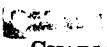


The Union of India etc. v. Kirpal Singh etc. (Gopal Singh, J.)

(5) In fairness to Mr. Ambalvi we notice that ultimately the learned counsel conceded that neither under sections 108B nor 124 any appeal lay and he argued that his only remedy, if at all, should be under Articles 226 and 227 of the Constitution. Counsel prayed before us that we should treat the present appeal as a writ petition under those Articles. We are wholly disinclined to do so, but we would observe that the rejection of the present appeal as incompetent would not in any way prejudice the rights of the appellant to seek such other remedies which at law may be available to him.

(6) We consequently hold that the appeal is incompetent and dismiss the same, however without any order as to costs.

 SHARMA, J.—I agree.

N.K.S.

LETTERS PATENT APPEAL

Before Prem Chand Pandit and Gopal Singh, JJ.

THE UNION OF INDIA, ETC.—Appellants.

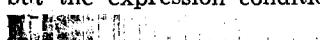
versus

KIRPAL SINGH, ETC.—Respondents.

Letters Patent Appeal No. 714 of 1970.

March 10, 1972.

States Re-organisation Act (XXXVII of 1956)—Section 115(7)—Practice in a Government Department of Pepsu regarding higher scale of pay on passing an examination—Whether covered by section 115(7)—Punjab Educational Service Class III School Cadre Rules (1955)—Rules 7 and 10—Appointment to the posts in the service—Appointing authority—Whether has full discretion to determine from what source or sources such appointments to be made—Executive instructions issued by the Government fixing scales of pay—Whether can be issued under Rule 10 and are statutory.

Held, that a practice prevalent in a Government Department of Pepsu before merger regarding higher scale of pay on passing an examination even though hardened into a rule of law is not covered by section 115(7) of States Reorganisation Act, 1956. Government servants who were serving in Pepsu prior to merger are entitled to protection against the conditions of service, but the expression condition of service cannot cover such like practice.  (Para 7).

Held, that clause (i) of Rule 7 of Punjab Educational Service Class III School Cadre Rules, 1955 provides that posts in the Service may be filled either by direct recruitment or by transfer from other services or by promotion from lower grade in the Service itself. According to this rule it is in the discretion of the appointing authority to determine as to from what source or sources and in what proportion should teachers be appointed and again, it is the appointing authority, who is to base his decision for appointment on considerations of qualifications and/or consistent good record for a number of years and no official shall have any claim to such appointment as of right. (Para 11).

Held, that Rule 10 of the Rules authorises the Government to provide for scales of pay, to which a member of the Service may be entitled. It is in the discretion of the Government to fix such scales of pay and to revise those existing as provided in Appendix 'A' attached to those rules. It is in exercise of the statutory power conferred by that rule that the Government is authorised to issue executive instructions fixing the scales of pay. The instructions amount to an order passed by the Government in exercise of its power under Rule 10, and they cannot be dubbed as administrative in character. (Para 16).

Letters Patent Appeal under Clause X of the Letters Patent against the Judgment of Hon'ble Mr. Justice Bal Raj Tuli passed on 26th August, 1970 in Civil Writ No. 3301 of 1969.

R. C. Dogra, Advocate for Advocate-General (Punjab), for the appellant.

S. Abnasha Singh, Advocate and J. I. Gupta, Advocate, for the respondents.

JUDGMENT

GOPAL SINGH, J.—(1) This is letters patent appeal by the State of Punjab and the Director of Public Instruction, Punjab, against Kirpal Singh and 20 others. Union of India has been inadvertently shown as an appellant. The appeal is directed against the judgment of single Judge, dated August 26, 1970 partially allowing the writ petition filed on behalf of the respondents under articles 226 and 227 of the Constitution.

(2) The facts leading to the appeal are as under :—

(3) The respondents were teachers in the erstwhile State of Pepsu, prior to the merger of that State in Punjab on November, 1, 1956. When they originally joined, they were either J.B.Ts. or J.S.Ts. According to the practice prevalent in the Education Department of Pepsu State, these teachers were on passing Bachelor of

The Union of India etc. v. Kirpal Singh etc. (Gopal Singh, J.)

Teaching examination or its equivalent entitled to be appointed as Masters in the higher scale of pay of Rs. 90—140. Some of the petitioners passed B.T. examination prior to the date of merger whereas others did so thereafter. After merger, the higher scale of pay of Rs. 90—140 grantable to Masters was revised to a pay scale of Rs. 110—250. The claim of the respondents is that by virtue of Section 115(7) of the States Reorganisation Act, 1956, hereinafter called the Act, they are entitled to the higher revised scale of pay inasmuch as they became entitled to that scale meant for the post of a Master consequent upon their passing examination of Bachelor of Teaching or its equivalent. Their stand is that the practice, which was prevalent in Pepsu, had hardened into a rule of law and could not be given a go-bye in the face of the said provision of the Act. The respondents in the alternative pleaded that in any case according to letter, dated July 23, 1957, which became effective from May 1, 1957, circulated on behalf of the appellants, they are entitled to that revised grade if they passed the examination of Bachelor of Teaching or its equivalent. By letter, dated November 7, 1958, the respondents also claimed to be considered for appointment to the posts of Masters to the extent of 25 per cent of the vacancies that occurred from time to time and only 75 per cent of the vacancies had to be filled otherwise. The case of the appellants is that after the merger, the practice said to be in vogue in Pepsu had not been recognised and was not binding on them. It was denied on behalf of the appellants that either the letter, dated July 23, 1957 entitled the respondents to claim grade of Rs. 110—250 or that they could on the basis of letter, dated November 7, 1958 claim appointment to the post of a Master. These claims of the respondents were not recognised. They made repeated representations to the Department with no effect.

(4) In the writ petition filed on behalf of the respondents on December 22, 1969, they claimed that writ or direction be issued to the appellants to grant them the pay scale of Rs. 110—250 and to promote them as Masters.

(5) The learned single Judge did not agree with the contention of existence of any continuous and consistent practice as alleged on behalf of the respondents. He, however, after considering the letters referred to above along with the service rules applicable came to the conclusion that the respondents were entitled to claim the revised pay scale of Rs. 110—250, with effect from October 22, 1966, on the

footing that they became entitled to that grade of pay from May 1, 1957 or the date, when they passed the B.T. or B.Ed. examination, whichever is earlier (it should be later) and be treated as having been serving in that grade continuously and not on six months basis. The appellants were further directed to consider the respondents for appointment to the posts of Masters in the revised scale to the extent of 25 per cent of the vacancies as fixed for their category in accordance with seniority-cum-merit formula without taking into consideration the question of combination of subjects. The appellants feeling aggrieved of the judgment of the learned single Judge have preferred the appeal.

(6) It has been contended by the counsel for the appellants that the respondents having confined their case in the writ petition to the prevalence of practice about B.Ts. or their equivalent being entitled to the scale of post of a Master upon their passing that examination and having not pleaded in the alternative that they were entitled to the grade of Rs. 110—250 by virtue of letter, dated July 23, 1957 nor their having relied upon letter, dated November 7, 1958 to support their appointment as Masters, the learned single Judge should not have considered their case on the basis of these two letters, when on the footing of the practice claimed by them, they did not succeed. He also urged that by virtue of Rule 7 of the Punjab Educational Service, Class III, School Cadre Rules, 1955, hereinafter called the Rules, the respondents are not entitled to seek shelter behind these letters. Shri Abnasha Singh, appearing on behalf of the respondents contended that the respondents were entitled to the advantage of the practice, which was in force in Pepsu. He relied on sub-section (7) of Section 115 of the States Reorganisation Act, 1956. He also pleaded in the alternative that there is every justification for the claim of the respondents being recognised to the grade of Rs. 110—250 while functioning as teachers on the basis of letter, dated July 23, 1957 consequent upon their acquiring degree of Bachelor of Teaching or its equivalent. He also stressed that they were entitled to be appointed to the extent of 25 per cent of the posts of Masters, which fell vacant from time to time and that Rules 7 and 10 read in conjunction with item (ii) of Appendix 'A' attached to the Rules fully warrant the claim of the respondents as recognised by the learned single Judge.

(7) Before dealing with the rival contentions of the parties based upon the two letters and the Rules as relied upon by them,

The Union of India etc. v. Kirpal Singh etc. (Gopal Singh, J.)

it will be proper to dispose of the additional point pertaining to the practice said to have been prevalent in the Education Department of Pepsu before its merger in Punjab on November 1, 1956. It has been urged on behalf of the respondents that right up to the beginning of 1955, there had been followed practice that teachers acquiring degree of Bachelor of Teaching or equivalent became entitled to the scale of post of Master the day they passed that degree examination. It is contended that by virtue of sub-section (7) of Section 115 of the Act that practice had virtually become a rule of law and consequently the respondents were on the footing of that practice entitled to the Master's grade on the date they passed Bachelor of Teaching examination. Admittedly, that practice was not followed in Pepsu in 1955 nor in 1956 prior to the date of merger on November 1, 1956. Government servants, who were serving in Pepsu prior to merger are entitled to protection against conditions of service, which gave them additional advantage. The expression, condition of service could not cover such a practice. Couple of years before the date of merger this so-called practice had been given a go-bye by the Department of Education of Pepsu and the employees of that Department entitled to the advantage of that practice did not claim that advantage. Not only those, who, came to possess degree in Bachelor of Teaching in 1955 and in 1956 were not granted the scale of the post of a Master but even thereafter after merger of Pepsu with Punjab, this scale was not given to them either in 1956 or in 1957. The Government declined to recognise that claim of theirs. Although they made some representations to the Government but seem to have adjusted themselves to the non-recognition of their claim on the basis of that practice and did not move either by way of suit or by way of writ petition under article 226 of the Constitution. The writ petition, which has given rise to the present appeal was filed as recently as December 22, 1969. It was sought to be enforced for the first time in that writ petition. The refusal of the Governments both of Pepsu and Punjab from 1955 to December, 1969 was not earlier cared to be contested or challenged. Thus, this point raised on behalf of the respondents has no force and the view taken by the learned single Judge is fully warranted.

(8) Before the merits of the respective contentions of the parties are taken up, it is necessary to dispose of the point urged on behalf of the appellants that the two letters having not been relied upon by the respondents in the writ petition and their case having been founded upon the above referred to practice alone, the decision given by the learned single Judge on the basis of those letters is not

called for. There is no doubt that there is no reference to letter, dated July 23, 1957 in the body of the writ petition as initially filed. On behalf of the respondents, there was filed an affidavit of Sat Paul, dated July 27, 1970. In that affidavit, reliance has been placed upon that letter. The relevant portion of that letter has been reproduced in that affidavit. In reply to that affidavit, there was filed counter affidavit of appellant No. 3. The existence and contents of that letter have been specifically admitted in that counter-affidavit. Its effect as urged on behalf of the respondents has, however, been denied. This affidavit filed on behalf of the respondents has to be treated as supplementary to the petition supported by an affidavit and so also has to be treated the counter-affidavit filed on behalf of the appellants as supplementary of the return filed earlier. Thus, the Plea raised that reference to this letter does not find place in the body of the writ petition has no significance. Subsequent affidavit filed on behalf of the respondents has to be treated as part of the writ petition and consequently it cannot be held that the respondents did not rely upon that letter, in support of their plea of their being entitled to the grade of Rs. 110—250. The other objection that letter, dated November 7, 1958 has not been relied upon by the respondents in their writ petition has no force. It has been specifically referred to in para 10 of the petition. Its existence and contents as relied upon by the respondents in that para have been admitted in the corresponding para of the return filed on behalf of the appellants although it has been urged that the view about the contents and scope of the letter as sought to be made out on behalf of the respondents has not been accepted. Thus, the point raised on behalf of the appellants that these letters had not been relied upon by the respondents in their writ petition and consequently the learned single Judge should not have considered their case on the basis of those letters has no substance.

(9) Now I come to the rival contentions of the parties. The contentions will be better appreciated if the above letters and others pertaining thereto along with the rules are discussed in their chronological order.

(10) Before I deal with the letters, it is necessary to refer to the Rules, which came into force on May 23, 1957. Rule 7 of the Rules runs as follows :—

“Method of recruitment.—(i) Posts in the service shall be filled—

(a) by direct appointment, or

The Union of India etc. v. Kirpal Singh etc. (Gopal Singh, J.)

- (b) by transfer of an official from other services or posts of Government in the Education Department of any Government in India; or
- (c) by promotion from lower grades in the service;
- (ii) when a vacancy occurs or is likely to occur in the service, the appointing authority specified in rule 3, shall determine in what manner such vacancy will be filled.
- (iii) Appointment to any post by promotion of officials already in the service or by transfer from other services within the Education Department of Government or other departments of any State or Central Government shall be made strictly by selection based on consideration such as qualifications and/or consistent good record for a number of years and no official shall have any claim to such appointment as of right."

(11) Clause (i) of Rule 7 provides that posts in the Service may be filled either by direct recruitment or by transfer from other services or by promotion from lower grade in the Service itself. These are the three sources, from which appointments to posts in the Service can be made. By virtue of clause (ii) of the Rule, the manner in which the vacancies are to be filled, whether by direct recruitment, by transfer or by promotion shall be determined by the appointing authority, which, as given in Rule 3 of the Rules in relation to the teachers means appellant No. 3, Clause (iii) of Rule 7 says that an appointment to be made by the appointing authority shall be made strictly by selection based on qualifications and/or consistent good record for a number of years and no official shall have any claim to such appointment as of right. Thus, according to this rule, it is in the discretion of the appointing authority to determine as to from what source or sources and in what proportion should teachers be appointed and again, it is the appointing authority, who is to base his decision for appointment on considerations of qualifications and/or consistent good record for a number of years and no official shall have any claim to such appointment as of right.

(12) The next rule, which has been relied upon by the parties in connection with the question of right of the Government to fix scale of pay is Rule 10. That rule runs as follows :—

"Members of the service will be entitled to such scales of pay as may be authorised by Government from time to time.

The scales of pay at present in force are specified in Appendix 'A' against each post."

(13) The relevant item in respect of the posts of Masters in Appendix 'A' is item (ii). According to Rule 10, the scale of pay, to which an incumbent in the Service is entitled, shall be the one as may be determined by the Government from time to time. According to this rule, it is in the discretion of the Government to revise scales of pay from time to time as it thinks necessary. The scale of pay given in item (ii) for the posts of Masters, who are ordinary graduates with degree of Bachelor of Teaching or equivalent thereof is Rs. 110—8—190/10—250 whereas for M.As. and M.Sc.s., with the degree of Bachelor of Teaching or Master of Teaching or their equivalents, the start of the grade is higher.

(14) Letter, dated July 23, 1957 was addressed by the Secretary to Government, Punjab, Finance Department to all Heads of the Departments. The subject mentioned in that letter is 'Revision of scales of pay of low-paid Government Servants'. The relevant portion of that letter runs as follows :—

"I am directed to state that for some time past the question of the revision of scales of pay of the subordinate services and of removing anomalies occasioned by the piecemeal revisions of the scales of pay of certain classes of non-gazetted Government servants, in the past, has been engaging the attention of Government. After carefully considering the recommendations made by the pay Revision Committee appointed to examine this matter, it has been decided that the existing scales of pay of certain categories of posts should with effect from the 1st May, 1957 be revised as shown in the enclosed statement."

(15) By this letter, the Government revised the scales of pay of subordinate services including those of the teachers in the Education Department. The revision of the scales was introduced with effect from May 1, 1957. Various scales of various services are given in the statement enclosed to that letter. In that statement, it is mentioned that the teachers in the Education Department would be placed in two categories, 'A' and 'B'. Category 'A', with which we are concerned relates to ordinary graduates with additional qualifications of a degree of Bachelor of Teaching or its equivalent. The revised scale given to such teachers is of Rs. 110—8—190/

The Union of India etc. v. Kirpal Singh etc. (Gopal Singh, J.)

10—250.' Thus, according to this letter all those, who satisfied the test of the said educational qualifications became entitled to the grade of Rs. 110—8—190/10—250. In that letter, there is no further limitation or qualification as to its applicability being subject to combination of certain subjects taken by them or being subject to their selection by the Subordinate Services Selection Board. In other words, this letter settled the question that any one serving as a teacher in the Education Department, who satisfied the test of certain academic qualifications, became entitled to the scale of Rs. 110—250. This letter will apply not only to those, who had passed the Bachelor of Teaching examination or its equivalent examination either before May 1, 1957 or they passed that examination after that date. If they fulfilled the condition of the said academic qualifications before or on May 1, 1957, they became entitled to the said revised scale of pay with effect from that date. If they passed that examination after that date, they became entitled to that grade from the date they passed that examination.

(16) An attempt was made by the learned counsel for the appellants to urge that this letter is administrative in character and has no statutory force. As referred to above, Rule 10 of the Rules authorises the Government to provide for scales of pay, to which a member of the Service may be entitled. It is in the discretion of the Government to fix such scales of pay and to revise those existing as provided in Appendix 'A' attached to those rules. It is in exercise of the statutory power conferred by that rule that the Government issued letter, dated July 23, 1957 and entitled ordinary graduates with further academic qualification of being holders of degree of Bachelor of Teaching or equivalent thereof to the higher scale of pay of Rs. 110—250. That letter amounts to an order passed by the Government in exercise of its power under Rule 10. That letter could not be dubbed merely to be a letter incorporating order of administrative character.

(17) It is on the basis of letter, dated July 23, 1957 that Sarvshri Sham Lal and Ishar Singh teachers were granted the grade of Rs. 110—250, with effect from May 1, 1957 as provided in that letter. This was done by appellant No. 3, by his order, dated November 21, 1969. If appellant No. 3 has applied that letter to Sarvshri Sham Lal and Ishar Singh, who have the qualification of being Bachelors of Teaching, there is no reason why the respondents, who have the same academic qualification should have been differently treated. If the letter can apply to these two

teachers from Pepsu, it can equally apply to others of that category. This order shows that appellant No. 3 as Head of the Education Department has himself given the benefit of letter, dated July 23, 1957, in any case to two of them though that benefit was denied to others.

(18) In order to seek clarification of the above letter, dated July 23, 1957 about its application to Pepsu unadjusted teachers possessing degrees in Bachelor of Teaching or equivalent thereof, the President of the Pepsu Unadjusted B.Ts. Union addressed a letter, dated August 23, 1957 to the Secretary to Government, Punjab, Finance Department and asked if it could be presumed that B.A., B.Ed. teachers from Pepsu could claim the grade of Rs. 110—250 as mentioned in that letter of the Government. The Secretary of the Department sent communication, dated September 24, 1957 to the President of the Union in reply as under :—

“Your presumption that teachers holding B.A.B.T./B.A.B.Ed. qualifications would henceforth be placed in category ‘A’ is confirmed.”

(19) Thus, according to this letter of the Government, the revised scale was reiterated to be applicable to the respondents.

(20) Now, I come to the next letter, dated November 7, 1958 addressed by appellant No. 3 to the Inspectors of Schools. The subject of this letter is ‘Promotion of the so-called unadjusted B.A.B.T./B.Ed. teachers to the posts of Masters in 110—250 grade’. The necessity of this letter arose because in spite of the revised grade of Rs. 110—250 having been granted to B.Ts. or equivalent thereof, they were not being appointed by process of promotion to the posts of Masters. Even if anybody aspired to be appointed to that post, he had to be considered by the Subordinate Services Selection Board on merits and could not claim promotion to that post. The relevant portion of that letter runs as follows:—

“It has been decided that 25 per cent posts of B.T./B.Ed. Masters in Rs. 110—250 grade should be filled by promotion from amongst the teachers working in lower grade, who have passed the B.A.B.T./B.Ed. examinations. The selection is to be made on the basis of seniority-cum-merit, due regard being paid to good reputation regarding character, popularity among students and parents and capacity to maintain discipline.”

(21) According to this letter, teachers from Pepsu, who were B.Ts./B.Eds. were entitled to be appointed to the post of a Master

The Union of India etc. v. Kirpal Singh etc. (Gopal Singh, J.)

with the grade of Rs. 110—250. This letter specifically says that to the extent of 25 per cent these teachers are entitled to be appointed by promotion with the further qualification of their being so entitled on the footing of seniority-cum-merit. According to this letter, Pepsu teachers could not claim vacancies by promotion exceeding 25 per cent of all the vacancies of the posts of Masters occurring. Secondly, their claim for appointment by promotion had to take into consideration not merely their seniority but also their merit. This letter thus reserves the appointment to the posts of Masters for Pepsu teachers if they satisfied the academic qualification given therein any if they so deserved by seniority-cum-merit percentage of 25 as fixed by this letter for the Pepsu teachers is covered by clause (ii) of Rule 7 whereas the basic principle of selection for appointment as evolved for those teachers is covered by clause (iii) of Rule 7 of the Rules. This letter again came to be written incorporating the order of the Government passed in exercise of power conferred by Rule 7. This letter too could not be assailed on the ground of its being merely of executive nature and having nothing to do with Rule 7. It is in pursuance of the power conferred by Rule 7 that it derives its strength for its existence.

(22) The earlier letter, dated July 23, 1957 merely fixed scale of pay on the basis of academic qualifications. The subsequent letter, dated November 7, 1958 recognises the right of promotion to the teachers to the posts of Masters limited to the extent of 25 per cent on the footing that if they are entitled to be promoted when judged by the test of seniority-cum-merit basis, they be promoted. The scope of the letter admits of no doubt that it deals with the subject of promotion to the posts of Masters recognising the scale of pay as given in item (ii) of Appendix 'A' attached to the Rules.

(23) Although, by letter, dated November 7, 1958, the Inspectors of Schools had to supply information with regard to the class of teachers covered by it in a *pro forma* enclosed with that letter, in order to implement the decision taken by that letter, this decision was, however, not implemented. By letter, dated November 27, 1959, an assurance was held out to the teachers that steps were being taken to implement the decision taken by letter, dated November 7, 1958. No implementation of that decision, however, followed till 1962. Some of the teachers were, however, from time to time promoted but never continuously beyond period of six months. After completion of six months, there was given break to avoid continuity in service for the posts of Masters beyond six

months. The stand of the appellants was that the Pepsu teachers could not be considered for promotion unless their adjustments for appointments were made through the Subordinate Services Selection Board and by the Board too only if they satisfied the condition of the subjects combination, namely, if ordinary graduates with training qualifications, they must have studied two out of four subjects of History, Geography, Economics and Political Science and if M.A. one of these four subjects in B.A. and one of these three subjects other than Political Science had also been studied by them. The case of the respondents is that once the Government had taken a decision as contemplated by letter, dated November 7, 1958, they should not have dilly-dallied for its implementation and that the device resorted to by the Government to appoint for six months on temporary basis and not to allow them to continue beyond that period shows that Government was not carrying into effect the letter and spirit of that decision. It is further stressed on their behalf and quite rightly that that decision for appointment by way of promotion is completely independent of any consideration like the combination of subjects or the matter of appointment by promotion being indispensably reference to the Subordinate Services Selection Board. The contents of letter, dated November 7, 1958 do not even remotely suggest of the implementation of that decision being subject to these limitations or restrictions. To the extent of 25 per cent as reserved for Pepsu teachers, they were in terms of that letter entitled to be promoted without their case being referred to the Selection Board or their being further subject to additional qualification of combination of certain subjects. Thus, it was sought to be made out on behalf of the appellants that letter, dated November 7, 1958, was subject to the limitations of the subjects combination and reference to Selection Board has, in the light of language of that letter, no force. The letter has devised only two limitations, (1) Pepsu teachers cannot claim more than one-fourth of the vacancies of the posts of Masters occurring and (2) while so claiming by way of promotion, their cases shall be considered by the appointing authority on the basis of seniority-cum-merit. By necessary implication it follows that only these two limitations were to cover the cases of their promotions and no other limitation was to be taken into account while appointing them to the posts of Masters by way of promotion. In the return filed on behalf of the appellants, no reliance was placed by the appellants on the condition of subjects combination. There is no reference to it in the body of the return filed on their behalf. No

The Union of India etc. v. Kirpal Singh etc. (Gopal Singh, J.)

annexure was placed on the record to show that any such condition had to be there. In course of arguments in reply to the arguments by the counsel for the respondents, the counsel for the appellants wanted to refer to a letter on the Government file referring to the condition of the subjects combination being satisfied under certain circumstances. As the point had not been specifically taken in the return although its reference in the judgment shows that something was mentioned about it without the material pertaining thereto having been placed on the record, the respondents had no opportunity before the learned single Judge to controvert the contents of that letter, which is now sought to be relied upon and to be placed on the record. Even in the ground of appeal, no ground had been specifically taken to the effect that appointments by promotion by virtue of letter, dated November 7, 1958, were subject to the condition of the subjects combination being fulfilled. Considering all these circumstances, we do not think it proper to allow the counsel for the appellants for the first time to draw out of the relevant file a document and to place it on the record of the Court to show that subjects combination was a condition applicable to the respondents. On the basis of the material produced on the record, the appellants have failed to prove that the condition of subjects combination is applicable to the respondents.

(24) Now I come to the second condition pertaining to the matter of appointment to the post of a Master being referable to the Subordinate Service Selection Board. That stand has been taken on the footing of clause (vi) pertaining to functions of Selection Board given in notification, dated September 11, 1953, issued by the State Government in exercise of powers conferred under article 309 of the Constitution. That notification provides for the constitution of the Board and its function. Clause (vi) deals with its functions. In that clause, it is stated that all appointments to non-gazetted posts, which carry an initial salary of Rs. 50 per mensem or above shall be made on the advice of the Board provided that the State Government shall be competent to exclude any post from the purview of the Board. It has not been denied on their behalf that the Government did not exclude the appointment to the posts of Masters from the purview of the functions of the Board. The scope of Clause (vi) of the notification does not cover cases of promotions on the footing of seniority-cum-merit. The appointments to posts by direct recruitment are contemplated to be covered by Clause (vi). The function of the Board

is purely advisory. Even if advice is tendered by a Board in connection with the cases of appointments, Government is not bound by that advice. The Government may make appointment, not because of the advice but inspite of it. Thus, the advice of the Board is not binding on the Government. Hence if advice of the Board has not been sought and the appointment has been made inspite of that advice, the non-seeking of advice by the Government will result in mere irregularity and not vitiate the appointment made by the Government without any advice sought from the Board. The plea as to the appointment by promotion in pursuance of letter, dated November 7, 1958, being subject to seeking of advice of the Selection Board was not raised on behalf of the appellants in the return filed although as the judgment of the learned single Judge indicates, it was referred to at the time of arguments. The respondents were not afforded any opportunity to controvert the applicability of that notification to the present case and in particular to show that an order had been passed by the Government to exclude the posts of Pepsu teachers as covered by that letter, from the purview of the Selection Board.

(25) For the reasons recorded above, we find that the writ-petitioners are entitled to the following reliefs :—

- (i) to the scale of pay of Rs. 110—250, with effect from the date when they passed the examination of Bachelor of Teaching or its equivalent or May 1, 1957, whichever is later subject to their claim for salary being confined on the basis of the said scale to maximum period of 3 years and 2 months counting back from the date of presentation of the writ petition.
- (ii) to be treated as having been serving in that scale of pay continuously and not on six months basis.
- (iii) to be considered for appointment to the posts of Masters to the extent of 25 per cent quota as recognised for their category of teachers from Pepsu on the basis of seniority-cum-merit without being subjected to the condition of subjects combination.

(26) In the result, the appeal fails and is disallowed without any order as to costs.

P. C. PANDIT, J.— I agree.

K. S. K.