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THE HIGH COURT OF SIKKIM : GANGTOK

WRIT PETITION (C) NO. 33 OF 2003

In the matter of an application under Article 226 of the
Constitution of India

and

in the matter of

Arun Kumar Singh,
S/o Shri Chulahan Prasad Singh,
Graduate Teacher (Biology),
Government Junior High School,
Namok, North Sikkim **Petitioner**

versus

State of Sikkim
through the Secretary,
Department of Education,
Government of Sikkim,
Tashiling Secretariat,
Gangtok, East Sikkim **Respondent**

AND

WRIT PETITION (C) NO. 39 OF 2003

Bhubneshwar Prasad Chaudhary,
S/o Late Mana Chaudhary,
R/o Jetui,
P.S. & Dist. Hazipur,
Bihar **Petitioner**

versus

State of Sikkim
through the Secretary,
Department of Education,
Government of Sikkim,
Tashiling Secretariat,
Gangtok, East Sikkim **Respondent**

For the petitioners : Mr. A. K. Upadhyaya, Senior
Advocate assisted by Ms. S.
Pradhan, Advocate.

For the respondents : Mr. S. P. Wangdi, Advocate General
assisted by Mr. J. B. Pradhan,
Government Advocate and Mr.
Karma Thinley, Assistant
Government Advocate.

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**PRESENT: THE HON'BLE MR. JUSTICE N. S. SINGH, CHIEF JUSTICE (ACTING).
THE HON'BLE MR. JUSTICE A. P. SUBBA, JUDGE.**

Last date of hearing : 11th May, 2005.

DATE OF JUDGMENT : 12TH JULY, 2005.

J U D G M E N T

A. P. Subba, J.

Since facts of both the writ petitions and the questions of law that arise are identical they are taken up together and are being disposed of by this common judgment.

2. The case of the writ petitioner, Shri Arun Kumar Singh, in Writ Petition no. 33 of 2003, is that he is a graduate teacher presently serving the Education Department, Government of Sikkim and posted at Government Junior High School, Namok, North Sikkim. He joined service as graduate teacher on 4th September, 1980 on ad hoc basis. The ad hoc appointment of the writ petitioner was brought into contract service along with others with effect from 4th May, 1982 for a period of 3 years at the first instance. Thereafter, the contract service of the petitioner was extended from time to time. Ultimately his services were terminated on 18th December, 1990. On such termination, the writ petitioner and other similarly placed teachers filed a writ petition being no.27 of 1994 in this High Court and pursuant to the order passed by a Division Bench of this Court in the said Writ Petition the petitioner was appointed as graduate teacher (Biology) on 20th June, 1996 vide Office Order no.51/Est/Edn.

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The petitioner has prayed for three main reliefs, namely -

- (i) two pre-mature increments with effect from 3rd September, 1990 in terms of notification no.178/Gen/Est dated 24th October, 1980;
- (ii) advancement grade with effect from 2nd August, 1994 in terms of notification no.14/Gen/Dop dated 15th June, 1996; and
- (iii) notional fixation of initial pay of the petitioner after granting him the two pre-mature increments and the advancement grade as prayed for above and duly counting the break between 18th December, 1990 to 20th June, 1996 as qualifying service without arrears of salary.

In addition to the above, the petitioner has also prayed for a direction to the respondent to prepare and publish seniority list duly protecting his seniority from the date of his initial appointment i.e. 4th September, 1980.

3. The brief facts of the Writ Petition no. 39 of 2003 are that the petitioner, Shri Bhubneshwar Prasad Chaudhary joined service as graduate teacher under the Education Department, Government of Sikkim as graduate teacher on 2nd June, 1981 on contract basis. His contract service was extended from time to time till the same was terminated on 18th December, 1990. The petitioner along with other petitioners filed Writ Petition no.27 of 1994 in this Court seeking regularisation of their services and pursuant to the





order passed in the said Writ Petition he was appointed as graduate teacher on regular basis with effect from 14th June, 1996. The main relief prayed for by him are similar to the relief prayed for by the writ petitioner in the above Writ Petition no.33 of 2003, namely, two pre-mature Increments with effect from 2nd June, 1991, advancement grade with effect from 2nd August, 1994 and notional fixation of his initial pay after the grant of the two pre-mature increments and the advancement grade prayed for by him and duly counting the break between 18th December, 1990 to 15th June, 1996 as qualifying service without arrears of pay. In addition to the above main reliefs he also prayed for retirement benefits by duly counting the period from 2nd June, 1981 to 31st March, 2003 as qualifying service.

4. The State-respondent filed separate counter-affidavits and contended that the petitioners in both the cases were not eligible for grant of two pre-mature Increments as they had not completed the requisite years of service required under the related notification. With regard to the relief of advancement grade, it was contended that the petitioners were entitled to advancement grade subject to fulfillment of the criteria laid down in notification no.38/Gen/DOP dated 23rd September, 1999. As regards the notional fixation of initial pay of the petitioners on their appointment on regular basis, it was contended that the period between the date of termination of the contract service in the year 1990 and the appointment of the petitioner on regular basis in 1996 had to be treated as





leave without pay under the terms of the appointment on regular basis and as such, while fixing the pay notionally on their appointment the break in service cannot be counted towards qualifying service. Accordingly, neither the question of protection of seniority of the petitioner in Writ Petition No.33 of 2003 nor the question of retirement benefits to the petitioner in Writ Petition no.39 of 2003 would arise.

5. Mr. A. K. Upadhyaya, the learned Senior counsel assisted by Ms. S. Pradhan, learned counsel for the petitioners and Mr. S. P. Wangdi, learned Advocate General assisted by Mr. J. B. Pradhan, Government Advocate and Mr. Karma Thinley, Assistant Government Advocate for the State-respondents were heard.

6. The main points that arise for consideration in both the cases are (a) whether the petitioners are entitled to two pre-mature increments (b) whether advancement grades are admissible to the petitioners under the provision of the relevant rules and (c) whether fixation of initial pay can be done duly counting the break period as qualifying service without arrears of salary.

7. In order to appreciate the rival contentions raised by the parties, it is useful to notice the relevant provisions of the different rules and notifications relied on by the parties, at the first instance.

8. The first notification relied on by the petitioners is notification no.178/Gen/Est. dated 24th October, 1980. This



notification introduced the scheme of granting pre-mature increment to the teachers of all grades including Head Masters of Primary/Jr. High Schools/High Schools and the Principals of Higher Secondary Schools (both on regular and contract basis) on completion of specific period of service tenure. Clause 2 of the notification which is relevant may be reproduced as under:-

"2. Further, teachers of all Grades including Head Masters of Primary/Jr. High Schools/High Schools and the Principals of Higher Secondary Schools (both on regular and contract basis) shall be entitled to premature increments on completion of tenure of services mentioned below:-

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|-----|--|--|
| (a) | Total completed 10-14 years of service | 2 advance increments at the lowest rate of the relevant scale. |
| (b) | Total completed 15-19 years of service | 3 advance increments at the lowest rate of the relevant scale. |
| (c) | Total completed 20-24 years of service | 4 advance increments at the lowest rate of the relevant scale. |
| (d) | Total completed service of 25 years and above. | 5 advance increments at the lowest rate of the relevant scale. |

"Total completed years of service" means the completed years of service rendered in a substantive, officiating or temporary capacity in a particular post of Teacher under the Education Department and includes:

- (a) the period of leave other than extraordinary leave or leave without pay."

The above scheme of pre-mature increment was abolished with effect from 2nd August, 1994 vide notification no.14/GEN/DOP dated 15th June, 1996 which was made effective retrospectively from 2nd August, 1994. The relevant portion of this notification is as follows:-

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"This Scheme shall be deemed to have come into force on 2nd day of August, 1994.

Sl. No.	Category	Existing scale	Corresponding Pay Scale of Advancement Grade.
1.	Graduate Teacher/ Head Master of Junior High School	Rs.1520-40-1600 EB-50-2300-EB-60-2660	Rs.1820-60-2600-EB-75-3200
2.	Post Graduate Teacher/Head Master of Secondary School	Rs.1820-60-2600 EB-75-3200	Rs.2525-75-3200-EB-100-4000
3.	Principal of Sr. Secondary School	Rs.2525-75-3200- EB-100-4000	Rs.3450-125-4700

2. Attainment of the Advancement Grade shall be decided by Departmental Promotion Committee constituted for the purpose vide Notification No.33/GEN/DOP dated 27.9.94.

3. The Scheme of Pre-mature Increment provided on the basis of length of service under Para 2 of the Notification No.178/GEN/Est. dt. 24.10.1980, shall be deemed to have been abolished with effect from 2nd day of August, 1994."

On 24th January, 1998, the Sikkim Government Services (Revised Pay) Rules, 1998 were promulgated by the Governor of Sikkim in exercise of the powers provided under proviso to Article 309 of the Constitution. These rules were enforced retrospectively with effect from 1st January, 1996. The Sikkim Government Services (Revised Pay) (Amendment) Rules, 1998 which amended the above rules in 1998 added rule 11 to the above Sikkim Government Service (Revised Pay) Rules, 1998 as under:-

"(a) Government servants up to the level of Deputy Secretary and equivalent shall be granted pay scales of the advancement grade on completion of 10 years of continuous service in a post/grade if they do not get any promotion during that period are given in Appendix-II subject to,

(i) Clearance by Departmental Promotion Committee,

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(ii) Non-appearance of any adverse entry in their Confidential Reports for preceding three years prior to consideration for advancement grade.

Provided that grant of advancement grade under this rule shall not be deemed to be promotion to the higher grade nor the employee shall have right to claim for promotion unless vacancy in such higher grade exists and is otherwise eligible to be considered for promotion to such higher grade.

- (b) Grant of advancement scale of pay would not involve any change in the designation of the employee concerned.
- (c) Grant of advancement grade of pay shall be once in a particular post/grade."

Therefore, under the above new rule 11 provision was made for advancement grade to government employees of different grade upto Deputy Secretary and equivalent grade. However, the above rule 11 was deleted by the Sikkim Government Services (Revised Pay) Amendment Rules, 1999 on and from 1st January, 1996 i.e. the date on which the rules were brought into force. Rule 2 of the said Amendment Rules provided as follows:-

"2. In the Sikkim Government Service (Revised Pay) Rules, 1998 (hereinafter referred to as the said rules), rule 11 shall be deleted."

Upon deletion of rule 11 from the Sikkim Government Service (Revised Pay) Rules, 1998 the Government simultaneously made separate provision for grant of advancement grade to different categories of government servants and promulgated the Sikkim Government Services (Advancement Grade) Rules, 1999 duly making it effective retrospectively from 1st January, 1996. These rules were published vide notification no.38/GEN/DOP dated 23rd September, 1999. These rules





similarly made comprehensive provision for grant of advancement grade to government servants up to the level of Deputy Secretary on completion of 10 years of continuous service. However, the persons on work charged establishment or on contract/ad hoc and persons engaged on muster roll basis were specifically excluded. Under rule 2 which is the exclusionary clause "persons on work charged establishment or on contract/ad-hoc and persons engaged on muster roll basis" were enumerated at sub-rule (f).

It is to be noted that the above words "contract/ad hoc and" occurring in rule 2(f) of the Sikkim Government Services (Advancement Grade) Rules, 1999 have now been deleted by the Sikkim Government Services (Advancement Grade) Amendment Rules, 2004 with the result that the persons working on contract/ad hoc basis also fall within the categories of government servants to whom the rules apply and who can be granted advancement grades.

Having thus noticed the relevant provision of the related rules, notifications and other administrative instructions in the matter, we may now take up the question of admissibility of the reliefs claimed by the petitioners.

9. So far as the relief of two pre-mature increments claimed by the petitioner in Writ Petition (C) no.33 of 2003 is concerned, the submission of the learned counsel for the petitioner is that the petitioner joined as graduate teacher on ad hoc basis on 4th September, 1980 and accordingly he





completed 10 years of continuous service on 3rd September, 1990 and as such he became entitled to pre-mature increment on 3rd September, 1990. As against this, the contention of the learned Advocate General, on the other hand, is that for an entitlement of two advanced increments under the relevant notification a government servant has to complete 10 years of continuous service and as the petitioner does not fulfil the requisite length of service he is not qualified for grant of pre-mature increments with effect from 3rd September, 1990 as claimed by him.

As per the statement of service record of the petitioner (annexure R-4) filed by the State-respondent, the petitioner joined service as teacher on contract basis on 4th September, 1980 and his contract service was terminated on 8th December, 1990. Then there was a gap of about 5¹/₂ years after which the petitioner was appointed on regular basis with effect from 21st June, 1996 in pursuance of the judgment passed by the Division Bench of this Court in Writ Petition no.27 of 1994 filed by several teachers including the present petitioner.

The above statement of the service record of the petitioner filed along with the counter-affidavit and marked as annexure R4 is not in dispute. The statement shows that during the service tenure of the petitioner spanning over 10 years there were several gaps in the service. The period between 25th May, 1987 to 16th June, 1987 (17 days) and period 8th May, 1989 to 25th May, 1989 (18 days) i.e. 35 days





in total have been treated as leave without pay. The period between 17th December, 1984 to 23rd December, 1984 (7 days) have been treated as GAP. Further, the period from 9th December, 1990 to 20th June, 1996 has been treated as extra-ordinary leave. Thus on deduction of the total gap period from the whole period on duty the length of contract service rendered by the petitioner comes to 9 years 11 months 28 days.

The notification no.178/Gen/Est. dated 24th October, 1980 under which the petitioner has claimed two pre-mature increments provides that two advanced increments shall be admissible to the teachers of all grades including Head-Master of Primary/Junior High Schools and the Principal of Higher Secondary Schools (both regular and contract basis) on completion of tenure of 10 to 14 years of service. The case of the petitioner falls under this clause and the question is whether the petitioner can be taken to have put in continuous service of the minimum period of 10 years. In this regard, the definition of "total completed years of service" as given in the notification is relevant. As per the explanation the total completed years of service means the total service rendered in a substantive, officiating or temporary capacity in a particular post of a teacher under the Educational Department and includes the period of leave other than extra-ordinary leave or leave without pay. It is obvious from this definition that the extra-ordinary leave or leave without pay is not to be counted





for computing the total completed year of service. The contention of the learned counsel for the petitioners is that the period from 25th May, 1987 to 16th June, 1987 and 8th May, 1989 to 25th May, 1989 ought not to have been treated as leave without pay since the petitioner had leave to his credit and the petitioner had requested for leave on the death of his grand-father. Whether the petitioner had leave in his credit and whether the leave applied for ought to have been sanctioned as leave without pay or any other kind of leave is a matter, which, in our view, ought to be decided by the competent authority on the basis of the materials before him in the light of the relevant rules. Hence at this stage, we are left with no option but to accept the position that the period of leave which have been treated as leave without pay is in conformity with the relevant rules and the computation of the continuous period of service done by the State-respondent does not suffer from any infirmity.

It thus follows that the petitioner does not qualify for grant of pre-mature increments.

So far as the service record of the petitioner in Writ Petition no.39 of 2003 is concerned, it appears from the statement filed and marked as Annexure - R4 that he joined service on contract basis on 2nd June, 1981. His contract services after several extension was ultimately terminated on 17th December, 1990. During the period between 2nd June, 1981 to 17th December, 1990, there was a gap of 11 days. The





actual period of service rendered by the petitioner from 2nd June, 1981 to 17th December, 1990 excluding the gap in service comes to 9 years 6 months and 13 days. It is the claim of the petitioner that he completed 10 years and became eligible for two pre-mature increments on 2nd June, 1991 but admittedly he was not in service from 18th December, 1990 onwards to 14th June, 1996 and therefore the question of counting period from the date of termination of contract service on 17th December, 1990 onwards to 2nd June, 1991 cannot arise. It is contended that out of 11 days gap 8 days have been illegally shown as leave without pay since the petitioner had applied for leave and he had leave in his credit. We have already indicated above that this is a matter to be decided at the discretion of the competent authority. It is however obvious that even if the 8 days in question were to be counted towards qualifying service the total length of service would still fall short of 10 years.

It therefore follows that the petitioners in both the cases are not entitled to grant of two pre-mature increments as they do not fulfil the requisite condition laid down in the relevant notification.

10. So far as the next relief of advancement grade is concerned, the contention of both the writ petitioners is that as per Sikkim Government Service (Revised Pay) Rules, 1998 which came into force with effect from 1st January, 1996, they would be entitled to advancement grade on completion of the





10 years of continuous service in the post/grade, on the same consideration as was followed in the Writ Petition bearing no.20 of 1999 filed by one C. K. Jacob, a post-graduate teacher. It appear that in the said Writ Petition the Division Bench of this Court which had heard the matter had directed the State-respondent to consider grant of advancement grade to the petitioner on completion of 10 years of service taking the view that the contract service of a post-graduate teacher must count for the purpose of computation of 10 years of continuous service. The learned counsel relied on the above case mainly for the purpose of highlighting the observation that contract service must count for the computation of the qualifying year of continuous service. We, however, find it hardly necessary for the petitioners to rely on the above judgment to support the above proposition keeping in view the changes that took place in the provision of the relevant rules and notifications after the above judgment.

As already noted herein-before, after the above judgment was passed the State Government promulgated the Sikkim Government Services (Advancement Grade) Rules, 1999 bringing the same into force with effect from 1st January, 1996. Rule 2(2)(f) provided that "persons on work-charge establishment or contract, ad hoc and persons engaged in muster roll basis shall not be eligible for advancement grade". It is stated by the learned Advocate General that even after the issue of such notification the department erroneously granted

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advancement grade to certain sections of teachers. Therefore in order to bring equity and justice the Government deleted the words "contract/ad hoc and" from 2(f) of notification no.38/Gen/DOP dated 5th July, 1999 by the Sikkim Government Services (Advancement Grade) Amendment Rules, 2004 published vide notification no.24/GEN/DOP dated 5th July, 2004 thereby making the contract or ad hoc service admissible for the purpose of grant of advancement grade. The State-respondents accordingly clarified that in view of this amendment the petitioners would be entitled for advancement grade subject to fulfillment of criteria laid down in notification no.38/Gen/DOP dated 23rd September, 1999.

In view of the above clarification given by the State-respondents it follows that it is open for the petitioners to seek grant of advancement grade subject to the fulfillment of the requisite conditions prescribed in the provisions of the relevant rules/notifications.

11. Now, coming to the question of notional fixation of initial pay of the petitioners on regular appointment the contention of the learned counsel for the petitioners is that the period of absence from duty on expiry of the contract service and the date of joining on regular appointment has to be counted towards qualifying service in terms of the direction of the Hon'ble High Court contained in the common judgment delivered in Original Writ Petition nos. 27 and 30 of 1994 and Writ Petition nos. 4 and 17 of





1995. It was submitted by the learned counsel for the petitioners that in the above Writ Petitions filed by the petitioners claiming regularisation the Division Bench of this Court which had heard the matter had held that "total period of service on ad hoc or contractual basis ignoring the period of break, if any, is to be reckoned as qualifying service towards the notional fixation of initial pay in the grade and also for the purpose of pension". Since State-respondent did not count the period in question as qualifying service towards notional fixation of initial pay while fixing the initial pay of the petitioners after their regular appointment the same was in contravention of the observation made by the Division Bench in the case.

12. The learned Advocate General in reply to the above contention of the learned counsel for the writ petitioners submitted that the interpretation placed by the Writ Petitioners on the judgment of the Division Bench of this Court in the above Writ Petitions and the Review Petition was misconceived. In support of this contention, the learned Advocate General referred to the observation made by the Division Bench of this Court in paragraph 17 of the judgment delivered in the Review Petition no.5 of 1995. It appears that the writ petitioners in the Review Petition had made a prayer for treating the past services of the ad hoc teachers as on duty for the years between date of retrenchment and their regularisation of service. It further appears that in the Review





Petition the Court had a clear opportunity of considering the argument that past service of ad hoc teachers whose services were going to be regularised should be taken into account for fixation of their seniority and they should be treated as on duty for the years in between the dates of the retrenchment and the regularisation of the service. Paragraph 17 of the judgment makes the above point clear.

"17. it has been argued on behalf of the respondents in this review petitioner that past Service of the adhoc teachers whose services are going to regularized should be taken into account for fixation of their seniority and also they should be treated as on duties for the years in between the dates of their retrenchment and of their regularisation in services. In this regard, we must refer to Dharwad P.W.D. Employees' Association case where it has been clearly noted that by awarding such a benefit, the Exchequer should not be encumbered unnecessarily and unreasonably. Moreover, in para 28(4) of the original judgement the effect of regularization of such adhoc Teachers were taken care of and it was noted that total period of service on adhoc or contractual basis, ignoring the period of break if any, is to be reckoned as qualifying service towards notional fixation of initial pay in the grade and also for the purpose of pension. Therefore, the candidate whose service are going to be regularized cannot expect anything further to the benefit ensured in Para 28(4) of the judgment. Since we have directed to place the adhoc Teachers who are to be regularized ahead of the Teachers to be recruited directly, some amount of benefit in terms of seniority becomes available to them."

On the basis of the above observation of the Court, it was contended by the learned Advocate General that the period of absence from duty from the date of expiry of contract service till the date of joining on regular service cannot be treated as qualifying service for any purposes. Accordingly the said period





was treated as extra-ordinary leave and the initial pay of the petitioners was fixed on the basis of what they had last drawn at the time of termination of their services on contract.

13. It is clear from the observation quoted above that the Court could not accept the contention of the petitioners in view of the law laid down by the Apex Court in Dharwad P.W.D. Employees' Association case wherein it was held that the exchequer was not to be encumbered unnecessarily and unreasonably by awarding such benefit. The Court had clarified the position by observing that "therefore, the candidate whose service are going to be regularized cannot expect anything further to the benefit ensured in Para 28(4) of the judgment. Since we have directed to place the adhoc Teachers who are to be regularized ahead of the Teachers to be recruited directly, some amount of benefit in terms of seniority becomes available to them".

In our considered view, the above observation of the Court leaves no room for doubt that the period of absence from duty between the date of termination of the contract service and the date of regular appointment is not to be counted as qualifying service towards notional fixation of initial pay in the grade.

14. The learned Advocate General also submitted that the period between termination of the contract service and the regular appointment cannot be treated as a qualifying service for any purpose becomes clear not only from the above





observation made by the Division Bench of this Court in the Review Petitioner no.5 of 1995 but also from the letters of acceptance duly signed by the writ petitioners at the time of accepting the offer of appointment on regular basis.

15. The letter of acceptance dated 17th June, 1996 addressed to the Director, Department of Education, Government of Sikkim by the petitioner in Writ Petition no.33 of 2003 clearly states that "I have accepted the offer letter no.55/Edn dated 15th June, 1996 for the appointment of graduate teacher and also I have submitted the documents required". The letter further says "I therefore request you kindly to issue the posting order". The letter of acceptance dated 12th June, 1996 signed by the petitioner in Writ Petition no.39 of 2003 similarly states that he has accepted the offer of appointment and accordingly posting order may be issued. The contention of the learned Advocate General on the basis of such letter of acceptance is that the period in question was treated as extra-ordinary leave not only in terms of the observation made in the above said Writ Petitions but it was also in terms of the conditions specified in para 7 of the memorandum no.55/Edn/Est dated 15th July, 1996 issued to the petitioner by way of offer of appointment and duly accepted by the petitioners at the time of regular appointment. It was further clarified by the learned Advocate General that in the said offer of appointment, it was a clear condition that the period between the date of termination of contract service to the date





of joining on regular appointment will be treated as extraordinary leave and no arrears of salary for the period of extraordinary leave shall be payable. This condition was accepted in writing by the petitioners in their letters of acceptance already referred to above. It was on such acceptance of the said offer by the petitioners that appointment orders on regular basis were issued and the question of counting this period towards qualifying service for any purpose cannot arise. The terms and conditions of appointment duly accepted by the petitioners thus clearly show that the period in question was to be treated as leave without pay and not to be counted as qualifying service.

It was, of course, contended by the learned counsel for the petitioners that the condition in the memorandum in question was unilaterally imposed upon the petitioners by the respondent and the petitioners who were at the receiving end without a job were forced to accept the same against their will and as such, the same is not binding on them. We, however, doubt whether it is open to the petitioners to advance such an argument after having accepted the condition and also having accepted the job offered by the State-respondent.

16. The above therefore shows that the offer of appointment was accepted by the petitioners in writing and now there seems to be no room for raising any plea that it was unilaterally imposed and they were forced to accept the offer against their will in so far as it is contrary to the letter of acceptance. Taking into account the fact that the petitioners





were not lay men but qualified graduate teachers and the fact that they willingly accepted the offer there seems to be no scope for raising the plea of unilateral force or duress. Had there been such unilateral force it was open for the petitioners to decline the offer of appointment. However, the petitioners have willingly accepted the offer of appointment and joined as graduate teacher. This implies absence of any inducement or unilateral force as contended by the learned counsel.

It therefore follows that the period between termination of contract service and date of joining on regular service cannot be counted as qualifying service for any purpose.

For the above reasons, we are of the view that the period between the termination of contract service and the date of joining on regular service cannot be counted towards qualifying service for the purpose of notional fixation of initial pay. For the same reasons, the reliefs relating to protection of seniority of the petitioners in Writ Petition no.33 of 2003 and the relief relating retirement benefits in respect of petitioners in Writ Petition no.39 of 2003 cannot be allowed.

17. So far as the question of preparation of seniority list is concerned, it was clarified by the learned Advocate General that the preparation of seniority list of graduate teachers is under process. Since the matter is already under process, we find no reason to pass any direction in this regard except expressing the hope that the preparation will be completed at the earliest possible time.



18. The learned counsel for the petitioners also submitted that the petitioners were discriminated against in the matter of grant of pre-mature increment, advancement grade and notional fixation of pay on regular appointment. He drew the attention of this Court to the averment made in paragraph 13 of the Writ Petition no.39 of 2003 to the effect that the respondent granted two pre-mature increments/advancement grade to number of other teachers who were similarly placed or even worst placed than the petitioners. In support of the averment the petitioner has given particulars of 6 such cases in which such pre-mature increments/advancement grade have been given without counting the gap in service as break as in the present case of the petitioners. The petitioners has also mentioned names of 4 such teachers in whose case gap of days ranging from 10 days to 74 days have not been treated as break in service. The learned counsel specifically pointed out the case of one U.N. Dubey, PGT (Math) of Sadam Senior Secondary School who was similarly placed with a petitioners but who has been given advancement grade with effect from 22nd March, 1999 ignoring the period of gap from 22nd March, 1991 to 9th June, 1996. In his case, it is further stated that the respondent counted the long gap of 5^{1/2} years and also the minor gap in between two sessions and other leaves including extra-ordinary leave as qualifying service whereas the similar gap of 5^{1/2} years as well as the minor gaps in the case of present petitioners have been treated as break in service





thereby denying the petitioners the benefit of pre-mature increments as well as advancement grades from the date they were entitled to.

It was further submitted that Mr. Dubey was a post-graduate teacher whereas the petitioners are graduate teachers but all the same they are similarly placed because the advancement grade rules for both the graduate as well as post-graduate teachers are the same.

On the basis of the above averments it was submitted that the petitioners were entitled to be granted the same benefits.

The above averments if true do appear to be serious enough even to amount to discrimination. We are however not in a position to verify as to whether cases similar to that of the petitioners have been dealt with differently by the respondent-department in the manner as alleged but it appears to us that even if we were in a position to do so it would be of no consequence in so far as any order passed by an authority in case of similarly situated person can never be a ground for issuing writ in favour of the petitioners as per the law laid down by the Hon'ble Supreme Court, in the case of Chandigarh Administration and another vs. Jagjit Singh and another reported in AIR 1995 SC 705. According to this decision, an illegal or unwarranted order passed by any authority furnishes no ground for the High Court to compel the authority to repeat



that illegality over and over again. Paragraph 8 of the judgment which contains the observation of the Apex Court is as follows:-

"8. We are of the opinion that the basis or the principle, if it can be called one, on which the writ petition has been allowed by the High Court is unsustainable in law and indefensible in principle. Since we have come across many such instances, we think it necessary to deal with such pleas at a little length. Generally speaking, the mere fact that the respondent-authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent-authority to repeat the illegality or to pass another unwarranted order. The extra-ordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the respondent-authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality over again and again. The illegal/unwarranted action must be corrected, if it can be done according to law – indeed, wherever it is possible, the court should direct the appropriate authority to correct such wrong orders in accordance with law – but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition. By refusing to direct the respondent-authority to repeat the illegality, the court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law. Of course, if in case the order in favour of the other person is found to be a lawful and justified one it can be followed and similar relief can be given to the petitioner if it is found that the petitioner's case is similar to the other person's

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case. But then why examine another person's case, in his absence rather than examining the case of the petitioner who is present before the court and seeking the relief. Is it not more appropriate and convenient to examine the entitlement of the petitioner before the court to the relief asked for in the facts and circumstances of his case than to enquire into the correctness of the order made or action taken in another person's case, which other person is not before the Court nor in his case. In our considered opinion, such a course – barring exceptional situations – would neither be advisable nor desirable. In other words, the High Court cannot ignore the law and the well-accepted norms governing the writ jurisdiction and say that because in one case a particular order has been passed or a particular action has been taken, the same must be repeated irrespective of the fact whether such an order or action is contrary to law or otherwise. Each case must be decided on its own merits, factual and legal, in accordance with relevant legal principles. The orders and actions of the authorities cannot be equated to the judgments of the Supreme Court and High Courts nor can they be elevated to the level of the precedents, as understood in the judicial world. (What is the position in the case of orders passed by authorities in exercise of their quasi-judicial power, we express no opinion. That can be dealt with when a proper case arises)."

In view of the above, this Court cannot, in exercise of the extra-ordinary and discretionary power, issue any direction in terms of the above prayer made by the writ petitioners. We may however place on record the submission made and the assurance given by the learned Advocate General on the issue.

19. The learned Advocate General in response to the above submission of the learned counsel for the petitioners very fairly conceded that some error was committed by the department in the case of Mr. Dubey and few others but the department is going to take steps to rectify the same. In view





of this assurance, we are not inclined to pass any directions. We, however, hope the concerned department will take immediate needful steps to set right the irregularities and once that is done the petitioners will have no cause for similar grievance.

20. Thus on a proper application of our mind to the contentions raised by the parties, we are of the view that the petitioners do not fulfil the requisite conditions for grant of the two pre-mature increments and that the period between the date of termination of contract service and the date on which they were appointed on regular basis cannot be counted as qualifying service for the purpose of fixation of initial pay, protection of seniority or for retirement benefits. It thus follows that the writ petitioners are only entitled to the relief of advancement grade subject to their fulfilling the conditions laid down in the relevant notification.

21. In the result, the writ petitions are partly allowed and the State-respondents are directed to consider grant of advancement grade to the petitioners in terms of the relevant rules/notifications.

22. No order as to costs.


(**A. P. Subba**)
Judge
12-07-2005

23. I agree.


(**N.S. Singh**)
Chief Justice (Acting)
12-07-2005