

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K. SURENDRA MOHAN

&

THE HONOURABLE MR. JUSTICE SHAJI P. CHALY

WEDNESDAY, THE 23RD DAY OF DECEMBER 2015/2ND POUSHA, 1937

O.P. (CAT).No. 103 of 2015 (Z)

AGAINST THE ORDER IN O.A. NO.40/2013 of CENTRAL ADMINISTRATIVE
TRIBUNAL, ERNAKULAM BENCH DATED 01.06.2015.

PETITIONERS/APPLICANTS:-

1. SAYED MOHAMMED IRFAN P.P., AGED 34 YEARS,
SON OF CHERIYA KOYA THANGAL,
TRAINED GRADUATE TEACHER (BIOLOGY), GSSS MINICOY,
(RESIDING AT PUTHIYAVEEDU, ANDROTH,
U.T. OF LAKSHADWEEP.
2. BEEGUM NAZEEDHA M.K., AGED 34 YEARS,
D/O.M.K.KOYA, TRAINED GRADUATE TEACHER (BIOLOGY),
GSSS KAVARATTI, RESIDING AT MALMI KAKKAD HOUSE,
KALPENI ISLAND, U.T. OF LAKSHADWEEP.

BY ADVS.SRI.V.A.MUHAMMED
SRI.M.SAJJAD

RESPONDENT(S)/RESPONDENTS:-

1. THE ADMINISTRATOR,
UNION OF LAKSHADWEEP, KAVARATTI - 682 555.
2. THE DIRECTOR OF EDUCATION,
DIRECTORATE OF EDUCATION,
UNION TERRITORY OF LAKSHADWEEP, KAVARATTI - 682 555.

R1-R2 BY ADV. SRI.S.RADHAKRISHNAN, SC, LAKSHADWEEP ADMN

THIS OP (CAT) HAVING BEEN FINALLY HEARD ON 20-10-2015, ALONG WITH O.P.
(CAT) NO. 113/2015, THE COURT ON 23.12.2015 DELIVERED THE FOLLOWING:

P.T.O.

OP (CAT).No. 103 of 2015 (Z)

APPENDIX

PETITIONER(S)' EXHIBITS:

- EXHIBIT P1. TRUE COPY OF THE ORDER IN O.A.NO.40/2013 DATED 01.06.2015 OF THE CAT, ERNAKULAM BENCH.
- EXHIBIT P2. TRUE COPY OF THE ORIGINAL APPLICATION ALONG WITH ANNEXURES.
- EXHIBIT P2(A). TRUE COPY OF THE MISCELLANEOUS APPLICATION FILED BY THE APPLICANTS.
- EXHIBIT P2(B). TRUE COPY OF THE REPLY STATEMENT FILED BY THE RESPONDENTS.
- EXHIBIT P2(C). TRUE COPY OF THE REJOINDER FILED BY THE APPLICANTS.
- EXHIBIT P3. TRUE COPY OF THE JUDGMENT IN W.A.NO.491/2000 DATED 26.02.2003.
- EXHIBIT P4. TRUE COPY OF THE JUDGMENT IN W.P.(C)NO.34629/2004 DATED 14.07.2006.
- EXHIBIT P5. TRUE COPY OF THE JUDGMENT IN W.P.(C)NO.10155/2005 DATED 09.09.2005.
- EXHIBIT P6. TRUE COPY OF THE NOTIFICATION DATED 21.07.2003.
- EXHIBIT P7. TRUE COPY OF THE JOINING REPORT OF THE 1ST PETITIONER DATED 27.06.2012.
- EXHIBIT P8. TRUE COPY OF THE INFORMATION UNDER RIGHT TO INFORMATION ACT DATED 18.06.2012.

RESPONDENT(S)' EXHIBITS: NIL

//TRUE COPY//

P.S. TO JUDGE

St/-

**K. SURENDRA MOHAN
&
SHAJI P. CHALY, JJ.**

O.P.(CAT) Nos.103 & 113 of 2015

Dated this the 23rd day of December, 2015

JUDGMENT

Shaji P. Chaly, J.

These Original Petitions are filed against the common order of the Central Administrative Tribunal, Ernakulam Bench in O.A.No.40 of 2013 and O.A.No.1156 of 2012 dated 01.06.2015, whereby the Tribunal dismissed the applications filed by the petitioners holding that petitioners are not entitled to get appointment as Trained Graduate Teachers (TGT) in regular vacancies with consequential benefits as prayed for in the Original Petitions. Since the subject matter of these Original Petitions are common in nature, we also propose to dispose of the same by this common judgment. The facts required in common are stated hereunder and wherever any change is required, facts will be narrated separately.

2. Petitioners in both the cases are belonging to Scheduled Tribe community residing in Union Territory of

Lakshadweep. The applicants in O.P.No.103 of 2015 are qualified and eligible to be appointed as TGT (Biology) and the applicant in O.P.No.113 of 2015 as TGT (Mathematics). The case put forth by the petitioners are that they are working as Trained Graduate Teachers, Biology and Mathematics respectively, on regular basis against the permanent cadre. Four substantive vacancies of TGT (Biology) in the cadre arose and 5 substantive vacancies of TGT (Mathematics) arose. They were notified for direct recruitment vide Employment Notice dated 21.02.2011, evident from Annexure-A2. It is indicated in the notice that anticipated vacancies are subject to change and will be filled from the merit list drawn on the basis of recruitment process. The list thus drawn will be valid up to 01.04.2012 for all the posts notified and for those vacancies that may arise up to 01.04.2012. So far as the discipline Biology was concerned, apart from the vacancies referred to above, two more vacancies arose. A duly constituted Selection Committee selected the petitioners and were included in the list as Rank Nos.7 and 8.

3. So far as the petitioner in O.P.No.113 of 2015 was concerned, the total number of vacancies in the cadre of TGT (Mathematics) were 8 in number. The posts earmarked for direct recruitment and promotion were 5 and 3 in numbers respectively. By order dated 21.10.2011 as per Annexure-A3, 5 persons were included in the select list. There were no qualified candidates with required qualification or experience in the feeder category of Primary School Teacher under the Department of Education available for promotion as TGT. The petitioner understood that for the next five years, there will be none in the cadre of Primary School Teacher eligible for promotion as TGT (Mathematics).

4. Matters being so, two substantive vacancies of TGT (Mathematics) arose consequent on transfer of one C.G. Faritha Beegum from G.S.S.S, Minicoy on 31.03.2009 and consequent to the promotion of K. Naseema as Post Graduate Teacher (PGT) from G.S.S.S., Amini from 16.09.2010. Those two vacancies remained unfilled and since there were no qualified candidates eligible for promotion, the Department with the approval of the Administrator took a conscious decision to divert the vacancies and to issue offer of

appointment to wait listed candidates in various subjects. Therefore, it is contended that with the approval of the Administrator, petitioner was issued with an offer of appointment to the post of TGT (Mathematics) in the scale of pay of Rs.9300-34800 with Grade Pay of Rs.4,600/- against permanent posts in the regular cadre. It is further contended by the petitioner that however, the said offer of appointment was modified as per Office Order dated 08.05.2012, treating the original offer of appointment on contractual basis. The offer of appointment and modified offer of appointment are produced as Annexures-A4 and A6 in O.P.(CAT) No.113 of 2015. As per Annexure-A7 proceedings dated 22.06.2012, petitioner in the said Original Petition was appointed as TGT (Mathematics) against the promotion vacancy in G.S.S.S., Kavaratti on contract basis and on consolidated monthly remuneration of Rs.15,000/-. It is the further case of the petitioner that the petitioner was selected and appointed against substantive vacancy in the regular cadre but she is treated as a contract appointee and posted on a consolidated remuneration against the terms and conditions of the offer of appointment. It is contended by the petitioner that the

method adopted by the Department is irregular and the intention of the Respondents is to deprive the whole benefits to the petitioner as a member of service.

5. It is further contended by the petitioner that the selection was against a cadre post. There is paucity of qualified hands for promotion where separate quota is fixed for direct recruitment and promotion, the Department of Personnel and Training as per O.M. dated 10.07.1990 empowered the Department to approve diversion of reserved vacancies from promotion to direct recruitment in the event of non-availability of suitable departmental candidates. It was further contended that the Administrator took a conscious decision relaxing the rigor contained in the quota rule and the posts in the cadre were diverted for direct recruits in terms of extant Rules/Instructions. In that circumstances, petitioner claims that she is entitled to be declared appointed against the regular post in the cadre with all attendant benefits including pay in the Pay Band with Grade Pay. In that circumstances, petitioner had submitted Annexure-A9 representation before the 1st Respondent, requesting to modify Annexure-A6 dated 08.05.2012 and treat the petitioner as holder of a civil post as

TGT (Mathematics).

6. So far as the petitioners in O.P.(CAT) No.103 of 2015 are concerned, it is contended that there were 6 vacancies of TGT (Biology) in the permanent cadre available to be filled up by Education Department of the Respondents. It is contended that by Annexure-A4 order dated 21.10.2011, two candidates from the select list were appointed as TGT (Biology) against the vacancies caused by promotion of one M.K.Sareena Gulsheer as Post Graduate Teacher and Mohammed Mukthar Ali P.P. (Rank No.3), G.S.S.S., Kadamath against the vacancy caused by promotion of Smt. M. Ramla Beegum as PGT respectively. There were no qualified candidates with required qualification of National Council for Teachers Education/experience in the feeder category of Primary School Teachers in the Education Department available for promotion as TGT (Biology). In such circumstances, the Department with the approval of Respondents, took a conscious decision to divert or convert the vacancies set apart for promotion quota to direct recruitment quota to fill up 8 vacancies of TGTs in different disciplines from the select list of candidates before 01.04.2012 and accordingly it was decided to fill up 4

vacancies of TGT (Biology) by appointing Rank Nos.5, 6, 7 and 8 from the select list. It is the case of the petitioners therein that thus the petitioners have been appointed as TGT(Biology) in the fixed Pay Band of Rs.9300-34800 with Grade Pay of Rs.4,600/- plus admissible allowances, as per proceedings dated 22.06.2012.

7. Thus, it is the common case of the petitioners in both the Original Petitions that they were appointed as permanent teachers against cadre posts and therefore they are entitled to continue in the posts irrespective of the modification made to the original order of appointment which are referred to above. In the said circumstances, the substantive contentions addressed by the petitioners before the Administrative Tribunal was that there were no qualified hands available for promotion and therefore the vacancies remained unfilled due to paucity of qualified hands for promotion. Therefore, the quota rule is impossible to be satisfied and thus quota rule has broken down in view of the conscious decision taken by the Department. Therefore, the only option left for the Department is to divert the post for direct recruitment in terms of Rules and this has been done by the Administration

for the benefit of the pupils. It was also contended that administrative exigencies warrant diversion of posts from promotion quota to direct recruitment quota. Taking note of those situations, the Respondent appointed under Article 239 of the Constitution of India took decision to divert the post from promotion quota to direct recruitment quota and that the appointment on contract basis is not a rule but an exemption and therefore the appointments made by the Respondents on contract basis were illegal. It is thus challenging the said actions of the Respondents, the Original Applications were filed before the Tribunal.

8. The Respondents have filed counter affidavit in the Original Applications, refuting the contentions raised in the applications so far as the contentious issues were concerned. It was contended that for the 28 posts of TGTs for various disciplines, the final selection could not be completed as 3 cases were pending before the CAT. After the disposal of the above three applications, the selection of the candidates for the 28 posts of TGTs of various disciplines were finalized by the Selection Committee by its minutes of the meeting dated 19.07.2011. Out of the 28 vacancies, one vacancy of TGT

(Social Science) reserved for differently abled candidates could not be filled up as there was no candidate under the above category eligible for appointment to the above vacancy. Against the 5 vacancies of TGT (Mathematics) notified, the Selection Committee selected top 5 meritorious candidates from the rank list of the candidates appeared for the post of TGT (Mathematics). The petitioner in O.P.(CAT) No.113 of 2015, 8th rank holder could not be recommended for appointment since the vacancies notified for TGT (Mathematics) were only 5. Since, out of the 27 candidates to whom offer of appointments to the post of TGTs were issued, 5 candidates in different disciplines did not accept the offer of appointment, offer of appointments were again issued to 5 candidates under different disciplines as per the merit list drawn for each subject and accordingly the 27 candidates selected for TGTs filled up the cadre posts.

9. It is further contended that on completing the action of filling up of all the 27 vacancies of TGTs, subsequent vacancies that occurred due to retirement/promotion from the grade of TGT/PGT etc. up to 01.04.2012 were assessed, and it was found that 4 posts of TGT (SS), 3 posts of TGT (Biology),

2 posts of TGT (Chemistry) and 2 posts of TGT (Mathematics) were vacant from these grades to PGT grade (total 11 vacancies). The Department without dividing these 11 vacancies between direct recruitment quota and promotion quota, suggested to fill up these vacancies by direct recruitment from the existing merit list drawn. Thus the petitioners were recommended by the Department for the post of TGT (Mathematics).

10. It was further contended that the proposal so made by the Department was returned by Secretary (Education) by noting in paragraphs 216 and 217 of note files for further clarification. And later the file was marked to the Services Department of the Respondents in the Secretariat on which the Services Department under paragraph 228 directed the Department again to verify the status of the vacancies considered for recruitment and to assess the number of vacancies that will be available for direct recruitment and for promotion quota in accordance with the Rotation Rules. Thereupon, it was found that as per the Rotation Rules, only 8 vacancies can be set apart for direct recruitment in accordance with the ratio prescribed in the Rotation Rules. Thus, the

Department by paragraph 236 of note file again requested the competent authority to convert the 8 vacancies of TGTs under promotion quota to direct recruitment and to appoint the candidates already available in the merit list. It was contended further that on the above proposal, the competent authority observed in paragraph 241 as follows:

"241. However, as regard the fill up of promotional post by direct recruitment, is not permissible while vice versa has been done for the reasons that the direct recruitment candidate occupies the post till his retirement. Therefore, the vacant posts of promotional quota (8 Nos.) as explained in para 236 can be filled as stop gap arrangement and these candidates could be engaged till the vacancies filled from the feeder cadre by way of promotion. It must be mentioned in the Offer of Appointment". (Sic)

11. It is thus offer of appointments against the post of TGTs for the disciplines mentioned above on a stop-gap arrangement basis were issued as per the orders of the competent authority under paragraph 241 of the note file, evident from Annexure-R1(b).

12. It was also contended by the Respondents that though the Department issued offer of appointment to the petitioners for short term appointment on stop-gap

arrangement basis to the promotional quota of TGTs on a scale of pay attached to the post of TGT, the same was again reviewed by the competent authority under paragraphs 254 to 257 of the note file and the Respondents under paragraph 258 ordered for appointment of candidates against the promotion quota on contract basis for the academic year 2012-2013 only and it was thus instead of payment of salary on pay scale basis, ordered to pay the remuneration as monthly consolidated amount to the petitioners under paragraph 261 of the note file. It is further contended that the petitioners have accepted the offer of appointment on contract basis for the academic year 2012-2013 and based on the acceptance of the offer for contract appointment, the petitioners were given contract appointment to the promotional quota post of TGTs for the academic year 2012-2013 alone by Office Order dated 22.06.2012. It was thus contended that the petitioners were never appointed on regular basis in the substantive vacancy of TGTs earmarked or converted for direct recruitment. It was also contended that the competent authority did not approve any proposal for converting the promotional quota of TGT posts to direct recruitment quota at any stage and hence the

claim of the petitioners for regular appointment by producing certain portion of the Department documents is mischievous and intended to mislead the Court/Tribunal. It was also contended that the contentions raised by the petitioners were against true facts and the competent authority has never decided to divert the posts to that of permanent one.

13. In such circumstances, the contention that, converting the promotion quota vacancies to the direct recruitment was approved by the competent authority is totally false and against the facts of the case as per paragraph 258 of the note file. It is also contended that in the absence of any approval of the competent authority for converting the promotion quota to the direct recruitment quota, the petitioners have no right to claim regular posting against the promotion quota vacancies. The Tribunal after appreciating the facts, law and circumstances involved in the case declined to grant any relief. It is thus aggrieved the Original Petitions are filed.

14. Heard Senior Advocate, Sri. Mathai M. Paikaday for the petitioner in O.P.(CAT) No.113 of 2015, Advocate Sri. V.A. Muhammed for the petitioners in O.P.(CAT) No.103 of 2015

and Sri. S. Radhakrishnan, learned Standing Counsel for the Respondents.

15. Learned Senior Counsel for the petitioners advanced three contentions: (1) the appointment of the petitioner was not based on contractual basis; (2) the appointment was not made for any specified period; and (3) the appointment was not on a consolidated monthly remuneration. It is the contention of the learned Senior Counsel that the appointment was made as per Annexure-A4 dated 29.03.2012 within the validity period of the merit list in the Pay Band of Rs.9300-34800 with Grade Pay of Rs.4,600/- plus admissible allowances at Central Government rates. The said order further states that the vacancy is on regular basis. However, the appointment was termed as on a stop-gap arrangement and as is usual in all such cases, admittedly, the petitioner duly accepted the appointment. It was also contended by the learned Senior Counsel that it was notified that the vacancies are subject to change and will be filled up from the merit list drawn on the basis of this recruitment process and since merit list was valid for posts notified and for those vacancies that

may arise up to 01.04.2012, the appointment of the petitioner was against a permanent cadre, after diverting a promotion post to that of a direct one.

16. By addressing the aforesaid point, learned Senior Counsel contended that the Office Order as per Annexure-A4 dated 29.03.2012 was modified *suo motu* by Annexure-A6 order dated 08.05.2012 without any notice or hearing provided to the petitioner and the post was thereupon converted to an unspecified amount of monthly remuneration and that too, limited to the academic year 2012-2013. There was no reason assigned for the abrupt and arbitrary modification of the service conditions of the petitioner. Therefore, learned Senior Counsel contended that the entire action of the Respondents are absolutely in violation of the principles of natural justice. So also, it is contended that no reasons are assigned in Annexure-A6 order dated 08.05.2012 for diverting the post as that of a contractual one against Annexure-A4 offer of appointment. To substantiate the contention so advanced, learned Senior Counsel has invited our attention to the judgment in '**Tejshree Ghag and Others v. Prakash Parashuram Patil and Others**' [(2007) 6 SCC 220] and

specifically to paragraphs 15 and 16 wherein it was held that the orders of transfer passed by the authority in purported exercise of its executive power which can be exercised only in terms of the extant rules were unsustainable. It was also held therein that where executive order results in civil consequences, principles of natural justice are required to be complied with prior thereto and relying on the said judgment, it is contended by the learned Senior Counsel that since Annexure-A4 offer of appointment was made, the Respondents were not at liberty to modify the same without providing opportunity of hearing to the petitioner. Relying upon the said judgment, learned Senior Counsel also contended that the executive order passed for unauthorized purpose would amount to malice in law and the order cannot prejudicially affect the status of an employee. So also, learned Senior Counsel has invited our attention to the judgment in '**East Coast Railway and another v. Mahadev Appa Rao and others**' [(2010) 7 SCC 678] with specific reference to paragraphs 10, 23 and 24 and canvassed the proposition that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so

mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Taking cue from the principles laid down in paragraph 10 of the said judgment, learned Senior Counsel contended that the contention of the Respondents in the affidavit filed before the Tribunal that the modification was made to the original order of appointment on the conscious decision made by the competent authority to change the mode of appointment from a permanent post to a contract one was only the outcome of an after thought and therefore such subsequent development cannot be taken note of either by the Tribunal or by a Court exercising its power under Article 227 of the Constitution of India.

17. So also, relying on paragraph 23 of the said judgment, learned Senior Counsel has submitted that every order passed by a public authority must disclose due and proper application of mind by the person making the order and that application of mind is best demonstrated by disclosure of mind by the authority making the order and disclosure is best done by recording the reasons that led the authority to pass the order in question. It was also contended that since reasons are absent in Annexure-A6 order,

explaining the circumstances under which same was modified from Annexure-A4, the said order is arbitrary and hence legally unsustainable. It is also the contention of the learned Senior Counsel that the note file produced shows that the Department Head made a proposal to divert the post to that of direct recruitment and therefore having decided so, it was imperative on the part of the Respondents to hear the petitioners before any modification was made.

18. It is also contended by learned Senior Counsel that since there are no qualified hands available under the promotion quota and there are no chances of getting qualified hands in the near future, it is only just and proper that the petitioners are continued in service for the best interests of the student community. So also, according to the learned Senior Counsel, under Clause-10 of Annexure-A8 Office Memorandum, the 1st Respondent is vested with power and therefore the appointment of the petitioners was made after diversion of the promotion quota and under that circumstances, in accordance with law, petitioners are entitled to continue in service. Learned Senior Counsel has invited our attention to the judgment of the Hon'ble Apex Court in '**Director General of**

Posts and Others v. K. Chandrashekar Rao' [(2013) 3 SCC 310] and specifically to paragraphs 5, 8, 9 and 18 and contended that even if an Office Memorandum is issued by appropriate competent authority, same is binding on the Respondents. On a perusal of the judgment *supra*, what we find is that the same was concerning compassionate appointment done by the competent authority as per a compassionate appointment Scheme. There, the consideration was whether formulation of the Scheme was a policy decision and therein the Apex Court has held that the policy decision so taken by the Government is based on concept of social justice and the spirit of the Scheme was to provide relief to the family members of the deceased persons and thus on the yardstick of social justice, such relief cannot be withdrawn on the ground of some alleged discrepancy which has not been supported by any data and therefore unreasonable and unsustainable. In our view, there, the Apex Court was considering the question of appointment made based on a Scheme, whereas in this case, the question is whether the post of promotion quota is diverted to direct recruitment as provided under Clause-10 of Annexure-A8 Office Memorandum. In our view, since the

diversion has not taken place, the Office Memorandum does not come up for our consideration at all.

19. Yet another judgment cited by the learned Senior Counsel is '**Union of India and Others v. N.R.Parmar and Others**' [(2012) 13 SCC 340]. On an appreciation of the principles evolved in the said judgment, what we gather is that there the question was with regard to the determination of seniority among direct recruits *vis-a-vis* promotees. It is true that there "quota" and "rota" principle was considered but the consideration was limited to determining *inter se* seniority between promotees and direct recruits on the basis of certain Office Memoranda. Therefore, in our view, the principle laid down thereunder has no bearing on the subject matter of this case. Thus, by canvassing the principles evolved in the said judgments, learned Senior Counsel contended that the petitioner is entitled to get advantage of Clause-10 of Annexure-A8 Office Memorandum.

20. The sum and substance of the contentions advanced by the learned Senior Counsel was that having taken a conscious decision pursuant to Employment Notice for direct recruitment on regular basis from the merit list, same cannot

be converted to contractual appointment for one year on a consolidated monthly remuneration. It is also contended that the employment notice was for a regular appointment on a prescribed Pay Band, without any specified period, the Rules of the game cannot be changed arbitrarily prescribing a consolidated monthly remuneration and confining the appointment only for one year. It is also contended that the subsequent change in the conditions of service made by the Respondents in the order of appointment issued to the petitioner, and since it entails civil consequences, it is mandatory that the petitioner should have been heard before modification or review of her conditions of service and therefore Annexure-A6 modified order is a nullity in law. That apart, it is also the specific contention of the learned Senior Counsel that Rules do not prescribe a contractual appointment on a consolidated remuneration and further that diversion of promotion quota to direct recruitment quota are governed by specific Rules which do not invite a contractual appointment.

21. Learned counsel for the petitioners in O.P.(CAT) No.103 of 2015 adopted the arguments put forth by the learned Senior Counsel and apart from the same, learned

counsel contended that the prime consideration for appointment of teachers should be, a method advantageous to the students or else the student community will suffer at large, for want of required strength of teachers to man the Educational Department of the Respondents. Learned counsel also contended that since substantive vacancies in the regular cadre arose in the year 2009-2010 and since there were no qualified hands available for promotion, the vacancies remained unfilled due to want of qualified hands and therefore the quota rule is impossible to be performed. In such circumstances, the quota rule has broken down especially due to the fact that a conscious decision was taken by the Department to divert the promotion quota to direct recruitment quota in terms of the Rules and therefore the post to which the petitioners were appointed were permanent in nature. Taking into account the future of the student community, the quota rule was relaxed and further that, vested right of any departmental candidates has not been infringed. It is also the contention of the learned counsel that administrative exigencies warranted diversion of posts from promotion quota to direct recruitment quota in the absence of

qualified teachers and taking note of that situation, the Administrator appointed under Article 239 of the Constitution of India, to whom power is delegated, took a conscious decision to divert the posts.

22. Learned counsel has relied on Ext. P6 order of the Respondents dated 21.07.2003 and contended that by the said orders, on an earlier occasion, the Respondents have diverted 10 posts in the Education Department and therefore Respondents had every power and right to divert the posts against promotional quota to direct recruitment quota and the appointments of the petitioners made by the Respondents was against direct recruitment quota and in such circumstances, they are entitled to continue in service in terms of the Rules as well as the original offer of appointment made by the Respondents. Learned counsel has also invited our attention to Exts.P3 judgments of a Division Bench of this Court in W.A.No.96 of 2000 dated 26.02.2003 and other connected cases, wherein, under similar circumstances this Court has held taking into account the Rule position under the Last Grade Servants Rules, that the appointments made by the authorities on provisional basis to substantive vacancies was not fair and

that therefore the petitioners were held entitled to continue in service. Learned counsel has also relied on Exts.P4 and P5 judgments of this Court and canvassed the proposition that if the appointments are made against substantive vacancies, the incumbents in office are entitled to continue in service irrespective of the contractual appointment made. It is further contended that, petitioners have objected to the modified offer and the appointment order and therefore it cannot be heard to say that the appointment order on contract basis was accepted.

23. *Per contra*, learned Standing Counsel for the Respondents contended that the petitioners were never appointed on a regular basis. In the absence of any approval of the competent authority for converting the promotion quota to the direct recruitment quota, petitioners have no right to claim regular appointment since they were appointed on promotion quota vacancies and that too on contract basis. So also, it was contended that petitioners have accepted the modified offer of appointment on contract basis and that too, only for one academic year, 2012-2013 on a consolidated monthly pay. Learned counsel further contended that the

petitioners have accepted the offer and worked without any ill-will and objection and therefore the said act of the petitioners amount to acceptance of the appointment order made in their favour. Learned counsel also contended that all these circumstances including the judgments pointed out by the learned counsel for the petitioners in O.P.(CAT) No.103 of 2015 were considered by the Tribunal and declined the reliefs since the petitioners were not entitled to the claims raised by them under law. Learned counsel apart from these contentions, contended that the reliance placed by the learned counsel for the petitioners on Ext. P6 order and Ext.P3 Division Bench judgment of this Court was misplaced, since the same were not applicable to the petitioners in any manner. It is contended that Ext.P6 order passed by the 2nd Respondent was a clear order of diversion and such circumstances are not existing in these cases. Learned counsel has invited our attention to the note file produced before the Tribunal under which in paragraph 258, it was ordered that appointment of candidates against the promotion quota be made only on contract basis for the academic year 2012-2013 only. Therefore, learned counsel contended that the order passed by

the Tribunal was in accordance with law and taking into account the factual circumstances required for the disposal of the applications.

24. Having considered the rival submissions made at the Bar, we are of the considered opinion that the question requires to be considered is whether there was diversion of posts of promotional quota by the competent authority so as to enable the petitioners to claim permanent appointment against the direct recruitment quota. To analyze the said situation, Clause-10 of Annexure-A8 Office Memorandum dated 10.07.1990 in O.P.(CAT) No.103 of 2015 which stipulates the method of diversion is extracted hereunder:

"10. Diversion of reserved vacancy to direct recruitment quota.

For posts filled both by direct recruitment and by promotion with separate quotas, Ministries/Departments are competent to approve diversion of a reserved vacancy from promotion to direct recruitment temporarily in the event of non-availability of suitable departmental candidate. In the subsequent year(s), the available reserve point in the direct recruitment quota will be transferred to promotion quota and utilized by appointing a promotee. Such diversion will be resorted to only if reserved category is not likely to be available for promotion in the near future".

Therefore, on a perusal of the said provision, it is clear that a procedure is contemplated for diversion of a reserved vacancy from promotion to direct recruitment. In such circumstances, the question is whether such a procedure was adopted by the competent authority. Accordingly, we proceed to analyze the same. We have gone through the records and on a reference to Annexure-A4 order in O.P.(CAT) No.113 of 2015, the offer of appointment, it was made against appointment as a stop-gap arrangement to the promotional quota posts of TGT under the Education Department and the offer was against the temporary posts but within a Pay Band as stated *supra*. That the above offer of appointment was issued as a stop-gap arrangement against vacant posts of promotional quota and the appointment was made subject to the conditions of Central Civil Services (Temporary Services) Rules, 1965. It was also stipulated thereunder that the appointment will be terminated at any time without assigning any reason especially when the vacancies are filled on regular basis on promotion from feeder category and when they are found unsuitable for Government Service. We have also gone through Annexure-A6 dated 08.05.2012 wherein a modified offer of appointment to

Annexure-A4 was issued whereby the competent authority had modified the offer to temporary posts of TGTs on consolidated monthly remuneration basis for the academic session 2012-2013 on contract basis. It was also stated that the above offer of appointment is issued on contractual basis for the academic session 2012-2013 as a stop-gap arrangement against the vacant post of promotional quota for academic year 2012-2013, or to the date up to which these vacancies under promotional quota is filled from the feeder category by promotion whichever is earlier.

25. Learned counsel for the petitioners have contended that having taken a conscious decision to divert the promotion quota to direct recruitment, the authorities are not at liberty to modify the Rule after the game started. Learned counsel for the petitioners in order to canvass the said submission has relied on a portion of the note file in paragraphs 225, 226 and 228 and contended that the same were conscious decision taken by the Respondents to divert the post and therefore they are bound by it. It is also the contention of the petitioners that since the said decision was taken, a vested right is accrued to the petitioners, and therefore to change the rule,

petitioners ought to have been heard. In that circumstances, since the basic principles were not followed by the Respondents, the decision taken to modify the order is arbitrary, without any reason and violative of the principles of natural justice.

26. On the other hand, the thrust of the contention advanced by the learned counsel for the Respondents is that no such conscious decision was taken by the competent authority to divert the post as claimed by the petitioners. Learned counsel also contended that the reference to the note files made by the petitioners counsel were only a part of the note file, by which proposals were made by the Respondents to the competent authority to change the post under promotional quota to direct recruitment quota which had not finally fructified consequent to the rejection of the proposal by the competent authority as contained in paragraph 258 of the note file. We find force in the said contention advanced by learned Standing Counsel for the Respondents. To us, if Exts.P3 to P5 judgments of this Court referred supra are analyzed in this background, though on a first flash appears to be a similar and convincing situation, actually it is not so, since all the said

judgments were rendered, appreciating and taking into account the procedure prescribed under relevant rules. Whereas in the cases on hand, the rule will come into play/vogue only if the competent authority has decided to divert the posts, which thus means, there was no enabling circumstance to the Respondents to make appointments in accordance with the rules. Therefore, the judgments of this court referred supra have no application at all to the fact situation in these cases. Moreover, the Administrative Tribunal had the advantage of perusing the original note file produced by the Respondents before it and it has arrived at a conclusion that there is no diversion of the posts by the competent authority and therefore the petitioners cannot claim that the posts to which they were appointed were of a permanent nature. Such factual aspect considered and decision taken by the Tribunal is not disputed in any manner by the petitioners.

27. So far as the legal propositions in the judgments of the Apex Court canvassed by the learned Senior Counsel are concerned, there what was under consideration were actions initiated by the respective authorities against the persons occupying a permanent post and so also against the question

of arbitrariness in the matter of cancellation of the select list without proper justification. The factual situations that arose in the judgments *supra* are not available in these cases. Moreover, we also find force in the contention of the learned Standing Counsel for the Respondents that in order to canvass the principles of arbitrariness or violation of principles of natural justice, a vested right should have been accrued to the petitioners but so far as the factual situations in these cases are concerned, the petitioners are only attacking the modification of offer of appointments and therefore, if the modification of offer of appointment made was not acceptable to the petitioners, the order of appointment should not have been accepted by the petitioners. Learned counsel also contended that the competent authority of the Education Department has not permitted diversion of posts, even though requested for and therefore the posts could not be diverted to the direct recruitment quota. In such circumstances, it is contended that there is no illegality in the contractual appointments of the petitioners temporarily for the academic session 2012-13. It is also contended that there is no change of the rule of the game since the game was started after

making modification to the offer of appointment and the petitioners were well aware of the same.

28. We also find force in the contention of the learned Standing Counsel that petitioners were conscious of the fact that their appointment order was issued on contractual basis and on a consolidated monthly pay. Even though learned counsel for petitioners have contended that Annexures-A7 and A9 objections against the contract appointment orders respectively were made by the petitioners, the same were not considered by the Respondents. It is true that the Respondents and the competent authority in order to tide over any situation are free and at liberty to take any decision in accordance with the extant rules also. But, here, in these proceedings we are at a question whether the orders passed by the Tribunal are legally justified. Taking into account the cumulative factual and legal circumstances and the evidence on record discussed above, we are of the considered opinion that we could not find any illegality or other legal infirmities in the orders passed by the Tribunal warranting our interference under Article 227 of the Constitution of India.

Accordingly, these Original Petitions are dismissed.

Sd/-
K. SURENDRA MOHAN
JUDGE

Sd/-
SHAJI P. CHALY
JUDGE

//true copy//

P.S. to Judge

St/-
23.12.2015