointment was due to reduction of staff strength of the institution should be countersigned by the pension sanctioning authority."

Rule 31 of Part III KSR along with Note 3 read as follows:

> "31. Interruptions:- Interruptions in the service of an employee will count for pension provided it is not specifically laid down in these rules or otherwise ordered by competent authority and recorded accordingly in the Service Book.
>
> xxxxxxx xxxxxx xxxxx xxxxx xxxxx xxxxx xxxx xxxx xxxx xxxxx xxxx xxxxx xxxxxx xxxxxxx xxxxxxxx xxxxxxx
>
> [Note 3:In cases where the period of an interruption in service exceeds one year, the benefit of reckoning the period of such interruption in service shall be restricted to the periods he was actually in service prior to the date of the interruption.]"

On a reading of Note 3 to Rule 31 read with decision no.8, the only conclusion that can be arrived at would be that in order to count the period of break not exceeding one year, the service should not be provisional and the break must be one occurred due to reduction of staff strength. That would in turn lead to the conclusion that when the break does not exceed one year actual service can be counted. When Government decision no.8

was added below the rule by way of G.O.(P) No.344/84/Fin dated 17.07.1984, for the purpose of extending the application of Note 3 to Rule 31 of Part III KSR, i.e for reckoning the period of break for less than one year towards qualifying service, it specifically provided for a certificate that the interruption/ break in service, was due to reduction of staff and the service should not be provisional. That would indicate that broken spells of aided school service and provisional service in aided schools can be counted for pension and it is only where the period of interruption is sought to be counted, that provisional service is not reckoned and only case where the break in service occurred due to reduction in strength alone would be reckoned for counting the period of break for more than one year. These provisions indicate that all types of aided School service could be counted under clause (a) of Rule 14E.

16. There was no provision in Rule 14E of Part III KSR regarding aided college service until the amendment carried out inserting clause (b) as per G.O.(P) No. 366/2009/Fin dated 28.08.1989 with effect from 30.07.2009.

17. On an examination of Rule 14(E) it can be seen that clause (a) provides for reckoning of aided school service put in by Govt. employees,

without any qualification to the expression `aided school service'. At the same time, in clause (b), which provides for reckoning of aided private college service along with Government service, certain conditions are provided. At the same time, clause 14(c) provides for counting of regular full time Government service of aided private college and private school staff prior to their entry in private schools. Here also what is provided is regular full time Govt. service of aided school/aided college teachers. In all these cases, the appointments of the petitioners in short spells, even if it is in different schools, are seen approved. Therefore, the provision to count service in aided college is subject to the conditions that the service should be regular and full time.

18. By way of the impugned orders, the prior service in aided Colleges of aided school staff cannot be reckoned for pension. Provisional service in aided school as well as aided college cannot also be reckoned along with regular full time aided school service. By the order dated 05.08.2016, both regular as well as provisional and broken spells of aided School service as also aided college service put in by aided School staff as well as aided college staff cannot be reckoned for pension. At any rate, the direction not to count any broken spells including broken regular service

irrespective of its duration, is unreasonable and illegal. As far as service of teachers of aided school as well as aided College are concerned, the method adopted for temporary as well as regular appointment is one and the same. Qualification is also the same. They are having the same pay and allowances. Unlike in Government service an approved spell of service in a private school or college, in whatever manner that be, would make the teacher a statutory claim holder in the school or college, as the case may be, against the next vacancy arising under the management.

19. Rule 14 E provides that aided school service prior to entry in service qualifies. The provisions in Part III KSR continue to apply by virtue of Rule 3 of Chapter XXVII B of KER in the case of aided School teachers. The aided School service rendered by Government School teachers can be counted for pension under Clause (a) of Rule 14E of Part III KSR. Rule 3 of Chapter XXVII B of KER read with Clause (a) of Rule 14E of Part III KSR, will therefore enable the aided School teachers to count their prior service. It is pertinent to note that the aided school service mentioned in clause (a) has not been subject to any conditions, except that the educational officers shall certify that service. Moreover, when government decision no.8 was added below the rule by way of G.O.(P) No.344/84/Fin dated

17.07.1984, for the purpose of extending the application of Note 3 to Rule 31 of Part III KSR, i.e for reckoning the period of break for less than one year towards qualifying service, it specifically provides that the interruption/ break in service, was due to reduction of staff and the service should not be provisional.

20. An overall reading of these provisions would indicate that Government themselves had not envisaged a situation of not counting the service of leave substitutes, despite the fact that such provisions are not available for Government teachers who had provisional service in Government schools, except under the conditions under Note 2 to Rule 33 of Part I KSR. Even that provision is not available after 1.10.1994 since decision no.2 is not available in the statute since 1.10.1994. Therefore, the impugned orders taking away the benefit of aided school service by way of an executive order is unsustainable. It cannot have the status of a clarification. Such orders cannot have any retrospective effect also.

21. The respondents are relying on the judgment of this Court in **Alizuamma v. Accounts Officer, Office of the Accountant General** [2013 (4) KLT 53] to defend the impugned orders saying that this Court has held that the service in leave vacancies will not be counted for pension. But that

judgment was rendered in a case where the teacher claimed that the service during the period of break/interruption also should be counted for pension, as can be seen from para 2 of that judgment which read as follows:

> "xxxx xxxxxx xxxxxx xxxxx The appellant claimed 17 years regular service and also reckoning of the 7 years in which she had spent various periods in service and sought for determining the period of interruptions in service also as qualifying service. While in total the appellant sought more than 24 years qualifying service, the respondents granted only 20 years qualifying service, computing only the period of actual service in aided schools before 1981."

Thereafter what was held was that the period of break as well as service in leave vacancy cannot be counted under Rule 31 of part III KSR. However it was held that claim of appellant will come under Rule 14E and the prior service in aided school would qualify. The relevant portion in para 4 of the judgment reads as follows:

> "xxxx Understood in the context of the interpretation placed on R.31; the appellant cannot have any claim for treating her period of service in leave vacancy nor the period of interruptions as qualifying service based on Rule 31. The claim of the appellant can only be under R.14E of Part III K.S.R, by which aided school service put in by Government employees prior to entry in Government service qualifies for pension. Hence, the aided school service put in by the appellant before she entered into regular service would necessarily qualify. xxxxx xxxxxx xxxxxxx xxxxxxx xxxxxxxx xxxxxxx."

Therefore, the judgment in **Alizuamma**'s case (*supra*) does not help the respondents.

22. There cannot be any modification of rules by way of an executive order and that cannot be treated as a clarification when the

decision no.8 as well as the Note 3 to Rule 31 specifically dealt with the position. Government is free to pass orders with prospective effect on matters which are not governed by statutory provisions. But it is settled law that there cannot be any executive order with retrospective effect.

23. When there is a separate provision dealing with counting of a particular type of service for pension one need not go to other provisions either in KSR or in KER to find out whether the service can be counted for pension.

24. Now the contention of the respondents is that the impugned orders are clarificatory in nature and therefore clarification can relate back to the date when the rules came into force. But there can never be any such clarification, which takes away the entire benefits out of the rule, that too when other Govt decisions continue to exist as such. Rule 14E only provides that aided School service put in by the Government employees qualifies. As far as aided School service is concerned there is no other provision in the rules. Nothing is stated regarding the nature of aided school service, though it is true that the provisional service or service in a leave vacancy under Government would not count for pension. Therefore, the prior service of aided School teachers as well as aided college teachers are

liable to be counted towards qualifying service for pension by virtue of clause (a) Rule 14E of Part III KSR. The contention that it is clarificatory and therefore executive orders can be issued with retrospective effect cannot be accepted. An executive order cannot be pressed into service in order to vary the effect of the provision in clause (a) of Rule 14E and impose conditions on it depriving the benefits attached to it. In Joseph's case this Court, after meticulous analysis of the provisions contained in Rule 14E, directed to count the service in aided Schools. The attempt of the respondents was to efface the very basis of that judgment, by issuing the impugned orders, with retrospective effect, without taking into account of the effect of an executive order.

25. It is settled law that statutory rules cannot be whittled down by executive orders and executive orders cannot have any retrospective effect, as held by the Apex Court in **Uday Pratap Singh v. State of Bihar, 1994 Supp (3) SCC 451, T.R. Kapur v. State of Haryana:AIR 1987 SC 415**, *etc* wherein it is held that even when the Government is competent to amend rules with retrospective effect, vested rights cannot be taken away and that any such rule shall satisfy the test of Articles 14 and 16 of the Constitution of India. In **Railway Board v. C.R. Rangadhamaiah, (1997) 6 SCC 623,**

the Apex Court was considering the case of re-fixation and reduction of pension of the railway employees, on account of retrospective alteration in the percentage of running allowance which was being reckoned for pension. Seeing that the rules were brought into force with retrospective effect, the Apex Court found that the right of the employees to have their pension computed on the basis of their average emoluments cannot be taken away by way of the amendment. It was held that a rule which seeks to reverse from an anterior date, a benefit which has been granted or availed of, can be assailed as being violative of Articles 14 and 16 of the Constitution to the extent it operates retrospectively. In the light of the dictum laid down in these judgments the impugned orders to the extent those relate to the prior service of teachers in aided schools, depriving the pensioners of their fundamental rights for equality before law and equal protection of law are liable to be struck down. The impugned orders which deprives the benefit conferred under the rules, that too, with retrospective effect are therefore unsustainable.

26. In the above circumstances, the G.O.(P) No.66/16/Fin dated 9.5.2016 (Ext P8) and G.O.(P) No.113/16/Fin dated 5.8.2016 (Ext P9) to the extent those orders relate to any kind of service in aided Schools, rendered

prior to the regular service in aided Schools or aided colleges and to the extent it is given retrospective effect are set aside.

27. There shall be a direction to the competent among the respondents to re-fix/recompute the pension and pensionary benefits of the petitioners, disregarding the orders Exts.P8 and P9, and sanction and disburse the same to the petitioners along with all consequential benefits, within a period of 3 months from the date of receipt of a copy of the judgment.

28. In the above circumstances, W.P(C) Nos.30167 of 2016, 24017/2016, 27438/2016, 30368/2016, 34321/2016, 35823/2016, 35868/2016, 39076/2016, 2055/2017, 3685/2017, 4433/2017, 6232/2017, 13153/2017, 17124/2017 and W.P(c).No.22495/2017 are allowed, with the above directions.

29. Since the petitioners in W.P(c).Nos.30330/2016, 40033/2016, 57/2017 and W.P(c).No.30575/2016 are teachers who are in service and who have got several years for their retirement, these writ petitions filed by the teachers who continue in service, are premature. They would be governed by the rules/orders in force at the time of their retirement. These writ petitions are therefore closed with the above observation,

reserving their right to approach this Court again, at the relevant time, if necessary.

30. Although writ petitions – W.P(c).Nos.30167/2016 and 32425/2016 have been filed at a time when all the petitioners were in service, during the pendency of this writ petition, the 1st petitioner in W.P (c).No.32425/2016 has already retired on 31.3.2017 and the others are continuing in service. Likewise in W.P(c).No.30167/2016, the 1st, 2nd, 4th and 7th petitioners have already retired from service and the others are continuing in service.

31. Therefore, W.P(c).No.32425/2016 is disposed of with the observation that the 1st petitioner will be governed by paragraphs 1 to 28 of this judgment and all the other petitioners will be governed by para.29 of this judgment.

32. W.P(c).No.30167 of 2016 is disposed of with the observation that the 1st 2nd, 4th and 7th petitioners will be governed by paragraphs 1 to 28 of this judgment and the 3rd, 5th and 6th petitioners will be governed by para.29 of this judgment.

Sd/- ***(P.V.ASHA, JUDGE)***

rtr/