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V. K. GIRIJA

v.

RESHMA PARAYIL & ORS.

(Civil Appeal No. 11829 of 2018)

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DECEMBER 04, 2018

[ASHOK BHUSHAN AND AJAY RASTOGI, JJ.]

Service Law:

C *Appointment – Whether by direct recruitment or by transfer – To the post of Higher Secondary School Teacher – Appellant was appointed to the post by direct recruitment – Respondent No. 1 who was working as Higher Secondary School Assistant in the School, filed a complaint questioning direct recruitment – She claimed that the post should have been filled up by her transfer – The complaint was rejected by Deputy Director of Education – Departmental appeal was dismissed by Director of Education – In Revision State Government held that post was required to be filled up by transfer of the respondent – Writ petition by appellant – Single Judge of High Court relying on r. 5(3) of Kerala State and Subordinate Services Rules, 1958 held that vacancy was to be filled up on the basis of cadre strength and not on the basis that first vacancy should be filled up by transfer – In appeal Division Bench of High Court setting aside order of Single Judge held that r. 5(3) of 1958 Rules were not applicable and the post was to be filled up by transfer – On appeal, held: Appointment of teachers in the school was governed by Kerala Education Rules, 1959 – Chapter XXXII of 1959 Rules shall be followed for appointment – r. 5(3) of 1958 Rules is not applicable – As per r. 4(2) of 1959 Rules the post was first to be filled up by transfer – Therefore, Division Bench of High Court was right in directing appointment of respondent No. 1 – Kerala Education Rules, 1959 – Chapter XXXII, r. 4(2) – Kerala State and Subordinate Services Rules, 1958 – r. 5(3).*

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Dismissing the appeal, the Court

HELD : 1. A perusal of the Rule 4(2) of Kerala Education Rules, 1959 contemplates that post of Higher Secondary School Teacher is to be filled up first “by transfer from Junior Lecturer

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in the subject concerned under the management / Higher Secondary School Teacher (Junior)". Thus, every vacancy of Higher Secondary School Teacher has to be filled up first by the transfer of Higher Secondary School Teacher (Junior) in the subject concerned. There is a purpose and object for providing a particular scheme for filling up the post of Higher Secondary School Teacher. Higher Secondary School Teacher (Junior) is also lecturer in concerned subject and the statute required that whenever post in Higher Secondary School Teacher arises, the same shall be first offered to the Junior Lecturer in the subject. Above statutory scheme serves the interests of the school, students and the teachers already serving in the institution. A Junior Lecturer working in the same subject is first choice to fill up the post, which obviates the management to take any other steps for recruitment. [Para 12][1048-D-E]

2. The second method of recruitment under Rule 4(2) begins with the word "in the absence of qualified hands under clause (1) above". Thus, recruitment under Clause (2) shall be resorted only when no qualified hands under clause (1), i.e. Junior Lecturer in the concerned subject is available. Further, the second phrase of Rule 4(2) begins with the word "the vacancies shall be apportioned in the ratio 1:3 between appointment by transfer and direct recruitment". The clear intendment is that vacancy arising in Higher Secondary School Teacher has to be apportioned in ratio of 1:3. There is no concept of looking to the cadre of the post of Higher Secondary School Teacher while apportioning the vacancy under Rule 4(2), the cadre strength is not to be looked into in view of the method of recruitment provided under Rule 4(2), i.e. of vacancies of Higher Secondary School Teacher is filled up first by transfer of Junior Lecturer. A plain reading of the above statutory provision clearly indicates that for apportioning the vacancy, the cadre strength of the Higher Secondary School Teacher is not to be looked into to find out as to which vacancy will go to transfer or direct recruitment. [Para 12][1048-D-H; 1049-A-C]

3. Above interpretation of Rule 4(2) is reinforced by looking to Rule 4(3), which deals with recruitment of Higher Secondary School Teacher (Junior). Higher Secondary School Teacher

A (Junior) is also to be filled up by transfer from qualified High School Assistant in the subjects concerned. In absence of qualified hands, by transfer from qualified Upper Primary School Assistants/ Lower Primary School Assistants in the subjects concerned under the Educational Agency. For filling up the posts in the subjects concerned, the direct recruitment is also provided as one mode of recruitment. Note 1, provides “25% of the total posts shall be filled up by the method specified in item (I) above on seniority-cum-suitability basis and 75% of such post shall be filled up by direct appointment”. Here, Note 1, uses two expressions “total posts” and “such posts”. Thus, computation of 25% and 75% is to be based on that total posts of Higher Secondary School Teacher (Junior). The language used in Note 1 when read in contradiction to Rule 4(2)(ii), the intention is clear that whereas for appointment in Higher Secondary School Teacher, the vacancy shall be apportioned, whereas for filling up the post of Higher Secondary School Teacher (Junior), “total posts” are to be apportioned on the basis of cadre strength. [Para 12][1049-C-H]

4. Rule 5 of Kerala State and Subordinate Services Rules, 1958 begins with the words “where the normal method of recruitment to any service, class or category is neither solely by direct recruitment nor solely by transfer, but is both by direct recruitment and by transfer”. Rule 5 of 1958 Rules also provides for method of recruitment and Note (3) to Rule 5 provides that whenever a ratio or percentage is fixed for different methods of recruitment/appointment to a post, the number of vacancies to be filled up by candidates from each method shall be decided by applying the fixed ratio or percentage to the cadre strength of the post to which the recruitment/transfer is made and not to the vacancies existing at that time. The Special Rules are Kerala State Subordinate Services Rules, 1992. The Kerala Education Act, 1958 and Kerala Education Rules, 1959 both are General Rules but in view of the fact that Chapter XXXII has been inserted in the Kerala Education Rules by notification dated 09.11.2001, which makes it clear that appointment of teachers and non-teaching staff in aided Higher Secondary School Teacher is to be governed by Kerala Education Rules. [Para 13][1050-A-D]

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5. Further, the recruitment under Rule 4(2) of Higher Secondary School Teacher is a recruitment specially statutorily designed in a different manner providing for all vacancy in Higher Secondary School Teacher subjects, to be first filled up by Junior Lecturer in the subjects concerned under the management. Thus, recruitment under Rule 4(2) cannot be said to be “normal method of recruitment” to any service as contemplated by Rule 5 of 1958 Rules. Thus, 1958 Rules cannot be held to be applicable for making recruitment under Rule 4(2) of Chapter XXXII of the Kerala Education Rules. Further, a set of Rules of Chapter XXXII having been brought subsequent to Special Rules, intendment is clear that it was intended that general rule being Chapter XXXII shall be followed for appointment of teachers in aided institutions. [Para 13][1050-D-F]

6. The Statutory Scheme as delineated by Chapter XXXII of Kerala Education Rules shall alone be applicable while making recruitment to the teaching posts and Rule 5 Note (3) of Kerala State and Subordinate Services Rules, 1958 is not attracted. [Para 16][1054-A-B]

7. The Division Bench of the High Court, thus, has taken correct view of the matter and has rightly reversed the judgment of the Single Judge restoring back the order of the State Government directing the management to appoint respondent by transfer as Higher Secondary School Teacher (Economics). [Para 17][1054-D-E]

8. When as per Rule 4(2), the respondent was entitled for appointment by transfer, which claim has been accepted by the State Government, the claim of respondent cannot be negated on the premise that appellant has been working and satisfactorily discharging her duties for last more than 5 years and respondent may get another chance for being appointed by transfer when any other vacancy arises on the post of Higher Secondary School Teacher (Economics). [Para 18][1054-E-G]

9. The appellant has no right to hold the post of Higher Secondary School Teacher (Economics) and on the said post, the respondent is to be appointed as per the direction of the State Government and affirmed by the Division Bench. The

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A management is directed to appoint the respondent on or before 31.12.2018 so as to enable the respondent to join her post of Higher Secondary School Teacher (Economics) w.e.f. 01.01.2019. [Para 19][1054-G-H; 1055-A-B]

B 10. In the ends of justice, the Court however, observed that the appellant, if willing to work on the post, at present held by respondent No.1, the respondents shall adjust her and allow her to work on the post occupied by respondent No.1 w.e.f. the same date, i.e. 01.01.2019. In the event, the appellant does not accept the aforesaid post, it shall be open for the respondents to proceed in accordance with law. [Para 19][1055-A-C]

C *Maya Mathew v. State of Kerala and Others* (2010) 4 SCC 498 : [2010] 3 SCR 16 – relied on.

D *S. Prakash and Another v. K.M. Kurian and Others* (1999) 5 SCC 624 : [1999] 3 SCR 610 ; *Prasad Kurien and Others v. K.J. Augustin and Others* (2008) 3 SCC 529 : [2008] 3 SCR 1 – Stood distinguished.

Ajithakumari v. Shamma (2009) 1 KLT 808 – referred to.

Case Law Reference

E	(2009) 1 KLT 808	referred to	Para 3.4
	[2010] 3 SCR 16	relied on	Para 13
	[1999] 3 SCR 610	stood distinguished	Para 17
	[2008] 3 SCR1	stood distinguished	Para 17

F CIVIL APPELLATE JURISDICTION : Civil Appeal No. 11829 of 2018.

From the Judgment and Order dated 17.08.2016 of the High Court of Kerala at Ernakulam in W.A. No. 1504 of 2015.

G Romy Chacko, Adv. for the Appellant.

P. V. Dinesh, Ms. Sindhu T. P., Mukund P. Unni, Ms. Arushi Singh, Vipin Nair, P. B. Suresh, Anushumaan Bahadur, Karthik Jayashankar Advs. for the Respondents.

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The Judgment of the Court was delivered by

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ASHOK BHUSHAN, J.

1. Leave granted.

2. This appeal has been filed against the Division Bench judgment of Kerala High Court dated 17.08.2016 in Writ Appeal No. 1504 of 2015 by which judgment the Writ Appeal filed by the respondent was allowed, reversing the judgment of learned Single Judge. The learned Single Judge has allowed the Writ Petition filed by the appellant, setting aside the order of the State Government which had directed for appointment of respondent Reshma Parayil.

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3. The brief facts of the case necessary to be noted for deciding the issue are:-

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3.1 The respondent No.5 is an aided institution. Respondent No.1 was serving as Upper Primary Assistant in the school. The school was upgraded as Higher Secondary School in the year 2011-2012. Consequent to the upgradation, 13 new posts of Higher Secondary School Teacher (Junior) were created. Out of 13 posts 4 posts of Higher Secondary School Assistant (Junior) were filled up by transfer of Higher Secondary School Assistant and 9 posts were filled up by direct recruitment. In 2012-2013, a new commerce batch with economics was allotted vide Government order dated 15.07.2013 by virtue of which two posts of Higher Secondary School Teacher (Junior) and two posts of Higher Secondary School Teacher (Commerce and Economics) were created. Both the posts of Higher Secondary School Teacher were filled up by direct recruitment by the management. The appellant was appointed on 26.08.2013 as Higher Secondary School Teacher (Economics) by direct recruitment.

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3.2 The respondent No.1, who was working as Higher Secondary School Assistant in the School, filed a complaint to the Regional Deputy Director of Education questioning the direct recruitment of the appellant. Respondent No.1 claimed that she being Higher Secondary School Assistant available in the school, the post of Higher Secondary School

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- A Teacher (Economics) was required to be filled up by transfer of respondent No.1. The complaint of respondent No.1 was rejected by Deputy Director of Education vide his order dated 22.02.2014. An appeal was filed by the respondent No.1 to the Director of Education, which too was dismissed on 07.07.2014.
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- 3.3 Respondent No.1 filed a revision before the State Government, which revision petition was allowed by the State Government vide order dated 01.11.2014. The State Government held that the post of Higher Secondary School Teacher (Economics) was required to be filled up by transfer of Reshma Parayil (the respondent herein). The State Government set aside the order of Deputy Director of Education and directed the management to fill up the post of Higher Secondary School Teacher (Economics) by transfer of respondent No.1, if she is otherwise eligible.
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- D The order of the State Government was challenged by appellant before the High Court by filing a Writ Petition NO. 30707 of 2014. Learned Single Judge relying on Rule 5(3) of the Kerala State & Subordinate Services Rules, 1958 took the view that vacancy has to be filled up on the basis of cadre strength and not on the basis that the first vacancy should be filled up by transfer. The order of the Regional Deputy Director and Director of Education was upheld and that of the State Government was set aside. The respondent No.1 aggrieved by the judgment of learned Single Judge filed a Writ Appeal before the Division Bench.
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- F 3.4 The Division Bench vide its judgment dated 17.08.2016 has allowed the Writ Appeal and set aside the judgment of the learned Single Judge. The Division Bench relied on an earlier Division Bench judgment in **Ajithakumari Vs. Shamma, (2009) 1 KLT 808**, which according to Division Bench covered the issue. The Division Bench took the view that Rule 5 of Kerala State and Subordinate Service Rules, 1958 (hereinafter referred to as 'KSS Rules) has no application and the vacancy of Higher Secondary School Teacher was to be filled up by transfer. Aggrieved by the
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judgment of the Division Bench, the appellant has filed this appeal. A

4. Learned counsel for the appellant submits that the Division Bench committed error in holding that vacancy of Higher Secondary School Teacher (Economics) was to be filled up by transfer. He submits that as per Rule 5 of KSS Rules, Note (3), when the method of recruitment is both by transfer and direct recruitment, and a ratio is fixed for different methods of recruitment, the candidate from each method shall be decided by applying the fixed ratio or percentage of the cadre strength of the post. He submits that vacancy in Higher Secondary School Teacher has no relevance for deciding the mode of recruitment and as per cadre strength, the post on which appellant was appointed fell into direct recruitment quota. The learned Single Judge was correct in its view that appellant was correctly appointed. Learned counsel for the appellant has placed reliance on two judgments of this Court namely, **S. Prakash and Another Vs. K.M. Kurian and Others, (1999) 5 SCC 624** and **Prasad Kurien and Others Vs. K.J. Augustin and Others, (2008) 3 SCC 529.** B C D

5. The submission made by learned counsel for the appellant has been refuted by learned counsel appearing for respondent No.1. Learned counsel appearing for respondent No.1 submits that provisions of KSS Rules has no application. He submits that the recruitments has to be made in accordance with Kerala Education Rules, 1959, Rule 4 Chapter XXXII. He submits that Chapter XXXII has been substituted in the Education Rules by G.O. dated 09.11.2001 published in Gazette on 12.11.2001, which is subsequent to Kerala State and Subordinate Services Rules, 1992, hence the Kerala Education Rules regulating the appointment of Higher Secondary School Teachers shall prevail. He submits that for appointment of Higher Secondary School Teachers cadre strength is not to be looked into rather appointment has to be made in accordance with Rule 4 of Chapter XXXII. He submits that judgment of this Court in **Maya Mathew Vs. State of Kerala and Others, (2010) 4 SCC 498** has clarified the situation and upheld that Special Rules (Kerala Education Rules, 1959) pertaining to recruitment, made subsequent to Kerala State and Subordinate Services Rules, which shall prevail. The earlier two judgments of this Court relied by learned counsel for the appellant have also been explained and distinguished. He submits that present case is E F G

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A fully covered by this Court's judgment in **Maya Mathew (supra)**. He further submits that respondent was fully eligible for appointment as Higher Secondary School Teacher (Economics) fulfilling all the qualifications. The post has wrongly been filled up by direct appointment by the appellant, which deserves to be set aside. He submits that the Division Bench rightly allowed the appeal, hence the appeal deserves to be dismissed.

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6. We have considered the submissions of the learned counsel for the parties and have perused the records.

C 7. From the submissions of the learned counsel for the parties and pleadings on record, following are three issues, which arise for consideration in the present case:-

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(i) Whether the post of Higher Secondary School Teacher (Economics) newly sanctioned in the School in the year 2012-2013 was required to be filled up by direct recruitment taking the cadre strength of the Higher Secondary School Teacher or the same was required to be filled up by transfer?

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(ii) Whether for filling the post of Higher Secondary School Teacher, Rule 5 of KSS Rules were to be resorted to?

(iii) Whether the Management committed error in making appointment of the appellant as Higher Secondary School Teacher (Economics) by direct recruitment?

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8. The Kerala Education Act, 1958 and the Rules framed thereunder regulate the recruitment of teaching staff in aided Higher Secondary School. Chapter XXXII of Kerala Education Rules deals with method of appointment and qualifications of teachers and non-teaching staff in aided Higher Secondary School. Rule 3 deals with categories of posts in aided Higher Secondary School. Rule 3 contains 8 categories out of which category 1 is Principal; Category 2 is Higher Secondary School Teacher in different subjects (total 39) and Category 3 is Higher Secondary School Teacher (Junior) in several subjects (total 39). Rule 4 deals with method of appointment. Rule 4(2) and 4(3) deals with appointment of Higher Secondary School Teacher and Higher Secondary School Teacher (Junior). Rules 4(2) and 4(3) are as follows:-

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Sl. No.	Category	Method of Appointment	A
1.	XXXXXXXXXXXXXXXXXX	XXXXXXXXXXXX	
2.	Higher Secondary School Teacher	<p>(1) By transfer from Junior Lecturer in the subject concerned under the management / Higher Secondary School Teacher (Junior)</p> <p>(2) In the absence of qualified hands under clause (1) above, the vacancies shall be apportioned in the ratio 1:3 between appointment by transfer and direct appointment as detailed below:</p> <p>(i) a) By transfer from High School Assistants, who possess the requisite qualifications, under the Educational Agency.</p> <p>b) In the absence of qualified persons under (a) above, by transfer from qualified Upper Primary School Assistants/ Lower Primary School Assistants who possess the requisite qualification in the subject concerned, under the Educational Agency.</p> <p>(ii) By direct appointment</p> <p>Note:- (i) When qualified persons are not available to fill up the vacancies set apart for appointment by transfer</p>	<p>B</p> <p>C</p> <p>D</p> <p>E</p> <p>F</p> <p>G</p> <p>H</p>

A		under item 2(i) above such vacancies shall also be allotted for direct appointment.
B		(ii) Appointments under item (I) above shall be made from select lists of qualified persons prepared on the basis of seniority and merit.
C	3.	Higher Secondary School Teacher (Junior)
D		1. (i) By transfer from qualified High School Assistants in the subject concerned under the Educational Agency.
E		(ii) In the absence of qualified hands under item (i) above, by transfer from qualified Upper Primary School Assistants / Lower Primary School Assistants in the subject concerned under the Educational Agency.
F		2. By direct appointment
G		Note:- (i) 25% of the total posts shall be filled up by the method specified in item (I) above on seniority - cum suitability basis and 75% of such post shall be filled up by direct appointment.
H		(ii) When qualified persons are not available to fill up the vacancies set apart for appointment by transfer under item 1 above, such vacancies also shall be allotted for direct appointment.

9. Another Rules, which are relevant for consideration are Kerala State and Subordinate Services Rules, 1992, reliance has been placed on Rule 5 of the said Rules, which is to the following effect:- A

5. Method of recruitment. _____ Where the normal method of recruitment to any service, class or category is neither solely by direct recruitment nor solely by transfer, but is both by direct recruitment and by transfer. _____ B

(a) the proportion or order in which the Special Rules concerned may require vacancies to be filled by persons recruited direct and by those recruited by transfer shall be applicable only to substantive vacancies in the permanent cadre; C

(b) person shall be recruited direct only against a substantive vacancy in such permanent cadre, and only if the vacancy is one which should be filled by direct recruit under the Special Rules referred to in clause (a); and

(c) recruitment to all other vacancies shall be made by transfer. D

Note. __ (1) All permanent vacancies and temporary vacancies except those of short duration shall be treated as substantive vacancies.

(2) The vacancies on account of leave and deputation with a duration of less than six months shall be treated as vacancies of short duration, provided, such vacancies with a duration of three months to six months should not be treated as vacancies of short duration, if the vacancies are likely to last long or new vacancies are likely to arise. E

(3) Whenever a ratio or percentage is fixed for different methods of recruitment/appointment to a post the number of vacancies to be filled up by candidates from each method shall be decided by applying the fixed ratio or percentage to the cadre strength of the post to which the recruitment/transfer is made and not to the vacancies existing at that time. F
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10. The appellant's submission is that for making appointment on the post of Higher Secondary School Teacher, Rule 5(3) of the KSS Rules are applicable and as per the said Rules, since recruitment on the post of Higher Secondary School Teacher is provided by two methods, i.e. by direct recruitment and transfer, for filling the post, the cadre H

A strength of Higher Secondary School Teacher is to be taken for apportioning the vacancy into ratio of 1:3. He submits that the learned Single Judge has rightly relied on Rule 5(3) of KSS Rules and has held that ratio can only to be worked out if the cadre strength is maintained whereas the Division bench of the Kerala High Court has reversed the judgment of learned Single Judge.

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11. Learned counsel for the respondent submits that for the above recruitment on the post of Higher Secondary School Teacher, Rule 5(3) of KSS Rules is not applicable and the appointment has to be made only on the basis of Rule 4 of Kerala Education Rules. He further submits that Special Rules namely Kerala State and Subordinate Services Rules, 1992 are Special Rules, which were framed in the year 1992, the chapter XXXII of the Kerala Education Rules having been inserted by G.O. dated 09.11.2001 w.e.f. 12.11.2001, there is no applicability of the KSS Rules.

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12. We may now first look into the statutory Scheme as delineated by Rule 4 of Kerala Education Rules. The first issue is as to whether for filling up the post of Higher Secondary School Teacher, the vacancy has to be allocated as per the cadre strength. A perusal of the Rule 4(2) contemplates that post of Higher Secondary School Teacher is to be filled up first “by transfer from Junior Lecturer in the subject concerned under the management / Higher Secondary School Teacher (Junior)”. Thus, every vacancy of Higher Secondary School Teacher has to be filled up first by the transfer of Higher Secondary School Teacher (Junior) in the subject concerned. There is a purpose and object for providing a particular Scheme for filling up the post of Higher Secondary School Teacher. Higher Secondary School Teacher (Junior) is also lecturer in concerned subject and the Statute required that whenever post in Higher Secondary School Teacher arises, the same shall be first offered to the Junior Lecturer in the subject. Above statutory Scheme serves the interests of the School, students and the teachers already serving in the institution. A Junior Lecturer working in the same subject is first choice to fill up the post, which obviates the management to take any other steps for recruitment. The second method of recruitment under Rule 4(2) begins with the word “in the absence of qualified hands under clause (1) above”. Thus, recruitment under Clause (2) shall be resorted only when no qualified hands under clause (1), i.e. Junior Lecturer in the concerned subject is available. Further, the second phrase of Rule 4(2) begins with the word “the vacancies shall be apportioned in the ratio 1:3”

between appointment by transfer and direct recruitment". The clear A
intendment is that vacancy arising in Higher Secondary School Teacher
has to be apportioned in ratio of 1:3. There is no concept of looking to
the cadre of the post of Higher Secondary School Teacher while
apportioning the vacancy under Rule 4(2), the cadre strength is not to be B
looked into in view of the method of recruitment provided under Rule
4(2), i.e. of vacancies of Higher Secondary School Teacher is filled up
first by transfer of Junior Lecturer. A plain reading of the above Statutory
Provision clearly indicates that for apportioning the vacancy, the cadre
strength of the Higher Secondary School Teacher is not to be looked
into to find out as to which vacancy will go to transfer or direct C
recruitment. Now coming to the facts of the present case, in the year
2012-2013, two new posts were created in Higher Secondary School
Teacher, i.e. Commerce and Economics, both were the new vacancies
and no Junior Lecturers, i.e. Higher Secondary School Teacher (Junior)
qualified in the subject being available, Rule 4(2) has to be resorted to.
The ratio mentioned is 1:3, which means that first vacancy is to be filled D
up by transfer. Resorting to cadre strength, thus, was not contemplated
by plain reading of Rule 4(2). We, thus, do not find any substance in the
submission of the counsel for the appellant. Above interpretation of
Rule 4(2) is reinforced by looking to Rule 4(3), which deals with
recruitment of Higher Secondary School Teacher (Junior). Higher E
Secondary School Teacher(Junior) is also to be filled up by transfer
from qualified High School Assistant in the subjects concerned. In
absence of qualified hands, by transfer from qualified Upper Primary
School Assistants/ Lower Primary School Assistants in the subjects
concerned under the Educational Agency. For filling up the posts in the
subjects concerned, the direct recruitment is also provided as one mode F
of recruitment. Note 1, which is very relevant, provides "25% of the
total posts shall be filled up by the method specified in item (I) above on
seniority-cum-suitability basis and 75% of such post shall be filled up by
direct appointment". Here, Note 1, uses two expressions "**total posts**"
and "**such posts**". Thus, computation of 25% and 75% is to be based G
on that total posts of Higher Secondary School Teacher (Junior). The
language used in Note 1 when read in contradiction to Rule 4(2)(ii), the
intention is clear that whereas for appointment in Higher Secondary
School Teacher, the vacancy shall be apportioned, whereas for filling up
the post of Higher Secondary School Teacher (Junior), "total posts" are
to be apportioned on the basis of cadre strength.

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- A 13. Now, we come to the Kerala State and Subordinate Services Rules, 1958 – Rule 5. Rule 5 begins with the words “where the normal method of recruitment to any service, class or category is neither solely by direct recruitment nor solely by transfer, but is both by direct recruitment and by transfer”. Rule 5 of 1958 Rules also provides for method of recruitment and Note (3) to Rule 5 provides that whenever a
- B ratio or percentage is fixed for different methods of recruitment/ appointment to a post the number of vacancies to be filled up by candidates from each method shall be decided by applying the fixed ratio or percentage to the cadre strength of the post to which the recruitment/ transfer is made and not to the vacancies existing at that time. The
- C Special Rules are 1992 Rules. The Kerala Education Act, 1958 and Kerala Education Rules both are General Rules but in view of the fact that Chapter XXXII has been inserted in the Rules by notification dated 09.11.2001, which makes it clear that appointment of teachers and non-teaching staff in aided Higher Secondary School Teacher is to be governed by Kerala Education Rules. Further, the recruitment under Rule 4(2) of
- D Higher Secondary School Teacher is a recruitment specially statutorily designed in a different manner providing for all vacancy in Higher Secondary School Teacher subjects, to be first filled up by Junior Lecturer in the subjects concerned under the management. Thus, recruitment under Rule 4(2) cannot be said to be “normal method of recruitment” to
- E any service as contemplated by Rule 5 of KSS Rules. Thus, KSS Rules cannot be held to be applicable for making recruitment under Rule 4(2) of Chapter XXXII of the Kerala Education Rules. Further, a set of Rules of Chapter XXXII having been brought subsequent to Special Rules, intendment is clear that it was intended that general rule being Chapter XXXII shall be followed for appointment of teachers in aided
- F institutions. This Court in the case of **Maya Mathew (supra)** had occasion to consider Kerala State and Subordinate Services Rules, 1958 in reference to a general rule namely Kerala State Homeopathy Services Rules, 1989. Note (3) of Rule 5 of Kerala State and Subordinate Services Rules, 1958 came up for consideration in the above case. Whereas Rule
- G 3 of the Homeopathy Rules also provided for method of appointment and ratio to be maintained in making appointment. Kerala State and Subordinate Services Rules, 1958 were referred as General Rules in the aforesaid judgment. The Homeopathy Rules were referred to as Special Rules, which was repugnant to General Rules. In Para 12 of the judgment, rules of interpretation governing two set of Rules were noticed
- H to the following effect:-

“12. The rules of interpretation when a subject is governed by two sets of rules are well settled. They are: A

(i) When a provision of law regulates a particular subject and a subsequent law contains a provision regulating the same subject, there is no presumption that the latter law repeals the earlier law. The rule-making authority while making the later rule is deemed to know the existing law on the subject. If the subsequent law does not repeal the earlier rule, there can be no presumption of an intention to repeal the earlier rule; B

(ii) When two provisions of law—one being a general law and the other being a special law govern a matter, the court should endeavour to apply a harmonious construction to the said provisions. But where the intention of the rule-making authority is made clear either expressly or impliedly, as to which law should prevail, the same shall be given effect. C

(iii) If the repugnancy or inconsistency subsists in spite of an effort to read them harmoniously, the prior special law is not presumed to be repealed by the later general law. The prior special law will continue to apply and prevail in spite of the subsequent general law. But where a clear intention to make a rule of universal application by superseding the earlier special law is evident from the later general law, then the later general law, will prevail over the prior special law. D

(iv) Where a later special law is repugnant to or inconsistent with an earlier general law, the later special law will prevail over the earlier general law.” E

14. Kerala State and Subordinate Services Rules, 1958 contains Rule 2, which is to the following effect:- F

“2. *Relation to the Special Rules.*—If any provision in the General Rules contained in the part is repugnant to a provision in the Special Rules applicable to any particular service contained in Part III, the latter shall in respect of that service, prevail over the provision in the General Rules in this part.” G

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A 15. The earlier judgments of this Court in **S. Prakash and Another Vs. K.M. Kurian and Others, (supra)** and **Prasad Kurien and Others Vs. K.J. Augustin and Others, (supra)**, which had considered Note 3 of Rule 5 of Kerala State and Subordinate Services Rules, 1958 were also considered and distinguished. In Paragraph 14 to 20, following has been laid down:-

B “14. The question whether there can be an exception to the primacy given to the Special Rules by Rule 2 of the General Rules, was considered by this Court in *S. Prakash* and *Prasad Kurien*, with particular reference to Note (3) to Rule 5 of the General Rules.

C 15. In *S. Prakash*, this Court considered whether the provisions of the Special Rules, the Kerala Agricultural Income Tax and Sales Tax Service Rules, will have to yield to Note (3) to Rule 5 of the General Rules. This Court held: (SCC pp. 633-34, para 14)

D “14. From the aforesaid discussion, it is clear that if the intention of the rule-making authority was to establish a rule of universal application to all the services in the State of Kerala for which the Special Rules are made, then the Special Rules will give way to the General Rules enacted for that purpose. This has to be found out from the language used in the Rules which may be express or by implication. *If the language is clear and unqualified, the subsequent General Rule would prevail despite repugnancy. If the intention of the rule-making authority is to sweep away all the Special Rules and to establish a uniform pattern for computation of the ratio or percentage of direct recruits and by transfer, in such a case, the Special Rules will give way. ...* The language of Note (3) is crystal clear and is for removal of any ambiguity by using positive and negative terms. It applies to all the Special Rules whenever a ratio or percentage is prescribed in the Rules. It also emphatically states that it has to be computed on the cadre strength of the post to which the recruitment is to be made and not on the basis of the vacancies existing at that time.”

(emphasis supplied)

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16. In *Prasad Kurien*, while considering the Special Rules, the Kerala Excise and Prohibition Subordinate Service Rules, 1974, vis-à-vis Note (3) to Rule 5 of the General Rules, this Court followed the dictum in *S. Prakash*. A

17. These decisions reiterate the position that if the intention of the rule-making authority is to make a later general rule to apply to all services in the State, for which different earlier special rules exist, then the existing special rules will give way to such later general rule. That is, where the general rule is made subsequent to the special rule and the language of the general rule signified that it was intended to apply to all services and prevail over any prior special rules, the intention of the rule-making authority should be given effect by applying the subsequent general rule instead of the earlier special rule. B C

18. This Court held that the language of Note (3) to Rule 5 of General Rules showed that it was intended to prevail over existing Special Rules which indicated a contrary position. What is significant is that the two decisions considered the Special Rules that were earlier in point of time to the General Rules as amended by the 1992 Amendment rules which introduced Note (3) to Rule 5 of the General Rules. D

19. This Court held, on reading the General Rules in conjunction with the Special Rules, that Note (3) to Rule 5 of General Rules will prevail over the corresponding provisions in the Special Rules showing a different intention, when deciding whether the ratio of each feeder category should be determined with reference to the cadre strength or existing vacancies. E F

20. What logically follows from the principle enunciated in the two decisions is that if any special rule is subsequent to the general rule, then the question of examining whether the prior general rule will prevail over a later special rule will not arise at all having regard to the categorical provision contained in Rule 2 of the General Rules. The principle laid down in those decisions will not apply where the special rule is made subsequent to the general rule.” G

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A 16. This Court clearly held that principle laid down in **S. Prakash and Another Vs. K.M. Kurian and Others, (supra)** and **Prasad Kurien and Others Vs. K.J. Augustin and Others, (supra)** shall not apply where the Special Rules are made subsequent to the General Rules. The ratio laid down in the above case is fully applicable in the facts of the present case. Thus, the Statutory Scheme as delineated by B Chapter XXXII of Kerala Education Rules shall alone be applicable while making recruitment to the teaching posts and Rule 5 Note (3) of Kerala State and Subordinate Services Rules, 1958 is not attracted.

C 17. Learned counsel for the appellant has placed reliance on judgments of this Court in **S. Prakash and Another Vs. K.M. Kurian and Others, (supra)** and **Prasad Kurien and Others Vs. K.J. Augustin and Others, (supra)**. Both the above judgments had been considered and distinguished by this Court in the case of **Maya Mathew (supra)**. The ratio laid down in the case of **Maya Mathew (supra)** is fully attracted since Chapter XXXII of the Kerala Education Rules, which D is under consideration was inserted in the year 2011 in the Rules, i.e. much subsequent to Kerala State and Subordinate Services Rules, 1992. The Division Bench of the Kerala High Court, thus, has taken correct view of the matter and has rightly reversed the judgment of the learned Single Judge restoring back the order of the State Government directing E the management to appoint respondent by transfer as Higher Secondary School Teacher (Economics).

F 18. Learned counsel for the appellant lastly has submitted that appellant has been working and satisfactorily discharging her duties for last more than 5 years and respondent may get another chance for being appointed by transfer when any other vacancy arises on the post of Higher Secondary School Teacher (Economics). We do not find any substance in the above submission when as per Rule 4(2), the respondent was entitled for appointment by transfer, which claim has been accepted by the State Government, the claim of respondent cannot be negated on the premise as contended by the appellant. Learned counsel for the G respondent, however, during submissions has fairly submitted that she has no objection, if the appellant is adjusted on the post, which is at present held by the respondent.

H 19. In view of the foregoing discussions, we are of the view that appellant has no right to hold the post of Higher Secondary School Teacher (Economics) and on the said post, the respondent is to be appointed as

per the direction of the State Government and affirmed by the Division A
Bench. We, thus, direct the management to appoint the respondent on
or before 31.12.2018 so as to enable the respondent to join her post of
Higher Secondary School Teacher (Economics) w.e.f. 01.01.2019. In
the ends of justice, we, however, observe that the appellant, if willing to
work on the post, at present, held by the respondent No.1, the respondents B
shall adjust her and allow her to work on the post occupied by the
respondent No.1 w.e.f. the same date, i.e. 01.01.2019. In event, the
appellant does not accept the aforesaid post, it shall be open for the
respondents to proceed in accordance with law. We make it clear that
the above direction is being given in particular circumstances of the
present case and shall not be treated as any precedent. Subject to above, C
the appeal is dismissed.

Kalpana K. Tripathy

Appeal dismissed.