

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Soumen Sen

And

The Hon'ble Justice Saugata Bhattacharyya

MAT 1917 of 2019

With

I.A. No. CAN 2 of 2020 (Old No. CAN 279 of 2020)

The State of West Bengal

Vs.

Rabindra Nath Ghosh

For the Appellant	: Mr. Joyotosh Majumder, Ld. G.P., Mrs. Sucharita Paul, Adv. Mr. Sayan Ganguly, Adv.
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For the Respondent	: Mr. Chittapriya Ghosh, Adv., Mr. Goutam Acharya, Adv., Mr. Samir Kumar Adhikari, Adv.
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Hearing concluded on	: 25.03.2021
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Judgment Dated	: 28.05.2021
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Soumen Sen, J.: The appeal is arising out of an order of a learned Single Judge dated 10th October, 2018 in connection with the writ petition filed by the writ petitioner/respondent challenging the decision of the appellants in refusing to extend the Death-cum-Retirement Benefit Scheme of 1981 (hereinafter 'the Scheme of 1981') on the ground that there is a deficiency in qualifying service by 26 days and the appellants have no power to condone the shortfall.

The learned Counsel has formulated the following two issues for consideration:-

i) Whether the petitioner is entitled to get the benefit under rule 7(e)(iv) of the Scheme of 1981 thereby condoning the shortfall of 26 days of deficiency in qualifying service to enjoy the pensionary benefit.

ii) Whether the Government has the discretionary power under proviso/note appended to the substantive Clause to refuse condonation of shortfall for qualifying service of 10 years of service to enjoy the pensionary benefit.

The learned Single Judge interpreted of Rule 7(e)(iv) of the Scheme of 1981 in favour of the writ petitioner and allowed the writ application and directed the respondent authority to condone the deficiency of 26 days in qualifying service of the writ petitioner and disbursed the pensionary benefit in favour of the petitioner along with all arrears. This order is under challenge.

Before we advert to the submissions made by the learned Counsel for the parties, we summarise the facts for better appreciation of the order under challenge and the arguments advanced on behalf of the parties.

The petitioner was initially appointed as an assistant teacher on 27th October, 1995 at Chagram Free Primary School under District Burdwan (presently known as Purba Burdwan since 25th January, 1997).

The petitioner was transferred from Chagram Free Primary School to Sadhupalli Free Primary School. After that, the petitioner was again

transferred from Sadhupalli Free Primary to Arjuna Pathar Ghata Free Primary School on 4th November, 1997. Thereafter on 15th May, 2002 the petitioner was transferred from Arjuna Pathar Ghata Free Primary School to Maheswarpur Free Primary School. On 1st October, 2005, after rendering 9 years 11 months and 4 days of service, the petitioner retired from the service.

On 6th December, 2005 the Assistant Director Pension Provident Fund and Group Insurance, Government of West Bengal returned the pension case of the petitioner along with connected documents to the District Inspector of School (P.E.) Burdwan.

On 24th August, 2006 the respondent authorities refused to sanction the pensionary benefit of the petitioner vide memo No.312-SE (B) due to shortfall of 26 days of qualifying service.

Being aggrieved by that order the petitioner filed a writ petition being W.P. No. 24563 (W) of 2017. That writ petition was disposed of on 21st December, 2017, thereby directing the respondent authorities to revisit the issue within a stipulated period after giving an opportunity of hearing to the petitioner or his authorised representative and, thereafter, communicating the decision to the petitioner.

The Principal Secretary by an order dated 3rd April, 2018 rejected the writ petitioner's prayer for condonation of 26 days shortfall of qualifying service to enjoy pensionary benefit on the following grounds:

“Having considered the facts and circumstances of the case, it is found that there is a provision under para 7 (e) (iv) of Chapter III of the said Scheme which is set out as follows:-

Upon any condition which it may think fit to impose, the Government may condone of deficiency of six months in the qualifying service of the employees of Non-Government /Sponsored /Aided Educational Institutions/ Organizations.

The explanatory note of the aforesaid para 7(e)(iv) of the said Scheme is also set out below:-

The deficiency should not be condoned with a view to make up the minimum qualifying service for the purpose of death gratuity or family pension. In other cases power should be restricted to the employees drawing pay not exceeding Rs.425/- per month at the time of retirement on invalid or compensation pension.

This is to state that the power of condonation of short fall upto 6 months in qualifying service is restricted to the employees drawing pay not exceeding Rs.425/- per month at the time of retirement on invalid or compensation pension. The relaxation clause is not general in nature. As the claim of the petitioner does not fall within the periphery of invalid or compensation pension hence, the prayer of the petitioner for condonation of short fall in qualifying service towards pension cannot be entertained as per law.

*Moreover, the context of the case of **Subhas Chandra Chakraborty vs. State of West Bengal** reported in **2013(1) CHN (Cal) 438** is different. Delay occurred in the said case due to lapses on the part of the appointing authority to drag the matter to Court of Law in spite of the fact that the petitioner was already empanelled. Subsequently the petitioner was able to join for the intervention of the Hon’ble Court. In the present case no such incident was there.*

Hence, no relief can be granted to the petitioner. The matter is disposed of. All concerned be informed accordingly.”

(emphasis supplied)

This order was the subject matter of challenge in the present writ petition.

The learned Government Pleader on behalf of the appellant has submitted that the writ petitioner cannot as a matter of right claim condonation of delay of 26 days to complete the qualifying service of 10 years in terms of Clause 7(e)(iii) and Clause 7(e)(iv) of the Scheme of 1981. Our attention is drawn to the explanatory note appended to paragraph 7(e)(iv) of the Scheme of 1981 to emphasise that the deficiency should not be condoned with a view to make up the minimum qualifying service for the purpose of death, gratuity or family pension. It is submitted that the teacher cannot claim as a matter of right that the shortfall of qualifying service should be condoned by the authority just to avail pensionary benefit. The learned Government Pleader has submitted that the rule-makers have consciously used the adverb ‘may’ which signifies that the said provision is merely discretionary and not mandatory. It is submitted that the word ‘may’ for the relevant rule cannot be considered and substituted by the adverb ‘shall’ in order to give it a mandatory character.

The learned Government Pleader has also submitted that the reliance placed by the learned Counsel for the writ petitioner on memo No.26-SE(B)/IM-13/08 dated 2nd February, 2009 is misplaced. The said memo does

not in any manner dilute the explanatory note to paragraph 7(e)(iv) of the Scheme of 1981. It is submitted that the explanatory note carved out an exception and restricts the operation of the main clause. The note is in the nature of an exception and exclusion. It shows that the power of condonation of shortfall up to six months in qualifying service is restricted to the teachers drawing pay not exceeding Rs.425 per month at the time of retirement and compensation pension is in no manner disturbed or diluted by the School Education Department Memo dated 2nd February, 2009.

Per contra, the learned Counsel for the writ petitioner has submitted that Clause 7(e)(iii) is a substantive clause and Clause 7(e)(iv) cannot be supplemented by the note appended thereto. It is submitted that on a conjoint reading of Clause 7(e)(iii) and 7(e)(iv) of the said Scheme of 1981, it is clear that the Government is obliged to condone deficiency of up to six months to complete qualifying service of 10 years. It is submitted that the interpretation of the relevant rule as directory and not mandatory is not a proper appreciation of the relevant rules since the said rules are beneficial in nature and have to be interpreted in favour of the teacher. The learned Counsel has submitted that the aforesaid rule casts an obligation upon the respondent authorities to condone the shortfall or deficit in qualifying service whenever it arises.

It is submitted that the contention of the appellants that Clause 7(e)(iv) of the Scheme of 1981 is a discretionary one may not be apparent from the said rules. Even if it is assumed that it is a discretionary one, the appellants

in the given facts and circumstances of the case should have considered that the teacher on 1st October, 2005 after rendering 9 years 11 months and 4 days retired from the service. This is a relevant consideration in deciding the pensionary benefits under the relevant scheme. Discretion should be exercised on sound judicial principles.

The learned Counsel further argued that under Clauses 7(e)(iii) and 7(e)(iv) of the said Scheme of 1981, the respondent authority is under an obligation to condone the deficiency of 26 days for completion of qualifying service of 10 years without giving weightage to the proviso appended to the said clause.

In support of this contention, the learned Counsel also relied on the government circular dated 2nd February, 2009, wherein it has been clarified that for the purpose of calculation of retiral benefit fraction of a year that is equal to three months and above shall be treated as completed six months period of service that is to be reckoned as qualifying service for determination retiral benefits. According to the learned Counsel for the writ petitioner, the appellants have acted arbitrarily and irrationally in not taking into consideration the length of service and the power to be exercised by the said authority in a given situation like this one. It is submitted that failure to exercise such power for not extending and/or condoning the said period was on a complete misreading of the rules which are beneficial in nature. It is submitted that the learned Single Judge was justified in allowing the writ

petition by directing the authority concerned to condone the deficiency of 26 days in qualifying service.

In deciding the issue arising before us, it is necessary to refer to Rules 7(e)(iii) and rule 7(e)(iv) of Chapter III of the Scheme of 1981.

The said Rules are stated below:-

“7(e)(iii): Approved temporary service including approved service on leave or deputation vacancy in one or more institutions shall count towards pension subject to fulfilment of other conditions for grant of pensions.

Fractions of a year equal to six months and above shall be treated as a completed six monthly period for the purpose of calculation of any pension under this Scheme.

7(e)(iv): Upon any condition which it may think fit to impose, Government may condone a deficiency of six months in the qualifying service of the employees of non-Government/Sponsored/Aided Educational Institutions/Organisations.

Note: The deficiency should not be condoned with a view to make up the minimum prescribed qualifying service for the purpose of death gratuity or family pension. In other cases power should be restricted to the employees drawing pay not exceeding Rs.425.00 per month at the time of retirement on invalid or compensation pension.”

It is equally important to refer to memo no.26-SE(B)/IM-13/08 dated 2nd February, 2009 issued by Government of West Bengal, School Education Department, Budget Branch, the said memo is quoted below:-

“GOVERNMENT OF WEST BENGAL

School Education Department,

Budget Branch

No.26-SE(B)/IM-13/08

Dated: February 2, 2009

Sub: Calculation of the length of qualifying service for Retirement Benefit-Modification of the West Bengal Recognised Non-government Educational Institution Employees (DCRB) Scheme, 1981.

In terms of para 7(e)(iii) of the West Bengal Recognised Non-Government Educational Institution Employees (DCRB) Scheme, 1981, fraction of a year equal to six months and above shall be treated as a completed six monthly period for the purpose of calculation if any pension under the said Scheme in case of Government employees, a fraction of a year equal to three months and above is treated as completed six monthly period of Service and reckoned as Qualifying Service for the purpose of pensionary benefit in terms of Memo No.14791-F dated 16.12.83 Government in School Education for sometime past was considering extension of the said benefit to employees of Non.Govt. Aided Educational Institutions.

After careful consideration of the matter the Governor is pleased to decide that a fraction of a year equal to three months and above shall be treated as completed six monthly period of service and reckoned as qualifying service for determining retirement benefits and the period of service below three months will be ignored.

This order shall be deemed to have taken effect from the date of issue of this order.

This order issues with the concurrence of Finance Department vide their U/O/No. 896 Pension Br. Dated 17.12.08.

The Pension Cases already settled need not to be re-opened.”

The memo dated 2nd February, 2009 has stated that for the purpose of calculation of retirement benefits a fraction of a year equal to three months or more shall be treated as completed six months period of service that is to be reckoned as qualifying service for determining retiral benefits.

The learned Single Judge has taken note of the aforesaid rules and the memo dated 2nd February, 2009 and thereafter arrived at the following conclusions:

“If I accept the submission of the learned Advocate appearing for the state authority that weightage should be given to the note appended to the substantive Clause 7 (e) (iv) which clearly provides that the deficiency should not be condoned with a view to make up minimum prescribed qualifying service for the purpose of disbursement of retiral benefits then in my opinion two different stands cannot be applicable for the purpose of calculation of length of qualifying service under Clause 7 (e) (iii) and Clause 7 (e) (iv) and the benefits under the scheme cannot be curtailed by specifying the period of condonation then restriction would hit the discrimination and unfair practice adopted by the Government. Furthermore, in my opinion an explanatory note cannot supplant the provisions of the substantive clause under the scheme. It has to be read in the context of the substantive provision and not in derogation or contrary thereof.”

The purpose and object of para 7(e)(iv) of Chapter III shows that the said rule was framed with a view to extend the Death-cum-Retirement Benefits to teachers who have completed their service but may not qualify for the said benefit due to deficiency in qualifying service. The framers of the rules has considered it to be appropriate and fit to condone deficiency of six months in the qualifying service upon any condition which it may think fit to impose. The said rules read with the Government memo dated 2nd February, 2009 unmistakably shows that it is a beneficial legislation and unless there are compelling reasons and exceptional circumstances not to condone the deficiency the Government is bound to extend the said benefit to a teacher. Extending such benefit is the rule and denial of such benefit is an exception.

The said rule also makes it clear that in matters of condonation of deficiency of six months in the qualifying service the Government may impose any condition which it may think fit to impose. The explanatory note that the deficiency should not be condoned with a view to make up the minimum qualifying service for the purpose of death, gratuity or family pension makes the substantive provision otiose and it defeats the very object of the said Rules. The explanatory note cannot control the substantive provision. The note appended to rule 7(e)(iv) cannot be read in derogation to the substantive provision which precedes the said rules. The entitlement of the petitioner to get a pension as retirement benefit under the Scheme of 1981 cannot be denied. The shortfall in the qualifying service of 26 days is only for the

purpose of considering his claim for pension and not for the purpose of death, gratuity or family pension.

Even if one accepts that the said explanatory note may control the substantive provision, we are in agreement with the learned Single Judge that in the impugned order dated 3rd April, 2018 at the time of rejection of the prayer of the writ petitioner, weightage to the note appended to the substantive clause of the Scheme of 1981 was completely misplaced as the authority has lost sight of the fact that it is a beneficial piece of legislation and the note appended to the substantive clause cannot dilute the power vested to the said authority if the shortfall in the qualifying service is not exceeded by six months.

The learned Single Judge in arriving at the said decision has relied upon the decision of the Apex Court in **Civil Appeal No. 1870 of 2007, (V.B. Prasad vs Manager, P.M.D.U.P. School & Ors.)**, reported in **2007 (3) SCC 534**.

The said decision is apposite in our view to sustain the order of the learned Single Judge.

The learned Government Pleader has tried to impress upon this court that the date of approval of the educational institution is a relevant and crucial date in determining the length of service of the teachers in terms of the Scheme of 1981. It is submitted that the said scheme in rule 5(a)(ii) defines approved teaching and non-teaching employees to mean employees of

recognised educational institution whose services have been approved by the authorities referred to in sub-rule 5(a)(i). In 5(a)(i) “affiliated/approved” has been defined to mean recognised by the West Bengal Board of Secondary Education/West Bengal Madrassah Education Board/District School Boards etc. The “competent authority” under rule 5(i) means the Director and the State Government in the Education Department. “Employee” in rule 5(k) means a teaching or a non-teaching staff of an educational institution, the appointment of whom has duly been approved by the Director or any other authority as referred in sub-rule 5(a)(i). Chapter III rule 7 deals with service qualifying for pension.

The learned Government Pleader submits that rules 7(b) to 7(d) are relevant provisions requiring consideration. Rule 7(b) states that continuous service of a whole time approved employee in any educational institution, shall count as qualifying service. 7(d) deals with service rendered before partition, the said rule reads:-

“7(d) Service rendered before partition, i.e. during the period up to 14th August, 1947, by an employee in any affiliated institutions in areas included in East Pakistan (now Bangladesh) shall qualify for pension and the period of break from the date of leaving the institutions in East Pakistan (now Bangladesh) and the date of appointment in any institution in West Bengal is to be treated as automatically condoned.

Affiliation of a school will be verified on the basis of documentary evidence. In the absence of documentary evidence, contemporary

evidence duly signed by Director or any officer authorised by him, will be accepted.

Service rendered by an employee under Government if any will count towards pension. The service in an institution before its recognition will not count.”

We quote the aforesaid rules as the learned Government Pleader has relied upon the last sentence of the said rule, i.e. “service in an institution before its recognition will not count” and sought to apply the same in the instant case, although the said sentence was in the context of an employee rendering service before Partition in East Pakistan (now Bangladesh).

However, we have no difficulty in relying on the said sentence as we are not opposed to the view that unless an institution has not been recognised, the approval of teaching and non-teaching employees would not arise at all. The period of mandatory completion of 10 years as qualifying service is mentioned in Chapter IV rule 8 which deals with eligibility for pension. The said rule reads:

“Rule 8. Subject to satisfactory service, an employee shall be entitled to pension provided that in case of (i),(iii) and (iv) below, the employee concerned has completed at least ten years of qualifying services:

(i) on attaining the age of superannuation, or thereafter on the expiry of the period of approved extension, or

(ii) on voluntary retirement after completing 20 years of qualifying services, or

(iii) on being declared permanently incapacitated for further service by the Chief Medical Officer of the State Government in the district concerned or any Medical officer of equivalent status authorised by the pension sanctioning authority, or

(iv) on termination of service due to abolition of the post, or closure of the Institution concerned due to withdrawal of recognition or other valid reasons.”

The learned Government Pleader has submitted that the aforesaid rules clearly show that recognition precedes approval and until the institution is recognised the teachers appointed by the educational institution prior to recognition is immaterial and cannot be counted to make good the deficiency in service.

In the instant case, the pension was denied not on the ground that even if the Government condones the deficiency of six months in the qualifying service, the petitioner would not be eligible. It was denied relying upon the note to the Rule 7(e)(iv) which, inter alia, shows that deficiency should not be condoned in cases of employees drawing pay not exceeding Rs.425 per month at the time of retirement for invalid or compensation pension.

The deficiency in this case is of 26 days only.

In the instant case, it is a case of pension simpliciter. It is not the case of death gratuity or family pension or invalid or compensation pension. Moreover, the said note in our view cannot whittle down the effect of a substantive clause in the 7e(iv) read with the circular dated February 2, 2009. The scope and effect of explanation/note came up for consideration in **S.**

Sundaram Pillai & Ors. v. R. Pattabiraman & Ors., reported in **AIR 1985 SC 582**. On consideration of a large number of authorities in paragraph 52 the Hon'ble Supreme Court summarised the law in the following words:

“52. In Dattatraya Govind Mahajan and Ors. v. State of Maharashtra and Anr. MANU/SC/0381/1977 : [1977]2SCR790 Bhagwati, J. observed thus:

It is true that the orthodox function of an explanation is to explain the meaning and effect of the main provision to which it is an explanation and to clear up any doubt or ambiguity in it....

Therefore, even though the provision in question has been called an Explanation, we must construe it according to its plain language and not on any a priori considerations.”

The aforesaid decision was followed in a fairly recent decision in **New Okhla Industrial Development Authority v. Chief Commissioner of Income Tax & Ors.**, reported in **2018 (9) SCC 351** where the principles laid down in **S. Sundaram** (*supra*) were reiterated and it was held that the object of an explanation to a statutory provision is:

“(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same.”

It is thus clear from the aforesaid decision that the note which is in the nature of an explanation cannot in any way interfere with or change the substantive provision or prevent the working of the Scheme of 1981 by becoming a hindrance in extending benefit to the writ petitioner under the beneficial scheme.

Apart from the fact that we do not find any relevance of the said note to become an impediment or hindrance in extending the beneficial scheme to the petitioner, we also observe that the interpretation given by the authorities and advanced before us by the learned Government Pleader to restrict the power of the authorities concerned to condone the deficiency of six months in the qualifying service only restricted to the employees drawing pay not exceeding Rs.425 per month would be contrary to the scheme and would entirely change the purpose of the enactment, and instead of suppressing the mischief and defending the object of the rule, it would be a hindrance.

Accordingly, the said interpretation given by the authorities concerned as well as by the learned Government Pleader is not acceptable.

In fact, the judgment relied upon by the learned Government Pleader namely, ***Tara Singh & Ors. v. State of Rajasthan & Ors.***, reported in **1975 (4) SCC 86** also supports our view as it has been categorically stated in the said judgment that, *“the function of the notes is to provide procedure and to control discretion. The real purpose of the notes is that when rules are silent the notes will fill up the gap”*.

The learned Government Pleader has relied upon the decision of the Hon’ble Supreme Court in ***R. Venkata Ramudu & Ors. v. State of A.P. & Ors.*** reported in **2016 (16) SCC 464** in which there was a conflict between the general rules and special rules and in that context the Hon’ble Supreme Court held that the note appended to the special rules permitting extension of probation period only in those cases where probationer had failed to pass test would be taken into consideration. In the instant case, there is no sub-rule which clearly excludes the efficacy and effects of the substantive provision extending the benefit to the petitioners. There is only one rule governing the field.

Similarly, the decision of the Hon’ble Supreme court in ***State of West Bengal vs. Dr. Tanmoy Mondal*** reported at **2019 (16) SCC 348** is not applicable. In ***Dr. Tanmoy Mondal*** (*supra*) rule 75(a) West Bengal Service Rules 1971 came up for consideration, the said rule was framed in exercise of

power conferred under Article 309 of the Constitution of India. It appears from the paragraph 10 of the said judgment that the different view on the interpretation of the rule 75 was taken by a different Division Bench in a review petition and the Hon'ble Supreme Court found that the Division Bench which earlier decided the matter had laboured hard to interpret the rule 75 by analysing it more effectively and rightly than done while reviewing the order.

We find from the said decision that the expression "compulsory retirement" had been inadvertently used in the said rule 75(a) which deals with retirement upon attaining the age of superannuation. It was in that context the note was found to be relevant as it was not confined in operation to sub rule (aaa) of rule 75(a). For better understanding we may reproduce the relevant portion of rule 75:

"75. For Group A, Group B and Group C service. (a) Except as otherwise provided in these rules, a Government employee other than a member of the Group D service shall retire from service compulsorily with effect from the afternoon of the last day of the month in which he attains the age of fifty-eight years;

Provided that a Government employee other than a member of the Group D service whose date of birth is the first of a month shall retire from service with effect from the afternoon of the last day of the preceding month of attaining the age of fifty-eight years;

Provided further that the age-limit for retirement as prescribed in this rule shall not be applicable in cases where higher age limit up to 60 years for retirement has been fixed under any general or special orders of Government.

(aaa) Any government employee may, by giving notice of not less than 3 months in writing to the appointing authority, retire from Government service after he has attained the age of 50 years, if he is in Group A or Group B (erstwhile gazetted) service or post, and had entered Government service before attaining the age of 35 years; and in all other cases, after he has attained the age of 55 years:

Provided that it shall be open to the appointing authority to withhold permission to a Government employee under suspension who seeks to retire under this sub-rule.

Note 3 - The appointing authority should invariably keep on record that in his opinion it is necessary to retire the Government employee in pursuance of the aforesaid rule in public interest.”

It is in this context the Hon’ble Supreme Court held in paragraph 18 as follows:

“18. However, Note 3 which is relevant is not confined in operation to sub-rule (aaa) of Rule 75. It is clearly provided in Note 3 that the appointing authority should invariably keep on record that in his opinion it is necessary to retire the Government employee in pursuance of the aforesaid rule in public interest. Obviously, the Note 3 is applicable to both Rule 75 (aa) and 75 (aaa) as was rightly opined by the Division Bench while rendering the judgment and order dated 22.08.2014.

Contextually Note 3 was held to be not confined in operation to sub Rule (aaa) of Rule 75. The said rules, in fact, provided an additional support

to the dominant object to the Act and were consistent with the dominant object which it seems to sub-serve.

In **V.B. Prasad (supra)** Note appended to Rule 45 of the Kerala Education Rules (1959) came up for consideration. The post of Headmaster in P.M.D. Upper Primary School fell vacant on or about June 1, 1994. There were two contenders for the said post, namely, Respondent no.2 and Respondent no.6 named in the SLP. Respondent no.2 was appointed in the said post. The Respondent No. 2 joined the School on 16.07.1969. Appellant herein joined the school as a Drawing teacher on 17.07.1978 and has been working on a regular basis only with effect from 02.06.1980. He was declared a protected teacher from 01.06.1989. While discharging his duties as a teacher, Appellant applied for and granted study leave for higher studies for two years with effect from 01.06.1991. He remained on leave upto 28.02.1993. It is accepted that he was not a candidate who was considered for appointment to the post of Headmaster. He indisputably gave consent for appointment of Respondent No. 2. His case, therefore, never fell for consideration either by the management of the school or by the Government or by the High Court. Rule 45 of the Kerala Education Rules in the aforementioned context came up for consideration. The rule and the Note was reproduced under paragraph 8 of the judgment which are reproduced:

"45. Subject to rule 44, when the post of Headmaster of complete U.P. School is vacant or when an incomplete U.P. School becomes a complete U.P. School, the post shall be filled up from among the

qualified teachers on the staff of the school or schools under the educational Agency. If there is a Graduate teacher with B.Ed. or other equivalent qualification and who has got at least five years experience in teaching after acquisition of B.Ed. degree he may be appointed as Headmaster provided he has got a service equal to half of the period of service of the senior most under graduate teacher. If graduate teachers with the aforesaid qualification and service are not available in the school or schools under the same Educational Agency, the senior most primary school teacher with S.S.L.C. or equivalent and T.T.C. issued by the Board of Public Examination Kerala or T.C.H. issued by the Karnataka Secondary Education Examination Board, Bangalore or a pass in Pre-degree Examination with pedagogy as an elective subject conducted by the University of Kerala or any other equivalent training qualification prescribed for appointment as primary school assistant may be appointed.

Note: The language/specialist teachers, according to their seniority in the combined seniority list of teachers shall also be appointed as Headmaster of U.P. School or Schools under an Educational Agency provided the teacher possesses the prescribed qualifications for promotion as Headmaster of U.P. School on the date of occurrence of vacancy."

The aforesaid note was interpreted by the Hon'ble Supreme Court in the following manner, relevant paragraphs of the judgment are stated below:

"9. The said rule, thus, provides for essential qualification. Rule 45 is in three parts. The first part provides for the qualification of a teacher who can be appointed in the post of Headmaster. He must be graduate with B.Ed. or other equivalent qualification and must have at least five years' experience in teaching after

acquisition of B.Ed. degree. The second part of the rule provides for consideration of such teachers only in the event a graduate teacher is not available. Indisputably, Respondent No. 6 fulfils the educational qualification as also five years' experience in teaching after acquisition of B.Ed. degree. Ignoring her claim, Respondent No. 2 was appointed whose case comes within the purview of the second part of Rule 45, as she did not have the qualification specified in the first part thereof. Appellant was a Drawing teacher. He, therefore, was a specialist teacher. According to him his case comes within the purview of the 'note' appended to Rule 45.

10. For the time being, we may assume that in view of fact that he had also acquired the qualification of B.Ed. in April 1989, his case also could be considered in terms of Rule 45; although it is well-settled principles of law that the note appended to a statutory provision or the subordinate legislation must be read in the context of the substantive provision and not in derogation thereof. Five years' teaching experience for appointment to the post of Headmaster was a sine qua non. Such teaching experience was to be 'teaching experience' and not a deemed teaching experience.

11. In *Punjab State Electricity Board Ltd. v. Zora Singh and Others* [(2005) 6 SCC 776], this Court noticing a decision of a Full Bench of the Andhra Pradesh in *A.P. SRTC v. STAT* [ILR 2001 AP 1], observed : "23. In *A.P. SRTC v. STAT* a Full Bench of the Andhra Pradesh High Court has noticed thus: (An LT p. 544, para 31) 31[24]. The meaning of note as per *P. Ramanatha Aiyars Law Lexicon*, 1997 Edn. is a brief statement of particulars of some fact, a passage or explanation.

24. The note, therefore, was merely explanatory in nature and thereby the rigour of the main provision was not diluted.”(emphasis supplied)

Moreover, the memorandum dated 2nd February, 2009 in the instant case has treated a fraction of a year equal to three months and above as a completed six months period of service that is reckoned as qualifying service for determining retirement benefits in supersession of the proviso to rule 7(e)(iii) which clearly brings out the beneficial feature of the said scheme. Although the said memorandum may not be relevant in the instant case but certainly it reinforces the beneficial nature of the scheme and supports our view in relation to the Rules under consideration.

It is lamentable that the appellant has decided to prefer an appeal against the order of the learned Single Judge. The teacher has worked for almost 10 years and was found to be eligible for being appointed as a teacher would be denied pensionary benefits on such flimsy ground. The avowed object of the 1981 scheme which is undoubtedly a beneficial piece of legislation enacted for the purpose of teachers and other employees covered by the said scheme to not be deprived of their past service is now being attempted to be rendered nugatory by taking recourse to harsh and irrational views in denying such legitimate claim. In our view, it does not augur well with the appellants. The object and of the said scheme is defeated and rendered otiose if the interpretation given by the appellants are accepted to deny the benefits to the teachers.

On such consideration, we uphold the order under appeal and dismiss the appeal and the stay petition without t costs.

I agree

(Soumen Sen, J.)

(Saugata Bhattacharyya, J.)