

(2014) 05 PAT CK 0052

In the Patna High Court

Case No : Letters Patent Appeal No. 1569 of 2010 in Civil Writ Jurisdiction Case No. 12054 of 2010 and Interlocutory Application No. 8759 of 2010 in Letters Patent Appeal No. 1569 of 2010

Kalpana Rani and Prashant Kumar

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 15-05-2014

Acts Referred:

Bihar and Orissa General Clauses Act, 1917 — Section 8
Civil Procedure Code, 1908 (CPC) — Section 141, 98
Constitution of India, 1950 — Article 14, 16, 219, 21A, 226
General Clauses Act, 1897 — Section 3, 4(18), 4(45), 6

Citation : AIR 2014 Patna 173 : (2014) LabIC 3793 : (2014) 4 LLN 753 : (2014) 2 PLJR 665

Hon'ble Judges : Rekha M. Doshit, C.J.;Mihir Kumar Jha, J;Ashwani Kumar Singh, J

Bench : Full Bench

Advocate : Y.V. Giri, Senior Advocate and Mr. Sanjay Kumar Singh, Advocate for the Appellant; Kumar Pankaj, A.C. to S.C.-21 for Respondent-State, Mr. Nawal Kishore Singh, Advocate for Respondent No. 7, Mr. Maruth Nath Roy, Advocate for Respondent No. 8, Mr. Rajeev Kumar Verma, Sr. Advocate and Mr. Mritunjay Kumar, Advocate for Respondent No. 10, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Rekha M. Doshit, C.J.—This Appeal under Clause 10 of the Letters Patent preferred by the respondent no. 9 arises from the judgment and order dated 16th September 2010 passed by the learned single Judge in CWJC No. 12054 of 2010.

2. The matter relates to appointment of Panchayat Shiksha Mitra under the Gram Panchayat Mohiuddinpur, P.S. Hansa, District-Samastipur under the then prevalent Scheme (hereinafter referred to as "the Scheme") and absorption as Panchayat Teacher under the Bihar Panchayat Elementary Teacher (Employment and Service Conditions) Rules, 2006 (hereinafter referred to as "the Rules of

2006").

3. The respondent no. 10 Prashant Kumar approached this Court under Article 226 of the Constitution in CWJC No. 12054 of 2010 to challenge the order dated 26th June 2010 made by the District Magistrate, Samastipur in Miscellaneous Case No. 1 of 2010 and the order of cancellation of his appointment made by the Gram Panchayat on 1st January 2009.

4. It appears that as early as in April 2003, the writ petitioner was appointed as Panchayat Shiksha Mitra under the Scheme. His appointment as Panchayat Shiksha Mitra was continued from time to time. Thus the petitioner continued till 1st July 2006. On 1st July 2006, the petitioner, by operation of Rule 20(iii) of the Rules of 2006 came to be absorbed as Panchayat Teacher.

5. Since his absorption as Panchayat Teacher on 1st July 2006, his appointment came to be questioned by the Block Development Officer at the instance of the appellant. After several rounds of litigations and representations by the appellant, under the order made by the District Magistrate on 26th June 2010, the appointment of the petitioner as Panchayat Shiksha Mitra came to be cancelled and a direction was issued to appoint the appellant as Panchayat Teacher.

6. Feeling aggrieved the petitioner approached this Court under Article 226 of the Constitution in above CWJC No. 12054 of 2010. The learned single Judge has, following the judgment in the matter of Alok Kumar Singh Vs. The State of Bihar and Others, , allowed the writ petition and has set aside the order of the District Magistrate. Therefore, this Appeal by the respondent no. 9.

7. Since the impugned judgment passed by the learned single Judge, a Division Bench of this Court (to which one of us, the Chief Justice was a party) has, in the matter of Smt. Renu Kumari Pandey Vs. The State of Bihar and Others, , held that on and after 1st July 2006 the cadre of Panchayat Shiksha Mitra stands abolished; no further appointment, therefore, can be made to the post of Panchayat Shiksha Mitra; the Panchayat Shiksha Mitras absorbed as Panchayat Teacher by operation of Rule 20(iii) of the Rules of 2006 are governed by the Rules of 2006. Their service cannot be terminated in any manner or for any reason other than the ones prescribed under the Rules of 2006. It has also been held that the District Magistrate was not an authority competent to entertain and decide the grievances in respect of the Panchayat Shiksha Mitra and is not an authority competent to entertain and resolve the disputes in relation to appointment, termination of service etc. of the Panchayat Teachers.

8. This Appeal came up for hearing before the Bench of this Court (Coram: Mr. Justice Shiva Kirti Singh, as he then was and Mr. Justice Shivaji Pandey) on 28th September 2011. On the submissions made by the learned counsel for the appellant, under order dated 28th September 2011 the Appeal was directed to be heard by a Full Bench. The Bench observed, "Considering that large number of cases are arising on the aforesaid issue, it is desirable that this appeal be heard

by a Full Bench....

9. At the outset we may note that the aforesaid reference has been made keeping in view the large number of cases filed in the subject matter and not because the Bench did not agree with the view expressed in the matter of Smt. Renu Kumari Pandey (supra). In my opinion, unless the latter Bench, for cogent reasons, disagrees with the earlier view taken by the collateral Bench, the question of referring the matter to a larger Bench shall not arise. Reference can be had to the judgment of the Full Bench of this Court in the matter of Akhauri Krishna Kumar Sinha and Others Vs. Mundrika Prasad, . Nevertheless, as the Appeal has come up for hearing before this Bench, the Appeal is heard and is decided on merits.

10. We have heard the learned advocates appearing in this Appeal and also the learned advocates appearing in other cognate matters which are ordered to be heard with this Appeal. In support of their submissions, the learned advocates have relied upon the judgments of the Hon'ble Supreme Court in the matters of State of West Bengal and Others Vs. Shivananda Pathak and Others, ; of Gammon India Ltd. Vs. Spl. Chief Secretary and Others, ; of Balakrushna Behera and Another Vs. Satya Prakash Dash, ; of Y. Satyanarayan Reddy Vs. The Mandal Revenue Officer, A.P., ; of Fuljit Kaur Vs. State of Punjab and Others, ; and of State of Punjab Vs. Salil Sabhlok and Others, ; and of this Court in the matter of Akhauri Krishna Kumar Sinha and Others Vs. Mundrika Prasad, ; of Prathmik Adhyapak Sangh and Others Vs. The State of Bihar and Others ; of Abdul Quadir and Others Vs. The State of Bihar and Others ; of Kishori Prasad Vs. The State of Bihar and Others, ; of The State of Bihar and Others Vs. Indra Mohan Rai ; of Alok Kumar Singh Vs. The State of Bihar and Others, ; of Indu Devi Vs. The State of Bihar & Ors. [2010 (2) PLJR 241]; of Smt. Renu Kumari Pandey Vs. The State of Bihar and Others, ; of Reema Kumari Vs. The State of Bihar and Others, ; of Umesh Chandra Shiva Vs. The State of Bihar and Others, ; of Pintu Das Vs. The State of Bihar and Others, ; of Subodh Kumar Yadav Vs. The State of Bihar and Others, ; and of Awadh Bihari Rai Vs. The State of Bihar and Others, .

11. Learned counsel Mr. Y.V. Giri has appeared for the appellant. He has raised objection against the constitution of the Bench. He has submitted that this Bench (the Chief Justice) shall not hear this Appeal because the Chief Justice has already expressed her opinion in the matter of Smt. Renu Kumari Pandey (supra). The "principle of judicial obstinacy" requires that this Bench should not hear this Appeal. In support of this submission, Mr. Giri has relied upon the judgment of the Hon'ble Supreme Court in the matters of State of West Bengal and Others Vs. Shivananda Pathak and Others, and of Prathmik Adhyapak Sangh and Others Vs. The State of Bihar and Others .

12. Mr. Giri has strenuously urged that once a Judge has expressed his/her opinion, he or she gets biased and that Judge shall not hear a similar matter raising identical issue. In my opinion, the submission is totally absurd. Nothing in the above referred judgments even remotely suggests that a Judge should not

hear a matter on an issue on which he/she has already expressed some view; or in other words a Judge should hear not more than one matter on a particular issue. If the submission were accepted it would lead to total chaos. Every judge, every day entertains, hears and decides similar or identical issues. The Court, therefore, cannot be said to be biased.

13. Mr. Giri has next submitted that whether authorized by law or not, the District Magistrate, Samastipur had heard and decided the Miscellaneous Case No. 1 of 2010 pursuant to the direction issued by this Court in CWJC No. 1732 of 2009. The impugned order, therefore, cannot be held to be made without the authority of law.

14. Mr. Giri has next submitted that while considering the Rules of 2006, particularly Rule 20(iii) thereof in the matter of Smt. Renu Kumari Pandey (supra), the Bench has erred in not considering the provisions contained in the General Clauses Act. He has submitted that Section 6 of the General Clauses Act, 1897 and Section 8 of the Bihar and Orissa General Clauses Act, 1917 make similar provision in respect of consequences of a repeal of an Act. Section 6 of the General Clauses Act, 1897 and Section 8 of the Bihar and Orissa General Clauses Act, 1917 read as under:

The General Clauses Act, 1897

6. Effect of repeal.-Where this Act, or any [Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effects; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

The Bihar and Orissa General Clauses Act, 1917

8. Effect of repeal.-Where any Bihar and Orissa Act, or Bihar Act repeals any enactment hitherto made, or hereafter to be made, then, unless a different

intention appears, the repeal shall not,--

(a) revive anything not in force or existing at the time at which the repeal takes effects; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed.

15. I have considered and relied upon the judgment of the Hon''ble Supreme Court in the matter of Gammon India Ltd. Vs. Spl. Chief Secretary and Others, .

16. In my opinion, nothing provided in the above referred Section 6 of the General Clauses Act, 1897 or Section 8 of the Bihar and Orissa General Clauses Act, 1917 affects the decision in the matter of Smt. Renu Kumari Pandey (supra). The fallacy in the submission is apparent. Both the above referred Sections 6 and 8 operate only in case the concerned Repealing Act does not provide for consequences, for both the above referred Sections 6 and 8 use the phrase "unless a different intention appears". Thus in case the Repealing Act provides for the consequences of such repeal, the same shall prevail.

17. In the present case, Rule 20 of the Rules of 2006 provides for the consequences of repeal in the following terms:

18. The aforesaid Rule 20 of the Rules of 2006 has been considered by the Bench in the matter of Smt. Renu Kumari Pandey (supra). In absence of any doubt raised in respect of construction of the said Rule 20, there is no scope for taking any other view in respect of the effect of the Rules of 2006, particularly Rule 20(iii) thereof, on Panchayat Shiksha Mitra serving as such as on 1st July 2006.

19. We may also note here that the judgment in the matter of Smt. Renu Kumari Pandey (supra) has been affirmed by the Hon''ble Supreme Court under its order dated 9th January 2012 made on Petition for Special Leave to Appeal (Civil) No. 33303 of 2011. Mr. Giri has rightly submitted that summary dismissal of Petition for Special Leave to Appeal does not amount to confirming the judgment under challenge. In that case, the judgment under challenge would be final and binding to the parties thereto, but does not lay down a binding precedent. In support thereof, Mr. Giri has relied upon the judgments of the Hon''ble Supreme Court in the matters of Y. Satyanarayan Reddy Vs. The Mandal Revenue Officer, A.P., and

of Fuljit Kaur Vs. State of Punjab and Others, .

20. On this issue, we do agree with Mr. Giri. However, Mr. Giri has not been able to point out that the interpretation of Rule 20 put forward by the Division Bench in the matter of Smt. Renu Kumari Pandey (supra) is incorrect in any manner or has a possible second view.

21. The Scheme framed under Government Resolutions dated 21st June 2002 and modified on 11th August 2004 and 7th April 2005; and explained on 21st April 2005 has been considered and discussed in the above referred judgment of Smt. Renu Kumari Pandey in extenso. The relevant paragraphs are reproduced hereunder for convenience:

4. The State of Bihar in discharge of its constitutional responsibility and under its policy of "Education for All", under its Resolution dated 21st June 2002 framed the scheme for contractual employment of Panchayat Shiksha Mitra under the Gram Panchayats for primary education in the State of Bihar. The said scheme was later modified by the Government Resolutions dated 11th August 2004 and 7th April 2005.

5. Under its Resolution dated 21st June 2002, the Government of Bihar framed a scheme for selection and employment of Panchayat Shiksha Mitra under the Gram Panchayats in the State of Bihar. The salient features of the said scheme as are relevant for the present set of writ petitions were:-

(i) The District Superintendent of Education was empowered to determine, with the approval of the District Magistrate, the strength of the Panchayat Shiksha Mitra in every district, the extent of reservation and the distribution of posts amongst the Gram Panchayats.

(ii) For employment as Panchayat Shiksha Mitra, a candidate shall be a resident of the Panchayat and shall possess a minimum qualification of passing of matriculation or equivalent examination from a recognized Board with minimum 45% marks.

(iii) The employment would be contractual on monthly honorarium of Rs. 1500.00. The contractual period would be 11 months excluding the summer vacation.

(iv) In case of satisfactory service the employment may be extended for a further period of 11 months.

(v) No Panchayat Shiksha Mitra would be employed for more than $11 \times 3 = 33$ months.

(vi) The selection would be made in order of merit on the basis of the marks obtained at matriculation examination. In case of equal marks, the trained candidate, the candidate having higher marks or a woman candidate would be given preference in that order.

6. The said Resolution of 2002 was modified by Resolution dated 11th August 2004. The said Resolution modified the scheme to the extent it provided, inter alia, :-

(i) As far as possible a minimum 50% reservation for women. In case women candidates with prescribed qualification were not available the requirement may be relaxed.

(ii) The candidate must have passed Intermediate examination or an equivalent examination with at least 45% marks.

(iii) In the event in any Panchayat women candidates having Intermediate qualification are not available, women candidates having Matriculation or equivalent qualification may be employed on condition that such candidate will acquire the Intermediate or equivalent qualification within three years. The District Magistrate was required to make proposal in respect of such candidates to the State Government and the State Government would obtain relaxation under Regulation 5 of National Council for Teacher Education (Determination of minimum qualification for recruitment of teachers in schools) Regulation, 2001 from National Council for Teacher Education.

(iv) The selection for employment as Panchayat Shiksha Mitra would be made on the basis of the marks obtained at Intermediate or equivalent examination, higher educational qualification, training and physical training in accordance with the table under Schedule "Ka".

7. Under the Government Resolution dated 7th April 2005, paragraph 8 of the aforesaid Resolution of 2004 was modified. Paragraph 8 provided for:

(i) Contractual employment for monthly honorarium of Rs. 1500/-.

(ii) Termination of contract of employment.

(iii) Reemployment after expiry of the term of employment;

(iv) The Panchayat Shiksha Mitra may be employed for maximum three times each for 11 months" period.

(iv) The Panchayat Shiksha Mitra may be employed for maximum three times each for 11 months" period.

(v) The said Resolution also provided that the trained persons having Diploma in Education or B.Ed. shall be given preference.

(vi) The comparative merit would be decided in accordance with the schedules "Ka" and "Kha" thereunder.

(vii) In absence of the trained candidates the vacancies be filled-in by operating the merit list "Kha"(untrained candidates).

Schedule "Ka"

The weightage to be given for preparation of merit list of trained persons.

Schedule "Kha"

The weightage to be given for preparation of merit list of untrained persons.

8. The note below the aforesaid paragraph 7 provided that the weightage being equal; persons with higher qualification be placed higher in the merit list.

9. Certain issues relating to the employment of Panchayat Shiksha Mitra arising under the aforesaid Resolution dated 11th August 2004 were clarified under Government Resolution dated 21st April 2005. Clause 7 of the said Resolution provided that the tenure of the Matriculate Panchayat Shiksha Mitra shall not be extended.

18. We may also note here that though the State Government framed a complete scheme for employment of Panchayat Shiksha Mitra at Gram Panchayat level in furtherance of its goal of "Education for All", in none of the aforesaid Resolutions the Government had provided for an adjudicatory machinery. In other words, the State Government did not make any provision for redressal of grievance in respect of selection and employment of Panchayat Shiksha Mitra or their reemployment after the expiry of the contractual period. On perusal of the records of the above writ petitions, we find that in absence of such machinery, the aggrieved persons approached the authority whom such persons considered to be the competent/the convenient authority. In our opinion, in absence of powers expressly conferred upon any such authority the reports or the orders made by such authority are of no consequence. No relief can be granted on the basis of the finding recorded by such authority. We may also point out that Elementary Teachers Appellate Authority constituted under Rule 18 of the Rules, as amended by Bihar Panchayat Elementary Teacher (Employment and Service Conditions) (Amendment) Rules, 2008 is empowered to entertain, hear and decide the appeals arising out of the employment of elementary teachers under the Rules. The said appellate authority has no jurisdiction to entertain, hear or decide the disputes relating to the employment of Panchayat Shiksha Mitra under the then prevalent Resolutions, Circulars, Orders, Instructions.

22. The aforesaid Scheme came to an end with enactment of the 2006 Rules which came into operation on 1st July 2006. The scope and ambit of the Rules of 2006, particularly Rule 20 thereof have been discussed in the above referred matter of Smt. Renu Kumari Pandey. The relevant paragraphs are reproduced for convenience:

10. The Government of Bihar, in exercise of power conferred by Article 243Q of the Constitution and by Section 146 of the Bihar Panchayat Raj Act, 2006 framed the Bihar Panchayat Elementary Teacher (Employment and Service Conditions) Rules, 2006 (hereinafter referred to as "the Rules"). Under Rule 3 of the Rules, the elementary teachers are grouped into two categories; (a) the Block Teacher (Prakhand Shikshak) at Block level and; (b) the Panchayat Teacher (Panchayat

Shikshak) at Gram Panchayat level.

11. Rule 2 of the Rules defines "Primary School" to mean Government and nationalized schools imparting education up to Vth standard. "Middle School" is defined to mean Government and nationalized schools imparting education for VIIth and VIIIth standard. "Elementary School" is defined to mean Government and nationalized primary and middle schools. Rule 8 thereof provides for eligibility for appointment as Block Teacher and Panchayat Teacher. Rule 9 thereof provides for procedure for constitution of selection committee and for selection and appointment of Block Teachers and Panchayat Teachers. Rule 18 thereof provides for appeals arising out of the selection made under the Rules.

12. Rule 20 of the Rules provides for repeal and saving. Clause (i) thereof provides, inter alia, for repeal of all Rules, Resolutions, Orders and Instructions issued in respect of employment of Panchayat Shiksha Mitra. Clause (ii) thereof provides for saving of selection and service conditions of the Panchayat Shiksha Mitra employed under the Rules, Resolutions, Orders or Instructions prevalent prior to the date of the repeal. Clause (iii) thereof provides for absorption of Panchayat Shiksha Mitra appointed or employed under the then prevalent Rules, Resolutions, Circulars, Orders and Instructions as Panchayat Shikshak under the Rules. In other words, the Panchayat Shiksha Mitra appointed under the then prevalent Rules, Resolutions, Circulars, Orders, Instructions and employed as Panchayat Shiksha Mitra as on 1st July 2006 are absorbed as Panchayat Shikshak under the Rules. It is the aforesaid Clause (iii) which is the subject matter of reference before us.

16. Clause (iii) of Rule 20 of the Rules reflects the policy decision of the State Government. We are of the considered opinion that no legal provision can be held to be arbitrary or discriminatory or ultra vires Articles 14 and 16 of the Constitution on hypothetical set of facts. We, therefore, hold that Clause (iii) of Rule 20 of the said Rules is neither arbitrary nor discriminatory nor it is violative of Articles 14 and 16 of the Constitution.

17. Coming to the second issue, we are of the opinion that the Rules are statutory in nature and have to be implemented in letter and spirit. Under Clause (i) of Rule 20 of the Rules all earlier resolutions, orders, directions issued in respect of employment of Panchayat Shiksha Mitra are repealed. Consequently, the posts of Panchayat Shiksha Mitra stood abolished. Thereafter, no person can be employed as Panchayat Shiksha Mitra; nor can there be a deemed employment as Panchayat Shiksha Mitra; nor can there be a deemed absorption in the service as Panchayat Shikshak by operation of Rule 20(iii) of the Rules. In our opinion, even in a case where a person has a legitimate grievance in respect of his or her non-selection as Panchayat Shiksha Mitra at the relevant time or non-continuance as Panchayat Shiksha Mitra, such person cannot be deemed to have been appointed as Panchayat Shiksha Mitra; nor can he/she be deemed to have been employed as Panchayat Shiksha Mitra as on 1st July 2006; nor can such person be deemed to have been absorbed in service as Panchayat Shikshak

under the Rules.

23. Having considered the scope and ambit of the Scheme for appointment of Panchayat Shiksha Mitra and the Rules of 2006, the Bench held:

21. All these petitions arise from the claim made by the respective writ petitioners for employment as Panchayat Shiksha Mitra under the then prevalent scheme for selection and employment of Panchayat Shiksha Mitra under the Gram Panchayats. None of them was employed as Panchayat Shiksha Mitra as on 1st July 2006. As we have held that from the date of the Rules (1st July 2006) such persons have no right to claim employment or deemed employment as Panchayat Shiksha Mitra or a right to be absorbed as Panchayat Shikshak by operation of Rule 20(iii) of the Rules, the reliefs prayed for by the writ petitioners cannot be granted.

24. Nothing said in the above referred matter of Smt. Renu Kumari Pandey is questioned before us. Nothing has been brought before us which persuades me to take a different view of the Scheme and the Rules of 2006. The Hon''ble Supreme Court has, in the matter of Balakrushna Behera and Another Vs. Satya Prakash Dash, , held that by mere selection a candidate does not acquire indefeasible right to appointment to a post which can be enforced in a petition filed under Article 226 of the Constitution. The Hon''ble Court has also held that the Court cannot direct the State Government by writ of mandamus to appoint a person against a post which has been abolished by the State Government.

25. Another Division Bench headed by Justice Smt. T. Meena Kumari had the similar view in the matter of Umesh Chandra Shiva Vs. The State of Bihar and Others, . It reads, ".....the Rules namely Bihar Prarambhik Shikshak Nioyojan and Shikshak Niamawali Adhiniyam-2006, does not permit selection earlier made for the post of Panchayat Shiksha Mitra to be either saved or retained for any purpose, inasmuch as, Rule-18 and 20 read in tandem would make it absolutely clear that all circulars and guidelines relating to selection and appointment on the post of Panchayat Shikshak were repealed as a whole and therefore, once the saving clause also was limited to reserving the rights of already appointed Shiksha Mitra either in respect of their salary or service condition, it has to be necessarily held that the earlier selection and preparation of panel in which Umesh Chandra Shiva had been found to be best among the backward candidate was limited for the post of Panchayat Shiksha Mitra and on that basis, he cannot be appointed on the post of Panchayat Shikshak after 01.07.2006 in view of the aforementioned 2006 Rules.

26. In the matter before us also the appellant Kalpana Rani was never appointed as Panchayat Shiksha Mitra either in 2003 or at any time until 1st July 2006. After 1st July 2006, the appellant could not set up right to employment as Panchayat Shiksha Mitra or right to be absorbed as Panchayat Teacher. The belated challenge to the appointment of the respondent nos. 9 and 10 and the claim for absorption as Panchayat Teacher raised by the appellant after 1st July

2006 was clearly an after thought. Such a claim cannot be entertained. Irrespective of the validity of the appointment of respondent nos. 9 and 10 as Panchayat Shiksha Mitra, the appellant has no right to be appointed as Panchayat Shiksha Mitra or to be absorbed as Panchayat Teacher.

27. We may note that the Scheme framed under Government Resolution dated 21st June 2002 was modified under Government Resolution dated 11th August 2004. Under the modified Scheme the eligibility was enhanced from Matric or equivalent qualification to that of Intermediate or equivalent qualification with minimum of 45% marks. 50% of the posts were reserved for female candidates. In case qualified female candidates in adequate number were not available, the concerned authorities were permitted to select female untrained candidates or the female candidates with lesser qualification of Matriculation or equivalent qualification on condition that they acquired the requisite qualification within three years. For that purpose the permission be obtained from the National Council for Teachers Education to relax the standard of eligibility. This concession was made for female candidates alone. A similar concession was not extended to the male candidates {paragraph-5(ga)}.

28. While allowing the said benefit of improvement of qualification to one Kishori Prasad Vs. The State of Bihar and Others, , the Bench failed to appreciate that the benefit of relaxation in qualification was not extended to the male candidates. The Bench also did not notice the factum of abolition of cadre of Panchayat Shiksha Mitra and the replacement of the Scheme by the Statutory Rules of 2006. The judgment in the matter of Kishori Prasad Vs. The State of Bihar and Others, is, therefore, per in curium and is expressly overruled. The decision in the matter of Reema Kumari Vs. The State of Bihar and Others, is affirmed.

29. Any judgment which has taken a view contrary to the above view expressed by us is impliedly overruled.

30. For the aforesaid reasons, Appeal is dismissed with cost. The cost is quantified at Rs. 10,000/-. The amount of cost will be deposited in the Government Treasury at Samstipur within eight weeks from today. In the event, the appellant fails to deposit the amount of cost as directed, the District Collector, Samastipur will recover the same as arrears of land revenue. Interim relief stands vacated.

31. Interlocutory Application stands disposed of.

Mihir Kumar Jha, J.

32. I entirely agree with Hon"ble the Chief Justice but, having regard to the seminal importance of the issues involved in this case, I am delivering my separate concurring judgment.

33. The facts giving rise to this appeal lie in a very narrow compass. Upon formulation of a scheme by a resolution dated 21.06.2002 issued by the

Department of Secondary, Primary and Adult Education of the Government of Bihar for engagement on contract on the post of Panchayat Shiksha Mitra when such post of Panchayat Shiksha Mitra was sought to be filled up in Mohiuddinpur Panchayat, both the appellant and the respondent no. 10 of this appeal and the writ petitioner (hereinafter referred to as the writ petitioner) with others had filed their application for being appointed as Panchayat Shiksha Mitra. The Sukh Suvidha Samiti of the Panchayat, thereafter, had selected and appointed the writ petitioner on 25.4.2003. As per the scheme of Panchayat Shiksha Mitra, the writ petitioner was also granted extension upon completion of tenure of eleven months of contract on 17.4.2004, 22.4.2005 and 25.4.2006 and thus, as the writ petitioner was continuing as a Panchayat Shiksha Mitra on 1.7.2006, he stood absorbed on the post of Panchayat Teacher in terms of Rule 20(iii) of Bihar Panchayat Prarambhik Shikshak (Nioyojan & Seva Sart) Niyamawali, 2006 (hereinafter to be referred to as "the 2006 Rules").

34. The appellant, however, had assailed the selection and appointment of the writ petitioner by an application dated 14.09.2006 filed by her in Janta Darbar of District Magistrate which was sent for disposal to the Block Development Officer in exercise of his power under Rule 18 of the 2006 Rules and he, by his order dated 18.11.2006, had cancelled the appointment not only of the writ petitioner but, all other appointments on Panchayat Shiksha Mitra, who actually by then had already stood absorbed on the post of Panchayat Teacher. It is, however, on record that later on the Block Development Officer by his order dated 25.1.2007 had recalled his order dated 18.11.2006 and, as such, the writ petitioner with others had continued to work as Panchayat Teacher.

35. The appellant, thereafter, had assailed the aforementioned order of the Block Development Officer dated 25.1.2007 in a writ petition before this Court in CWJC No. 675 of 2007 which was heard with 24 other similar writ petitioners all involving with regard to selection/appointment/re-appointment/absorption/payment of salary on the post of Panchayat Shiksha Mitra/Panchayat Teacher. This Court, by an order dated 18.5.2007 in the writ application of the appellant as also the other 24 writ petitions without interfering with the impugned order of the Block Development Officer dated 25.1.2007, had only given permission to the appellant and other writ petitioners in the batch of those writ petitions to file their representation before the concerned District Magistrate within a period of four weeks with a direction to the District Magistrate to look into the grievance as raised by the concerned writ petitioner and dispose of the same by a reasoned order within a period of three months.

36. Pursuant to the aforementioned direction of this Court in the order dated 18.05.2007 when the appellant had filed her representation before the District Magistrate, the same was disposed of by a reasoned order dated 12.7.2007 rejecting the case of appellant for her appointment as a Panchayat Shiksha Mitra in view of the government decision dated 10.11.2006 that no appointment from the panel of Panchayat Shiksha Mitra could be made after 1.7.2006, the date on

which 2006 Rules came into force. In this regard, it would be necessary to quote the relevant portion of the order of the District Magistrate, Samastipur dated 12.7.2007, which reads as follows:-

(underlining for emphasis)

37. It is significant to note here that this order of the District Magistrate, Samastipur dated 12.7.2007 has been made subject matter of the writ petition CWJC No. 11844 of 2007, which, according to the appellant as per her own averment in paragraph no. 14 of the memo of the present appeal, is still pending before this Court. It, however, appears that pursuant to the aforementioned direction of the District Magistrate, Samastipur as with regard to looking into the appointment of the writ petitioner, who allegedly was appointed as a Panchayat Shiksha Mitra even having lesser marks than the appellant, some enquiry was conducted and by an order dated 24.12.2008, the appointment of the petitioner was cancelled whereafter the writ petitioner had filed a writ application, CWJC No. 1732 of 2009 impleading the appellant as Respondent no. 9 and this Court by an order dated 3.2.2009 had held the order of termination of service of the writ petitioner dated 24.12.2008 to be bad only on the ground of violation of principle of natural justice, inasmuch as, such order was passed by the District Magistrate, Samastipur even without issuing any notice to the writ petitioner.

38. This Court again in the order dated 3.2.2009 in CWJC No. 1732 of 2009 had infact remitted the matter back to the District Magistrate, Samastipur with a direction that the writ petitioner should be afforded an opportunity of hearing along with the appellant and/or any other affected persons and decide the matter afresh only with regard to termination of the services of the writ petitioner because the appellant, in any event, could not have been appointed in view of the government decision abolishing the post of Panchayat Shiksha Mitra with effect from 1.7.2006. The appellant then had filed an appeal L.P.A. No. 374 of 2009 against the order dated 3.2.2009 and a Division Bench of this Court, while disposing of the appeal of the appellant by an order dated 8.10.2009, had only observed that the order of this Court dated 3.2.2009 in C.W.J.C. No. 1732 of 2009 would not stand in the way of the District Magistrate, Samastipur in considering and deciding the right of the appellant in accordance with law.

39. The District Magistrate, Samastipur had, thereafter, passed his order on 26.6.2010 holding the appointment of the writ petitioner to be bad and also directed in his same order dated 26.6.2010 for appointment of the appellant on the post of Panchayat Shiksha Mitra. It is this order dated 26.6.2010 of the District Magistrate, Samastipur which was assailed by the writ petitioner in CWJC No. 12054 of 2010 impleading appellant as Respondent no. 10 and has been quashed by the impugned order of this appeal dated 16.9.2010 wherein learned single Judge of this Court, having referred to and relied on the ratio in the case of Alok Kumar Singh Vs. The State of Bihar and Others, , has held that the order the District Magistrate dated 26.6.2010 was unsustainable both on the ground of jurisdiction as also because of abolition of the post of Panchayat Shiksha Mitra. It

is actually this order dated 26.6.2010 in CWJC No. 12054 of 2010, which is the subject matter of this appeal.

40. A Division Bench of this Court, while admitting this appeal for final hearing by an order dated 28.09.2011, has referred the appeal itself for its being heard by the Full Bench and the relevant part of the order of the Division Bench dated 28.09.2011, reads as follows:-

---In view of the aforesaid submissions and stand taken by Mr. Giri, we are inclined to admit this application for hearing by a Full Bench.---Considering that large number of cases are arising on the aforesaid issue, it is desirable that this appeal be heard by a Full Bench at an early date which may be got fixed by the Office under orders of Hon''ble the Chief Justice.

41. Mr. Y.V. Giri, learned senior counsel for the appellant, at the outset, had raised an objection to the hearing of the appeal by the Full Bench consisting Hon''ble the Chief Justice on the ground that the reference, having been made by the Division Bench in the order dated 28.9.2011 as with regard to the correctness of an earlier Division Bench judgment delivered by Hon''ble the Chief Justice in the case of Smt. Renu Kumari Pandey Vs. The State of Bihar and Others, , she should recuse herself from the Full Bench. In support of his aforementioned submissions, Mr. Giri had invoked the doctrine of judicial obstinacy and the resultant apprehension of likelihood of bias by placing also his strong reliance on the judgment of the Apex Court in the case of State of West Bengal and Others Vs. Shivananda Pathak and Others, as also a Division Bench judgment of this Court in the case of Prathmik Adhyapak Sangh and Others Vs. The State of Bihar and Others .

42. Per contra, learned counsel for the respondents led by Mr. Rajiv Kumar Verma, learned senior counsel for respondent no. 10, the writ petitioner, have vehemently opposed the views of Mr. Giri as with regard to seeking recusal of Hon''ble the Chief Justice from the Full Bench. According to Mr. Verma, first of all, the Division Bench in its order dated 28.9.2011, while referring this appeal for its hearing by a Full Bench, has nowhere even remotely doubted much less differed with the ratio of the judgment in the case of Smt. Renu Kumari Pandey (supra). According to Mr. Verma such a reference to the Full Bench by the Division Bench in the order dated 28.9.2011 is only by way of its desire for hearing the entire appeal itself. In this regard, Mr. Verma has also placed reliance not only on the order of reference dated 28.9.2011 but, also on the provision of the Patna High Court Rules with regard to reference of a case to Full Bench.

43. In the light of the aforesaid stand of the parties, to my mind, it would be necessary for one to first answer the following three aspects as with regard to recusal of Hon''ble the Chief Justice from the Full Bench namely:-

(i) Whether the reference by the Division Bench by its order dated 28.09.2011 is only for hearing of the whole appeal or for deciding the correctness of the ratio of an earlier division bench judgment in the case of Smt. Renu Kumari Pandey

(supra)?

(ii) Whether any law including Patna High Court Rules or its almost hundred years" precedence requires a judge to recuse himself or herself from Full Bench if his or her earlier judgment becomes the subject matter of consideration by the Full Bench?

(iii) Whether such recusal of Hon"ble the Chief Justice has been sought only because the ratio laid down by the earlier division bench in the case of Smt. Renu Kumari Pandey (supra) is totally against the case of the appellant?

44. There is no doubt that under the Patna High Court Rules a Division Bench can refer the case to the Full Bench under two circumstances as can be found from a bare perusal of Rule-1 of Chapter-V of the Patna High Court Rules, which reads as follows:-

1. Whenever a Division Bench desires and the Chief Justice consents that any case shall be referred to a Full Bench, or whenever in any case a Division Bench differs from any other Division Bench upon a point of law or usage having the force of law, such case shall be referred for decision by a Full Bench.

45. As would be apparent, there are two distinct situations for reference to be made by a Division Bench to the Full Bench. Firstly, if the Division Bench, having regard to the importance of the question, desires that any case should be heard by the Full Bench and Hon"ble the Chief Justice consents to such desire of the Division Bench, the case shall be referred to the Full Bench. The second situation will be such where the Division Bench straightway differs with the earlier Division Bench on a point of law in which case the case shall stand referred to a Full Bench even without consent of Hon"ble the Chief Justice.

46. Apart from the aforesaid Rule-1, the power of Hon"ble the Chief Justice to issue a direction that any application, petition, suit, appeal or reference shall be heard by a Full Bench is fully protected in Rule-11 of Chapter-II of the Patna High Court Rules, which, if read together, which are Rule 10A thereof, will leave nothing for speculation that the power of the Hon"ble the Chief Justice in making reference to a Full Bench is absolute.

47. In the background of the aforesaid provisions in the Patna High Court Rules, if the order of reference of the Division Bench dated 28.9.2011 is closely examined, it can be easily deciphered that it is actually the desire of the Division Bench that this appeal itself should be heard by a Full Bench because a large number of cases have arisen on the issues raised in this appeal.

48. From reading of the order of reference of the Division Bench dated 28.09.2011, in fact, it also becomes absolutely clear that though Mr. Giri had made his submission on a number of issues before the Division Bench, the order of reference did not say a word much less had given any reason to differ with the earlier judgment of the Division Bench in the case of Smt. Renu Kumari Pandey (supra). For me, therefore, I will read this order of reference to mean that the

whole appeal itself has been referred for its being heard by the Full Bench. This is precisely, according to me, the import of the order of reference dated 28.9.2011.

49. By now it is also well settled that reference to a larger Bench by the smaller Bench can be made either of a whole case or on a specific point. To that extent, the judgment of the Apex Court in the case of Kerala State Science and Technology Museum Vs. Rambal Company and Others, by itself would be an authority to show that reference made by the learned Single Judge to Division Bench in absence of any specific question was held to have been referred to Division Bench for hearing the whole case. The same view has been also recently reiterated in the case of State of Punjab Vs. Salil Sabhlok and Others, wherein it was held as follows:-

There is no bar shown whereby a Bench is precluded from referring the entire case for decision by a larger Bench.-it depends entirely on the reference made.---

50. Thus, both in view of the facts noted above and the law laid down by the Apex Court, I will have no difficulty in holding that it is the hearing of the appeal itself which has been actually referred to the Full Bench. Once I reach to this conclusion, I will have no hesitation in also holding that this appeal can be heard by this Full Bench consisting of Hon''ble the Chief Justice inasmuch as there is nothing in Patna High Court Rules or its Letters Patent as with regard to constitution of Full Bench for hearing of a Letters Patent appeal by any judge save and except that his or her judgment is not the subject matter of appeal. Thus as this appeal itself is to be heard by the Full Bench and as per Rule 12 of Chapter-II of Patna High Court such Full Bench has to be of any number not less than three Judges, it has to be essentially held that there is no bar in Patna High Court Rules in Hon''ble Chief Justice, being also a judge of this Court, to be a member of the Full Bench.

51. My aforesaid view is further fortified from reading of Rule 6 of Chapter II of Patna High Court Rules which is the only other provision to exclude a particular Judge from being a member of Full Bench and the same reads as follows:-

6. Appeals to the High Court under Clause 10 of the Letters Patent from the judgment of a Bench confirming the judgment of a Lower Court u/s 98 of the CPC shall be heard by a Bench consisting of at least three Judges, including both or neither of the Judges of the Bench from whose judgment the appeal is preferred, and if from the judgment of one Judge of a Bench of two Judges, it shall be heard by a Bench consisting of at least two Judges other than the Judge from whose judgment the appeal is preferred.

52. Having held so that since the appeal is to be heard by this Full Bench and Hon''ble the Chief Justice can be a member of this Full Bench, it is also not difficult for me to reject that part of submission of Mr. Giri that Hon''ble the Chief Justice should recuse herself because the referring division bench in its order dated 28.09.2011 had doubted the correctness of the law laid down in the case

of Smt. Renu Kumari Pandey (supra). In my view the order of reference dated 28.09.2011 of the Division bench is as clear as day light and there is nothing in it even by way of opinion of the Division Bench to show it had differed or even doubted the correctness of the law laid down in the earlier Division Bench judgment in the case of Smt. Renu Kumari Pandey (supra) while referring the hearing of this appeal itself to Full Bench only because a large number of cases were arising on the issue.

53. As a matter of fact after coming to this conclusion that the whole appeal itself has been referred by the Division Bench to the Full Bench, there was actually no need for me to go into the remaining submissions of Mr. Giri, learned senior counsel for the appellant, as with regard to the recusal of Hon''ble the Chief Justice from the Full Bench because if the ratio of judgment of the Division Bench in the case of Smt. Renu Kumari Pandey (supra) has not been doubted by the referring Division Bench, his very basis of the filibusterous submissions would automatically disappear. It is not the case of Mr. Giri that even if there is a judgment of earlier Division Bench, whose ratio has not been doubted much less differed by the other division bench its applicability while deciding the appeal cannot be examined by the Full Bench even by the members of the Full Bench, who were party to the Division Bench Judgment. As a matter of fact, Mr. Giri has firstly created a ghost in his mind and then has given a stick in the hands of ghost for running away from its shadow by assuming that ratio of earlier Division Bench judgment in the case of Smt. Renu Kumari Pandey (supra) has been called in question by the referring Division Bench.

54. The crucial question however would be where is the ghost? In my view, the submissions of Mr. Giri for recusal of Hon''ble the Chief Justice is in fact a bench hunting tactics, which has to be deprecated in the strongest terms, in view of the law laid down in the case of AIR 1932 485 (Lahore) wherein it was held that a statement made by a counsel before the Judges of Full Bench to the effect that his instructions are that his client does not wish the matter to be argued before the Bench as constituted, is a deliberate and intentional insult to the Court and that it is highly improper on the part of the counsel to make such a statement which actually amounts to a Contempt of Court.

55. To me it also appears that Mr. Giri is apprehensive that as he has no answer to the law laid down by the earlier Division Bench in the case of Smt. Renu Kumari Pandey (supra) whose judgment was delivered by a Division Bench presided by the Hon''ble Chief Justice, he wants her recusal for taking a chance before another Bench. Such approach of a senior counsel has been only recently been seriously frowned and deprecated by the Apex Court in the case of Subrata Roy Sahara Vs. Union of India & Ors. in a well considered judgment dated 6.5.2014 in a Writ Petition (Criminal) No. 57 of 2014 in the following words:-

10. We have recorded the above narration, lest we are accused of not correctly depicting the submissions, as they were canvassed before us. In our understanding, the oath of our office, required us to go ahead with the hearing.

And not to be overawed by such submissions, in our view, not hearing the matter, would constitute an act in breach of our oath of office, which mandates us to perform the duties of our office, to the best of our ability, without fear or favour, affection or ill will. This is certainly not the first time, when solicitation for recusal has been sought by learned counsel. Such a recorded peremptory prayer, was made by Mr. R.K. Anand, an eminent Senior Advocate, before the High Court of Delhi, seeking the recusal of Mr. Justice Manmohan Sarin from hearing his personal case. Mr. Justice Manmohan Sarin while declining the request made by Mr. R.K. Anand, observed as under.

The path of recusal is very often a convenient and a soft option. This is specially so since a Judge really has no vested interest in doing a particular matter. However, the oath of office taken under Article 219 of the Constitution of India enjoins the Judge to duly and faithfully and to the best of his knowledge and judgment, perform the duties of office without fear or favour, affection or ill will while upholding the constitution and the laws. In a case, where unfounded and motivated allegations of bias are sought to be made with a view of forum hunting/Bench preference or brow-beating the Court, then, succumbing to such a pressure would tantamount to not fulfilling the oath of office.

The above determination of the High Court of Delhi was assailed before this Court in R.K. Anand Vs. Registrar, Delhi High Court, . The determination of the High Court whereby Mr. Justice Manmohan Sarin declined to withdraw from the hearing of the case came to be upheld, with the following observations:

The above passage, in our view, correctly sums up what should be the Court's response in the face of a request for recusal made with the intent to intimidate the court or to get better of an "inconvenient" judge or to obfuscate the issues or to cause obstruction and delay the proceedings or in any other way frustrate or obstruct the course of justice.

(emphasis is ours)

11. In fact, the observations of the High Court of Delhi and those of this Court reflected, exactly how it felt, when learned counsel addressed the Court, at the commencement of the hearing. If it was learned counsel's posturing antics, aimed at bench-hunting or bench-hopping (or should we say, bench-avoiding), we would not allow that. Affronts, Jibs and carefully and consciously planned snubs could not deter us, from discharging our onerous responsibility. We could at any time, during the course of hearing, walk out and make way, for another Bench to decide the matter, if ever we felt that, that would be the righteous course to follow. Whether or not, it would be better for another Bench to hear this case, will emerge from the conclusions, we will draw. In the course of the present determination.

56. Recusal of a judge on the ground of apprehension of bias is only a part of the well enshrined principle of natural justice. The first requirement of natural justice is that the judge should be impartial and neutral and must be free from bias. He

is supposed to be indifferent to the parties to the controversy. He cannot act as judge of a cause in which he himself has some interest either pecuniary or otherwise as it affords the strongest proof against neutrality. He must be in a position to act judicially and to decide the matter objectively. Reference in this connection may usefully be made to the judgment of the Apex Court in the case of J. Mohapatra and Co. and Another Vs. State of Orissa and Another, .

57. Bias is of three types; (i) Pecuniary bias, (ii) Personal bias, and (iii) Official bias or bias as to subject-matter. As with regard to pecuniary bias, it is well settled that "the least pecuniary interest in the subject-matter of the litigation will disqualify any person from acting as a judge". Reference in this connection may be made to the observations made by Justice Stephen in the case of R. v. Farrant reported in (1987) QB 58(60). Griffith and Street in their treatise Principles of Administrative Law, 4th Edn., at page 156 have taken a view that a pecuniary interest, however slight, will disqualify, even though it is not proved that the decision is in any way affected". In Halsbury's Laws of England, 4th Edn., Vol. 1, para-68, it has been stated that there is a presumption that any financial interest, however small, in the matter in dispute disqualifies a person from adjudicating. The same principle has been followed in English decision reported in 77 ER 646 and in the case of Dimes v. Grand Junction Canal reported in (1852) 3 HLC 759.

58. The principle as with regard to pecuniary bias is also accepted in India as may be found from the judgment of the Apex Court in the case of Manak Lal Vs. Dr. Prem Chand, wherein Hon"ble Justice Gajendragadkar (as his Lordship then was) had observed:-

It is obvious that pecuniary interest, however small it may be in a subject-matter of the proceedings, would wholly disqualify a member from acting as a judge.

59. Later on, Hon"ble Justice Gajendragadkar in the case of N.B. Jeejeebhoy Vs. Assistant Collector, Thana Prant, Thana, had reconstituted the Bench on an objection being taken on behalf of the interveners in Court on the ground that the Chief Justice, who was a member of the Bench was also a member of the cooperative society for which the disputed land had been acquired. The same view in fact has also been taken subsequently by the Apex Court in the case of J. Mohapatra and Co. and Another Vs. State of Orissa and Another, .

60. The second type of bias is a personal bias. A number of circumstances may give rise to personal bias. Here a judge may be a relative, friend or business associate of a party. He may have some personal grudge, enmity or grievance or professional rivalry against him. In view of these factors, there is every likelihood that the judge may be biased towards one party or prejudiced towards the other, as has been also observed by Griffith and Street in their book Principles of Administrative Law, 4th Edn., p.156" and De Smith in his treatise Judicial Review of Administrative Action, 1980, p.265".

61. The above principle has also been accepted in India also as may be found

from the judgment of the Apex Court in the case of *The State of Uttar Pradesh Vs. Mohammad Nooh*, , in the case of *Mineral Development Ltd. Vs. The State of Bihar and Another*, and in the case of *Meenglas Tea Estate Vs. Its Workmen*, . The classic case of *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*, is still a benchmark as with regard to personal bias and has been followed by the Apex Court in a number of subsequent decisions including in the case of *Dr. S.P. Kapoor Vs. State of Himachal Pradesh and Others*, , in the case of *Ashok Kumar Yadav and Others Vs. State of Haryana and Others*, , in the case of *Sheonandan Paswan Vs. State of Bihar and Others*, as well as in the case of *Baidyanath Mahapatra Vs. State of Orissa and Another*, .

62. The third type of bias is official bias or bias as to the subject-matter. According to Griffith and Street in their book "Administrative Law, 4th Edn., p.156", only rarely will this bias invalidate proceedings. According to them, a mere general interest in the general object to be pursued would not disqualify a judge from deciding the matter and there must be some direct connection with the litigation. Professor Wade in the "Administrative Law, 1988, pp. 489-93" remarks that ministerial or departmental policy cannot be regarded as a disqualifying bias. The landmark judgment on the official bias of the English court is the case of *Ridge v. Baldwin* reported in (1963) 2 All ER 66.

63. The above principle has been accepted in India also and mere "official" or "policy" bias may not necessarily be held to disqualify an official from acting as an adjudicator unless there is total non-application of mind on his part or he has acted as per dictation of the superior authority instead of deciding the matter independently or has pre-judged the issue or has taken improper attitude to uphold the policy or the department, so as to constitute a legal bias. Reference in this connection may be usefully made to the judgment of the Apex Court in the case of *Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another*, .

64. The touchstone of official bias, therefore, in the words of De Smith in his treatise *Judicial Review of Administrative Action*, 1980, p.262" is that the "real likelihood" of bias" which means at least substantial possibility of bias. De Smith in his aforementioned treatise is also of the view that it should not be forgotten that the test of a real likelihood of bias must be based on the reasonable apprehensions of a reasonable man fully apprised of the facts. It is no doubt desirable that all judges, like Caesar's wife must be above suspicion, but it would be hopeless for the courts to insist that only "people who cannot be suspected of improper motives" were qualified at common law to discharge judicial functions, or to quash decisions on the strength of the suspicions of fools or other capricious and unreasonable people. The following observation of Justice Frank in the case of *Linahan Re* reported in (1943) 138 F 2nd 650 is locus classicus and worth quoting:-

If, however, "bias" and "partiality" be defined to mean the total absence of preconceptions in the mind of the Judge, then no one has ever had a fair trial,

and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions and the processes of education, formal and informal, create attitudes which precede reasoning in particular instances and which, therefore, by definition are prejudices.

65. The aforementioned views of Justice Frank has been approved in India also by the Apex Court in the case of International Airports Authority of India Vs. K.D. Bali and Anr, and again in the case of Secretary to Government, Transport Deptt., Madras Vs. Munuswamy Mudaliar and Another, . Thus, reasonable apprehension in the mind of the reasonable man is necessary and such reasonable apprehension must be based on cogent materials. It is this aspect of the matter which has been expanded and explained by the Apex Court in the case of International Airport Authority (supra) that there must be reasonable evidence to satisfy that there was a real likelihood of bias and vague suspicions of whimsical, capricious and unreasonable people should not be made the standard to regulate normal human conduct. The following observations of Justice John Clarke in this regard as quoted in the case of Linahan Re (supra) is worth quoting:-

I have never known any judges, no difference how austere of manner, who discharged their judicial duties in an atmosphere of pure, unadulterated reason. Alas! We are "all the common growth of the Mother Earth"-even those of us who wear the long robe.

66. When Mr. Giri submits that Hon''ble the Chief Justice should not participate in the Full Bench proceedings, he is definitely not referring any of aforesaid these three types of bias. A Judge, in fact, having delivered a judgment on the subject matter, cannot be even said to have got biased either personally or officially. Every day a Judge takes a view sitting singly, which is approved or overruled by the Division Bench or the view of the Division Bench is either approved or overruled by the Full Bench. Can it, therefore, be said that only because a Judge had rendered a judgment regarding a particular view, he becomes obsessed with his view? In my opinion, that would amount to question the whole judicial system. In a multi judges court, the view of a judge is not his particular view and in fact whatever judgment is rendered by him sitting Singly or in Division or in Full Bench is the view of the Court.

67. Nonetheless, since Mr. Giri has sought recusal of Hon''ble the Chief Justice from the Full Bench by expanding the doctrine of judicial obstinacy and the apprehended bias on account of participation of Hon''ble the Chief Justice in the Full Bench, I would like to go into the matter even deeper by examining the law on the subject. The issue, relating to conflict of interest and recusal of Judges, was also directly gone into at length by the Court of Appeal in the case of Locabail UK Limited Vs. Bayfield Properties Limited, (2000) QB 451 wherein the following situations for recusal of a Judge were enumerated:-

(1) that disqualification for direct personal interest (the Pinochet situation) was automatic irrespective of the strength of such interest, (subject to the de minimis

rule) or the judge's state of knowledge of it; and waiver could only be made by parties to the litigation in clear and unequivocal terms and with full knowledge of the relevant facts.

(2) that in any case of personal embarrassment or of automatic disqualification, the judge should (if he had knowledge of his interest before objection was made) recuse himself at the earliest possible stage;

(3) in any other case, when circumstances could be thought to give rise to real danger of bias, the Judge should make disclosure, as soon as possible, once he became aware of the matter, to give the opportunity for representations. What constituted appropriate disclosure depended on the stage reached in the proceedings: more was required by way of inquiry and disclosure before than towards the end of proceedings. If after disclosure was made, no objection was taken to his hearing the case, no subsequent complaint of bias could successfully be made;

(4) Different standards applied to members of the two branches of the legal profession when they sat as a part-time judges. Barristers were independent; and hence were deemed ignorant of and uninvolved in the affairs of the other members of chambers-the analysis is, in my view, more theoretical than real! By contrast, solicitors, being in partnership, should investigate with their own firm whether any association with one of the parties might disqualify them from sitting.

68. Having held so in the *Locabail* case (*supra*) the Court of appeal had also classified the factors for recusal of judges under the three heads, namely,

(A) factors which would always be irrelevant i.e. a judge's: (1) religion, or (2) ethnic (*Seer Technologies v. Saad Abbas* (2000) Ch D Pumfrey J, TLR 16/3/2000) or national (3) origin, (4) gender, class, means or sexual orientation

(B) factors which would not ordinarily be relevant:

(1) a judge's social or educational or service or employment background or history;

(2) social or educational or service or employment background or history of any member of the judge's family;

(3) a judge's previous political association;

(4) membership of social or sporting or charitable bodies;

(5) Masonic associations;

(6) previous judicial decisions;

(7) extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers);

(8) previous receipt of instructions to act for or against any party or solicitor or advocate engaged in a case before him;

(9) membership of the same circuit, local Law Societies or Chambers.

(C) factors which would usually be relevant:

(1) Personal friendship or animosity between the judges and any member of the public involved in the case;

(2) Close acquaintance of the judge with any member of the public involved in a case, particularly if the credibility of the individual could be significant in the decision of a case (unsuccessfully relied on in *Man "O" War Station Ltd. v. Auckland CC*, (CPC Appeal No 2, 2001) where the acquaintance was insufficient;

(3) where in a case equally the credibility of any individual was an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasions;

(4) where on any question in issue in proceedings before him, the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind. But the fact that a judge earlier, in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness unreliable, was by itself no ground for recusal or removal. There is no reason for a Lord Justice to recuse himself from hearing an appeal by reason of his earlier involvement, whilst a puisne judge in the Chancery Division, in interlocutory proceedings: *Woolwich Building Society v. Paisy Star* 16/3/2000 (CA). Where permission to appeal had been granted following a renewed oral application, the Lord Justice who had initially been minded to refuse leave nonetheless sits on the appeal: *Mohamed v. Morris* TLR 1/3/2000. This was elaborately confirmed in *Sengupta v. GMC* (2002) EWCA (iv 1104).

(5) if for any other reason there were real grounds for doubting the ability of the judge to ignore extraneous consideration, prejudices and predilections and to bring an objective judgment on an issue before him.

(underlining for emphasis)

69. Thus, neither English Law nor Indian Law nor the Patna High Court Rules nor even any precedent can come to rescue Mr. Giri as with regard to Hon"ble the Chief Justice recusing herself from the Full Bench.

70. In my considered view, though the Judges are also mortal and human being and thus, not infallible but, then, it would be too naive to ask a judge to recuse himself or herself only because he/she may have decided some similar cases earlier. In this regard and on this aspect, I would not like to say anything more but to quote Justice Frankfurter who in the case of Public Utilities Commission of

the District of Columbia Vs. Pillak reported in (1951) 343 US 451, had said as follows:-

The judicial process demands that a Judge may move within the framework of relevant legal rules and the court covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole Judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self discipline and that fortunate alchemy by which men are loyal to the obligation with which they are interested. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment or may not unfairly lead others to believe they are operating, Judges recuse themselves. They do not sit in judgment.....

71. The two judgments relied by Mr. Giri in support of his submission of judicial obstinacy to say the least is wholly inapplicable in the present case. The reliance placed by Mr. Giri on the judgment of the Division Bench of this Court in the case of Prathmik Adhyapak Sangh and Others Vs. The State of Bihar and Others is wholly misplaced. In that case the question, which had arisen that the learned single Judge, who was in his administrative capacity made a member of the Fitment Committee of the pay-scale of the State Government, had recorded certain view with regard to grant of pay-scale to the untrained teachers. Subsequently, when a batch of writ applications was filed, questioning the government decision based on the aforesaid recommendation of the Fitment Committee, it was held by the Division Bench that learned Single Judge ought to have not heard the matter as would be apparent from the following passage of the aforesaid judgment:-

13. The fact remains that the Hon"ble Judge who has decided the present cases was the Chairman of the Fitment Appellate Committee and in that capacity he has made recommendation in favour of certain class of untrained matric teachers who have higher qualifications and has not allowed the claim of untrained intermediate teachers. One of the grievances in the writ applications was made by the intermediate untrained teachers for treating them similar to the graduate untrained teachers whose claim was negatived by the Fitment Appellate Committee. The matter was considered and directions have been issued to implement the recommendations made by him as Head of the Committee as stated above and the claim of untrained intermediate teachers has been rejected.

16. After having given thoughtful consideration to the entire facts and circumstances of the case, we are of the view that it is not necessary to dwell upon the question of bias. However, the fact remains that the Hon"ble Jude has dealt with the materials in controversy earlier as Chairman and in that situation relying upon the dictum of Lord Hewart, C.J. as quoted above that justice should

not only be done, but should manifestly and undoubtedly be seen to be done without meaning anything against the Hon"ble Judge, we are of the view that the order rendered by the learned Single Judge is fit to be set aside.

72. The judgment referred to by Mr. Giri, learned senior counsel for the petitioner in the case of State of West Bengal and Others Vs. Shivananda Pathak and Others, also is wholly misplaced. In that case Mr. Justice A.K. Sengupta, Hon"ble Judge of the Calcutta High Court sitting singly, had disposed of the writ application on 21.8.1984 with certain direction. Such order of Justice A.K. Sengupta was subsequently modified by the Division Bench on 17.1.1985. Subsequently, a fresh writ application was filed in pursuance of that direction issued by Justice A.K. Sengupta but, the learned single Judge did not grant the relief and instead observed that since the direction issued by justice A.K. Sengupta was modified, it was for the State Government to consider the claim in accordance with the rules in terms of the earlier direction of the Division Bench dated 17.1.1985. An appeal was filed against this judgment of the learned single judge and the appeal was disposed of by a Division Bench which included Justice A.K. Sengupta. The question, therefore, arose as to whether Justice A.K. Sengupta could sit in the Division Bench to decide the appeal against that judgment and in that regard it was held by the Apex Court that he ought to have not heard the matter in Division Bench.

73. Thus, on reading of the judgment of the Apex Court in the case of Shivananda Pathak (supra), it would be clear that judicial obstinacy can be treated as a form of judicial bias. If a judgment is over-ruled by the higher court, the judicial discipline requires that the judge, whose judgment is over-ruled, must submit to that judgment. He cannot, in the same proceedings or in collateral proceedings between the same parties, re-write the overruled judgment. Even if it was a decision on a pure question of law, which came to be overruled, it cannot be reiterated in the same proceedings at the subsequent stage by reason of the fact that the judgment of the higher court, which has overruled that judgment, not only binds the parties to the proceedings but, also the judge who had earlier delivered that decision. That judge may have his occasion to reiterate his dogmatic views on a particular question of common law or constitutional law in some other case but, not in the same case. If it is done, it would be exhibitiv of his bias in his own favour to satisfy his egoistic judicial obstinacy.

74. In the present case, however, merely because a Division Bench consisting of Hon"ble the Chief Justice in the case of Smt. Renu Kumari Pandey (supra), after considering the entire provision of the Rules, had gone to hold that any person, being an aspirant for the post of Panchayat Shiksha Mitra after abolition of the post, cannot be appointed on the post of Panchayat Teacher, does the element of judicial obstinacy get attracted? It has to be in this regard kept in mind that such view was taken not only by Hon"ble the Chief Justice in the Division Bench but, even much earlier the same view was recorded by this Court in the case of Alok

Kumar Singh Vs. The State of Bihar and Others, wherein it was held as follows:-

13. There is another reason for holding the impugned order of termination bad. The Block Development Officer, by the impugned order has not only terminated petitioners from their post of Panchayat/Prakhand Teachers, but have also directed to appoint the complainants (Respondents) on the post of Shiksha Mitra with all consequential benefits. There is specific direction of Director, Primary Education in this regard that since after 1.7.2006, no post of Shiksha Mitras are existing, as such no one can be appointed on these posts.

75. It has to be noted that it is actually this judgment in the case of Alok Kumar (supra) which has been referred to and relied by the Hon'ble Single Judge in the impugned judgment out of which the present appeal arises.

76. As a matter of fact, even the earlier a Division Bench in the case of Umesh Chandra Shiva Vs. The State of Bihar and Others, on 14.3.2011 had taken a similar view and the case of Umesh Chandra Shiva (supra) was decided prior to the judgment in the case of Smt. Renu Kumari Pandey (supra), which was delivered only on 23.8.2011. This Court in the case of Umesh Chandra Shiva had held as follows:-

5. A question, would now arise as to how the vacancies which has been created on account of cancellation of the appointment of Alok Kumar has to be filled up. Mr. Singh would contend that as the complaint was pending on the date Alok Kumar got absorbed on the post of Panchayat Shikshak i.e. 01.07.2006, the benefit of such cancellation of appointment should go to the appellant writ petitioner Umesh Chandra Shiva as he was found to be best among the backward category. Interesting though the aforesaid submission may be but then the Rules namely Bihar Prarambhik Shikshak Nioyojan and Shikshak Niamawali Adhiniyam-2006, does not permit selection earlier made for the post of Panchayat Shiksha Mitra to be either saved or retained for any purpose, inasmuch as, Rule-18 and 20 read in tandem would make it absolutely clear that all circulars and guidelines relating to selection and appointment on the post of Panchayat Shikshak were repealed as a whole and therefore, once the saving clause also was limited to reserving the rights of already appointed Shiksha Mitra either in respect of their salary or service condition, it has to be necessarily held that the earlier selection and preparation of panel in which Umesh Chandra Shiva had been found to be best among the backward candidate was limited for the post of Panchayat Shiksha Mitra and on that basis, he cannot be appointed on the post of Panchayat Shikshak after 01.07.2006 in view of the aforementioned 2006 Rules.

77. Thus, in my considered view, merely because Hon'ble the Chief Justice has been party to the earlier Division Bench in the case of Smt. Renu Kumari Pandey (supra), will be no reason for her to recuse herself, specially when the view taken by the Division Bench in the case of Smt. Renu Kumari Pandey (supra) even after its being assailed before the Apex Court was not interfered, while dismissing the

SLP by an order dated 09.01.2012, wherein it was held as follows:-

Heard learned counsel for the petitioner.

We find that the High Court has discussed the facts before coming to the conclusion and we are not inclined to interfere with the order of the High Court.

The SLP is dismissed with liberty to the petitioner to file a review application before the High Court. We make it clear that we are not expressing any opinion one way or the other on the merits of such review application. If such an application is made, the High Court may deal with on its own merits and in accordance with law.

78. The submission of Mr. Giri that participation of Hon"ble the Chief Justice in the proceeding of the Full Bench, in this case, may lead to judicial obstinacy in fact is an argument of desperation. I am remembered of a case of Girja Shankar Shukla Vs. Sub-Divisional Officer, Harda and Others, decided by the Full Bench of the Madhya Pradesh High Court to which Hon"ble the Chief Justice J.S. Verma (as his lordships then was) was a party wherein the law was laid down that a holder of a current charge of the post cannot exercise the statutory power of a regular incumbent of the post. This view taken by the Full Bench in the case of Girija Shankar was cited before Hon"ble Justice Verma himself when he was as a Judge of the Apex Court in the case of Ramakant Shripad Sinai Advalpalkar Vs. Union of India and others, and the Division Bench of Apex Court to which Hon"ble Justice J.S. Verma (As his Lordship then was) was a party went to decide the case by placing reliance on the judgment of the Full Bench of Madhya Pradesh High Court in the case of Girija Shankar (supra) in the following words.

6. We may recall the observations of this Court in the context of a rule requiring as a condition for eligibility that the "person should have worked on the post for seven years" where the difference between merely working on the post and holding a post was indicated:

Perhaps there would have been some merit in the submission on behalf of the petitioner if in Rule 3(b) the words used were "who held the post" but the language in Rule 3(b) is so materially different and it speaks that a person should have worked on the post. The State was apparently wrong in introducing the element of rank for the purpose of Rule 3(b).

In Girja Shankar v. S.D.O., Harda, it was held that a "person appointed to be incharge of the current duties of the office" did not hold the rank to be incharge of the current duties of the office" did not hold the rank and, therefore, could not discharge the statutory functions assigned to the post. In the present case appellant cannot, on the strength of the office-order dated 30th August 1963, claim to have been promoted to the post of "Treasurer". The first contention is, therefore, insubstantial.

79. This is not the solitary instance but in fact there can be any number of instances where a Judge in his long career having taken his earlier view sitting

Singly or in Division has an occasion to answer the similar question in Full Bench or even before the Apex Court and he can definitely be not asked to recuse himself only because he had decided some case of the similar nature earlier.

80. In this regard, I must confess that I have not been able to get even a single authority of the Apex Court or any High Court, in my massive search for last six weeks since the judgment was reserved, which could even remotely suggest that only because a judge has earlier expressed his views in any judgment sitting Singly or in Division Bench, he/she is precluded from participating in the Full Bench. On the contrary, I have been able to lay my hand on a number of Full Bench decisions of this Court where a Judge participating in the Full Bench had the occasion to consider his own earlier judgment given by him sitting Singly or in Division Bench. In this context, I would also like to rely on a few of the cases of this Court only by way of illustration.

81. In this regard I would firstly refer to a Full Bench judgment of this Court in the case of *Sk. Latfur Rahman and Others Vs. The State*, wherein the correctness of an earlier Division Bench judgment in the case of *Satyanarayan Yadav Vs. The State of Bihar*, rendered by a Division Bench of Hon"ble the Mr. Justice Uday Sinha (as his Lordship then was) was called in question. Hon"ble Justice Sinha was not only party to the Full Bench in the case of *L.K. Latfur Rahman (supra)* but, had also in his concurring judgment while overruling his own earlier Division Bench judgment in the case of *Satyanarayan Yadav (supra)* had admitted the error in his earlier view.

82. In yet another Full Bench judgment in the case of *Mohammad Zainul Abedin and Another Vs. State of Bihar and Others*, which again involved correctness of earlier view recorded by Hon"ble Mr. Justice H.L. Agarwal (as his Lordship then was) sitting singly in the case of *Rajendra Singh Vs. State of Bihar and Others*, . Not only Justice Agarwal was a party to the Full Bench but had also again accepted the view of the Full Bench that the law laid down in the case of *Rajendra Singh (supra)* by him had not correctly laid down the law and in fact in his concurring judgment, he too had gone to explain his earlier view.

83. In the Full Bench judgment in the case of *Mahanth Siyaram Das and Another Vs. State of Bihar and Others*, , correctness of Division Bench judgment in the case of *Kesara Devi and Another Vs. State of Bihar and Others*, rendered by Hon"ble Mr. Justice B.P. Jha (as his lordship then was) was gone into by the Full Bench consisting also of Justice B.P. Jha and in fact the Full Bench had overruled the Division Bench judgment in the case of *Kesara Devi (supra)*.

84. I would not like to multiply a number of similar instances but, would like to conclude on this aspect by referring to yet another Full Bench judgment in the case of *Ram Chandra Singh Vs. State of Bihar and Others*, where Hon"ble Mr. Justice N.P. Singh (as his lordship then was), being a member of the Full Bench, had the occasion to consider the correctness of his own Division Bench in the case of *Prabhunath Singh Vs. State of Bihar and Others*, and had agreed that his

earlier view recorded in the Division Bench in the case of Prabhunath Singh (supra) was not a correct law. In fact there can be innumerable examples even by way of illustration that never in the history of Patna High Court, such an objection was raised by a senior counsel as with regard to participation of a judge in the Full Bench proceedings only because he or she had earlier delivered some judgment on the same point.

85. I have also carefully examined the aspect as to whether the view taken by the Division Bench headed by Hon"ble the Chief Justice in the case of Smt. Renu Kumari Pandey (supra) has been ever doubted by any other Division Bench. Mr. Giri of course has not been able to produce any such direct judgment of the Division Bench. On the contrary, I find that even before the judgment in the case of Smt. Renu Kumari Pandey (supra) was delivered by the Division Bench of this Court presided by Hon"ble the Chief Justice on 23.8.2011, the first judgment directly on this point was delivered by another Division Bench headed by Justice Smt. T. Meena Kumari delivered on 14.3.2011 in the case of Umesh Chandra Shiva Vs. The State of Bihar and Others, wherein it was held that upon enforcement of the 2006 Rules and repeal of the earlier provision relating to Panchayat Shiksha Mitra, no one could be appointed as a Panchayat Shiksha Mitra/Panchayat Teacher on the basis of the old selection and panel on or after 1.7.2006.

86. Let it be also noted that the similar view has also been taken in a number of decisions by the learned Single Judge of this Court, some of whom have also been reported such as in the case of Alok Kumar Singh Vs. The State of Bihar and Others, , in the case of Reema Kumari Vs. The State of Bihar and Others, , in the case of Subodh Kumar Yadav Vs. The State of Bihar and Others, , in the case of Saroj Kumar and Others Vs. The State of Bihar and Others, and in the case of Dayanand Yadav and Another Vs. The State of Bihar and Others, and if the submission of Mr. Giri, therefore, has to be accepted, in that event, every Judge of this Court who, once has expressed any view on any subject, would stand disqualified to be a member of the Full Bench. That in fact would really amount to creating an absurd situation because for last eight years, the dispute relating to Panchayat Shiksha Mitra/Panchayat Teacher has been in the roster of a number of Judges sitting Singly or in Division Bench and if all of them cannot hear the matter because at one point of time they had expressed one view or the other with regard to Panchayat Shiksha Mitra, the constitution of Full Bench itself will be practically impossible.

87. Thus, whatever was said with regard to judicial obstinacy by the Apex Court in the case of Shivananda Pathak (supra), in my view, will not at all be applicable in the fact of the present case. It has already been found by us that till date, the judgment of the Division Bench in the case of Smt. Renu Kumari Pandey (supra) has remained a good law and at least this Full Bench is not hearing an appeal arising out of the case of Smt. Renu Kumari Pandey (supra). It may be that since that judgment of Smt. Renu Kumari Pandey (supra) is against the appellant of

the present appeal and Mr. Giri appearing for her has to cross that hurdle to satisfy us as to the infirmity or incorrectness, if any, in the view recorded in the case of Smt. Renu Kumari Pandey (supra). I have, therefore, no hesitation in my mind that such submission of Mr. Giri for recusal of Hon'ble the Chief has no merit and is accordingly rejected.

88. Coming to the merit of this appeal, Mr. Giri has assailed the order of the learned single Judge primarily on two grounds. Firstly, he is of the view that in the facts of the present case, the impugned order passed by the District Magistrate, Samastipur dated 26.6.2010, which has been set aside by the learned single Judge, was passed in view of the direction of this Court and, therefore, the question of jurisdiction would never arise. Secondly, he has submitted that learned single Judge has failed to take into account the effect of repeal in terms of Section 6 of the General Clauses Act, which is *pari materia* Section 8 of the Bihar and Orissa General Clauses Act. According to him, even if the provisions of Panchayat Shiksha Mitra were repealed by the 2006 Rules, the pending proceeding, as with regard to the selection and appointment of the appellant, could not have been affected. Reliance in this regard has been placed by him on the judgment of the Apex Court in the case of Gammon India Ltd. Vs. Spl. Chief Secretary and Others, . To that extent, he has also questioned the correctness of the ratio laid down by this Court in the case of Alok Kumar (supra) relied by the learned single Judge in the impugned judgment under appeal. According to him, the law in this regard has been correctly laid down in the earlier judgment in the case of Kishori Prasad Vs. The State of Bihar and Others, , which having been not noticed in the case of subsequent Division Bench judgment of Smt. Renu Kumari Pandey (supra), will still govern the field.

89. Mr. Verma, learned counsel for the respondent, writ petitioner, on the other hand, has submitted that there would be no question of vesting of jurisdiction in the District Magistrate by this Court, inasmuch as, the District Magistrate was required to act in accordance with law as settled by this Court. In this regard, he has relied on a circular issued by the Principal Secretary to the Human Resources Development Department dated 14.5.2009, which was issued in terms of judgment of this Court dated 17.2.2009 laying down that even pending appeal with regard to any dispute of Panchayat Shiksha Mitra was to be adjudicated by the District Teachers Employment Appellate Authority (hereinafter to be referred to as "the Tribunal"). Proceeding further, Mr. Verma has submitted that in the present case, there would be no question of applicability of Section 6 of the General Clauses Act, inasmuch as, the scheme, relating to engagement of Panchayat Shiksha Mitra, was only by way of an executive instruction and thus, not "enactment". He has also submitted that the earlier Division Bench judgment in the case of Kishori Prasad (supra), having not even noticed the provision of Rule 20 of the 2006 Rules, is *per incuriam* and according to him, the law in this regard has been correctly laid down in the elaborate subsequent Division Bench judgment in the case of Smt. Renu Kumari Pandey (supra), which now also stands approved by Apex Court by way of dismissal of the SLP against the

aforesaid judgment.

90. Coming to the question of jurisdiction of the District Magistrate in the matter relating to examination of complaint by the District Magistrate, this Court would find that the scheme of engagement of Panchayat Shiksha Mitra was purely governed by executive instruction contained in the Resolution of the Secondary, Primary and Adult Education Department dated 21.6.2002. The power of engagement on the post of Shiksha Mitra on contract basis for the period of eleven months was vested in the Panchayat and its Sukh Suvidha Samiti. In the whole of the resolution dated 21.6.2002, there was no provision for interference by any authority of the Government. As a matter of fact, the Block Development Officer became the appellate authority only in the 2006 Rules, which came into force with effect from 1.7.2006. As would be apparent from reading of the 2006 Rules, the entire matter, relating to employment on the post of Panchayat Teacher, the jurisdiction was vested in the Block Development Officer. The term "Nioyojan" used in Rule 18 of the 2006 Rules was/is capable of wider import than the direct recruitment on the post of Panchayat Teacher as envisaged in the 2006 Rules. According to me, any dispute even as with regard to automatic absorption of the working Panchayat Shiksha Mitra as on 1.7.2006 as envisaged in Rule 20(iii) of the 2006 Rules was also capable of being agitated only before the Block Development Officer. This becomes more clear from the clarification issued by the State Government and its circular dated 10.11.2006, which reads as follows:-

(Underlining for emphasis)

91. Thus, when the appellant herself had filed her first complaint as with regard to alleged illegal appointment of the writ petitioner on 14.9.2006 as is also clearly mentioned in the order of the District Magistrate dated 26.6.2010, the only thing which could have been looked into was as to whether the engagement of the writ petitioner as a Panchayat Shiksha Mitra and his absorption as a Panchayat Teacher was in accordance with law. As a matter of fact, when this Court, by an order dated 18.5.2007 in the writ application filed by the appellant, CWJC No. 675 of 2007, assailing the order of the Block Development Officer dated 25.1.2007, holding the engagement of the writ petitioner to be justified and in accordance with law, was assailed before this Court and the matter was remitted. In the consequential order dated 12.07.2007 passed by District Magistrate, Samastipur he had rejected the case of the appellant by placing reliance on aforesaid Circular dated 10.11.2006. The aforesaid order dated 12.7.2007, even though challenged by the appellant in CWJC No. 11844 of 2007, has not been interfered and as per the appellant, that writ application is still pending.

92. A question thus would arise as to whether the District Magistrate could review his own order dated 12.7.2007 because he himself in the aforesaid earlier order dated 12.7.2007 had gone to hold that the appellant on account of abolition of the post of Panchayat Shiksha Mitra could not be appointed whereas

in his subsequent order dated 26.6.2010, he, having held initial engagement of the writ petitioner as Panchayat Shiksha Mitra to be bad, had passed an order for his removal from the post of Panchayat Teacher on which he had already been absorbed with effect from 1.7.2006 and had also gone to issue a direction in the same order dated 26.6.2010 for appointing the appellant as Panchayat Shiksha Mitra. By now, it is well settled that the power of review is a creature of statute and cannot be exercised by any authority in absence of such power being vested in him.

93. That, however, will not be the end of the matter because Mr. Giri has relied on the subsequent order of this Court dated 3.2.2009 in C.W.J.C. No. 1732 of 2009 filed by the writ petitioner and the order of Division Bench dated 08.10.2009 in L.P.A. No. 374 of 2009 filed by this very appellant which, according to him, had vested jurisdiction in the District Magistrate, Samastipur to decide the dispute as with regard to engagement of the writ petitioner on the post of Panchayat Shiksha Mitra and also for considering the case of the appellant for such appointment. First of all, it has to be kept in mind that the order dated 3.2.2009 was passed in a writ application filed by the appellant assailing the order of termination dated 24.12.2008 passed by the District Magistrate and since that order was passed without even notice much less affording an opportunity of hearing to the writ petitioner, the order was quashed and the matter was remitted back only on the point as with regard to the engagement of the writ petitioner on the post of Panchayat Shiksha Mitra/absorption as a Panchayat Teacher. This had been done because of an order passed by the State Government on 15.1.2009 authorizing the District Magistrate to decide the complaint as with regard to engagement on the post of Panchayat Shiksha Mitra made in the year 2003 and 2005. The said circular of the State Government dated 15.1.2009 reads as follows:-

94. As a matter of fact, after passing of the order dated 3.2.2009, while the appeal filed by the appellant against the aforementioned order dated 3.2.2009 was still pending, this Court in its another order dated 17.2.2009 had issued a direction to the State Government that all the pending matter relating to complaints arising out of Panchayat Shiksha Mitra were to be decided by the Tribunal and in compliance of the said direction, a circular was issued by the Principal Secretary to the Human Resources Development Department on 14.5.2009 taking away the jurisdiction of the District Magistrate and vesting the same in the Tribunal. To that extent, it would be absolutely necessary for me to reproduce the aforesaid circular of the State Government dated 14.5.2009, which reads as follows:-

(underlining for emphasis)

95. The District Magistrate, Samastipur, in fact, who has passed the impugned order dated 26.6.2010 giving rise to writ application and now the appeal, was well aware of the jurisdiction of the District Magistrate being taken away by the Government by the aforementioned circular dated 14.5.2009 in terms of the

direction of this Court dated 17.2.2009, which becomes manifest from the fact that when this Court by an order dated 16.7.2009 in LPA No. 713 of 2009 filed by one, Arun Kumar Arun, had remitted the matter to the District Magistrate, Samastipur to decide with regard to his grievance in relation to engagement on the post of Panchayat Shiksha Mitra, the representation filed by Arun Kumar Arun was disposed of by the same District Magistrate, Samastipur by an order dated 23.7.2009 sending the matter to the Tribunal for its disposal in terms of the government aforementioned circular dated 14.5.2009.

96. In view of the aforementioned precedent of Arun Kumar Arun, the District Magistrate, Samastipur was required to act in the similar manner after the receipt of the similar direction by this Court pursuant to the order of Division Bench dated 8.10.2009 in LPA No. 374 of 2009 filed by the appellant. Let it be also noted that when the Division Bench of this Court had passed an order dated 8.10.2009, it was clearly observed that the right of the appellant of this case will be decided in accordance with law, if such an occasion would arise. The law was delegation of power made by the State Government in the circular dated 14.5.2009 vesting power of deciding any dispute relating to Panchayat Shiksha Mitra only in the Tribunal and, therefore, this Court will have no difficulty in also approving that part of the impugned order under this appeal passed by the learned single Judge dated 16.9.2010 in the writ application filed by the writ petitioner who is respondent no. 10 herein, wherein it was held as follows:-

Learned counsel for respondent No 9 submits that the matter having come to this Court has been remanded to the Collector and, as such, Collector having decided, it cannot be said that the decision is without jurisdiction. I am afraid I cannot accept the submission because whenever the matter is sent back to the Collector, it is always sent with the direction to be decided in accordance with law. If, as has been shown in this case, Collector had no jurisdiction in the matter for his authority having been abolished, this Court neither could confer jurisdiction on the Collector to decide the matter especially when an alternative forum has already been provided statutorily nor this Court in fact intended to create a jurisdiction in the Collector. It is well established that even consent cannot confer jurisdiction and, as such, the Collector lacked the jurisdiction to entertain the matter at all. It is then submitted that respondent No 9 would suffer if the order of the Collector was set aside. In my view, even if the order of the Collector is to be sustained, it cannot be sustained in so far as selection of respondent No 9 is concerned for the simple reason, the selection of respondent No 9 or for that matter, the dispute between the petitioner and respondent No 9, was with regard to the post of Shiksha Mitra which stood abolished in the year, 2006 itself. No direction can be issued by any authority to absorb respondent No 9 on the dead and abolished post of Shiksha Mitra.

No relief could be granted to respondent No 9 even otherwise in view of the decision of this Court in the case of Alok Kumar & Others (supra) and in view of the facts noted, the impugned order of the Collector, as contained in Annexure-1,

cannot be sustained and it is set aside accordingly. The writ application is, accordingly, allowed.

97. In the light of the aforementioned discussions, I have no hesitation in holding that the order of District Magistrate, Samastipur dated 26.06.2010 is wholly without jurisdiction both in view of his own earlier order dated 12.7.2007 refusing to issue a direction for appointment of the appellant on the post of Panchayat Shiksha Mitra on account of its abolition on the post as also in view of the aforementioned government circular dated 15.1.2009, which can be definitely read as an exercise of statutory power by the State Government in terms of Rule 19 of the 2006 Rules vesting power in the State Government to issue instruction for removal of any difficulty in the enforcement of 2006 Rules.

98. The submission Mr. Giri that the provision of Section 6 of the General Clauses Act, which is *pari materia* Section 8 of the Bihar and Orissa General Clauses Act, will be applicable and would save the impugned order dated 26.6.2010 passed by the District Magistrate, Samastipur, has also to be only noted for its being rejected. In this regard, first of all, it would be necessary for me to reproduce the provision of Section 8 of the Bihar and Orissa General Clauses Act, which reads as follows:-

8. Effect of repeal.-Where any Bihar and Orissa Act [or Bihar Act] repeals any enactment hitherto made, or hereafter to be made, then, unless a different intention appears, the repeal shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed, or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under any enactment so repealed, or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any penalty, forfeiture or punishment may be imposed as if the repealing "Act" had not been passed.

99. From bare reading of Section 6 of the General Clauses Act or Section 8 of the Bihar and Orissa General Clauses Act, it would become clear that the same would be applicable only in case of "repeal of enactment". Enactment in fact has also been defined u/s 4(18) and reads as follows:-

4(18) "Enactment" shall include a Regulation (as hereinafter defined) and any Regulation of the Bengal Code, and shall also include any provision contained in

any Act or in any such Regulation as aforesaid;

100. As the definition of "Enactment" also includes regulation, it would also be necessary for me to reproduce definition of Regulation u/s 4(45), which reads as follows:-

4(45) "Regulation" shall mean a Regulation made by the Governor under sub-paragraph (2) of paragraph (5) of the Fifth Schedule to the Constitution and shall include a Regulation made by the Central Government under the Government of India Act, 1870 or the Government of India Act, 1915, or the Government of India Act, 1935 or by the Governor under the Government of India Act, 1935, or by the President under Article 243 of the Constitution.

101. A conjoint reading of the definition of "Enactment" and "Regulation" will leave nothing for speculation that any executive instruction is not an enactment. It is well settled that an executive instruction is not a rule. It does not create any legal right on the person covered by it. No legal action can be founded on it. Reference in this connection may be usefully made to the judgment of the Apex Court in the case of Raman and Raman Ltd. Vs. The State of Madras and Others, , in the case of State of Assam and Another Vs. Ajit Kumar Sharma and Others, and in the case of State of Assam and Another, etc. Vs. Basanta Kumar Das, etc. etc., .

102. In the background of this, if the provision relating to engagement of Panchayat Shiksha Mitra brought into force by a Resolution of the State Government dated 21.6.2002 is examined, it becomes absolutely clear that same was by way of pure executive instruction and was not in exercise of any statutory provision. To that extent, it would be relevant to extract the entire resolution dated 21.6.2002, which is in fact a Margdarshak (Guideline) and reads as follows:-

103. This Court has purposely quoted the aforesaid guideline dated 21.6.2002 because from its bare perusal, it becomes clear that same was by way of executive instruction. Thus there will be no question of application of Section 6 of the General Clauses Act which is pari materia Section 8 of the Bihar and Orissa General Clauses Act. As a matter of fact, it would be also necessary for me to mention here that though the aforementioned guideline dated 21.6.2002 had undergone certain changes by way of modification in the guideline by government resolution no. 1458 dated 11.8.2004 and also in view of the letter of the State Government contained in memo no. 604 dated 12.4.2005 as well as letter no. 672 dated 21.4.2005, the same at any point of time did not acquire any statutory status and remained out and out an executive instruction.

104. Thus, when this executive instruction, relating to Panchayat Shiksha Mitra, was repealed by the 2006 Rules framed by the State Government in exercise of its power under Article 243(Chh) of the Constitution of India read with Section 47 and 48 and 146 of the Bihar Panchayat Raj Act, 2006, nothing would be left for speculation that by the executive instruction relating to Panchayat Shiksha Mitra

were repealed as a whole by the statutory rules. To that extent, it would be necessary for me to also reproduce the relevant portion of the Rules, which reads as follows:-

105. The purpose of extracting the relevant portion of the Rule by me is two fold. First of all, from bare comparison of the 2006 Rules which is statutory in nature, it would be clear that the necessity for appointment of Panchayat Teacher was in view of the amendment in the Constitution of India under Article 21A for providing free and compulsory education to the children in the age group of six to fourteen years by the State. Thus, a completely different scheme with different qualification, different mode of selection and different service condition as well for the post of Panchayat Teacher was sought to be implemented with effect from 1.7.2006. As a matter of fact, from Rule 20(i), it would become clear that not only the circular relating to Panchayat Shiksha Mitra, who were definitely contractual employees for a limited tenure of eleven months subject to their renewal of contract for similar eleven months, even the statutory rules relating to recruitment of the regular teachers working in the cadre of primary school teachers and governed by the statutory rules were repealed with the only saving that those teachers appointed in the regular cadre of primary school teachers would not be adversely affected in the matter of their salary and service condition. Rule 20(iii) in fact was a saving clause in 2006 Rules only to protect the working Panchayat Shiksha Mitra as on 1.7.2006 who were deemed to have been automatically absorbed on the post of Panchayat Teacher.

106. A question, therefore, would arise as to whether in term of the repeal of the executive instruction of Panchayat Shiksha Mitra in terms of Rule 20(i) of 2006 Rules, could any dispute be adjudicated for appointment on the post of Panchayat Shiksha Mitra? The answer to this must be in negative, inasmuch as, if the entire provision for Panchayat Shiksha Mitra was itself repealed, there could not have been any appointment on the abolished post of Panchayat Shiksha Mitra. It is this aspect of the matter which has been dealt elaborately in the earlier Division Bench judgment in the case of Smt. Renu Kumari Pandey (supra) and I do not find any error in the same.

107. Once I come to this conclusion, it is also not very difficult for me to hold that the effect of repeal as with regard to executive instruction relating to engagement on the post of Panchayat Shiksha Mitra will not be governed by the provision made in Section 6 of the General Clauses Act or Section 8 of the Bihar and Orissa General Clauses Act. Thus, the provision relating to engagement on the post of Panchayat Shiksha Mitra being purely governed by executive instruction, as noted above, being not "enactment", there would be no question of applicability of Section 6 of the General Clauses Act or Section 8 of the Bihar and Orissa General Clauses Act. This aspect of the matter has also been decided by this Court in the case of Anant Ram Agrawal and Others Vs. State of Bihar, , wherein it has been held as follows:-

14. The Order 1973 was issued by the Governor of Bihar in exercise of the

powers conferred on him by Section 3 of the Act read with orders of the Government of India, Ministry of Agriculture (Deptt. of Food) No. G.S.R. 316(E) dated 20th of June 1972, G.S.R. 152(E) dated 25th of October 1972 and G.S.R. 168(E) dated 13th of March 1973 and with prior concurrence of the Central Government. The Order was not issued by the Governor in exercise of his legislative powers but was an executive act and hence it cannot have the status of an Act or Regulation. Hence the provisions of Order 1973 cannot be said to continue even after it was rescinded.

15. I am fortified in my view by unreported Division Bench decision of this Court in Cr. Miscellaneous No. 1170 of 1968 (Mohanlal Chhapolia vs. The State of Bihar) in which similar view has been taken with regard to the Bihar Rice Procurement (Levy) Order which was rescinded by a subsequent notification.

108. In view of the aforesaid conclusion, it would not be even necessary for me to refer to the judgment of the Apex Court in the case Gammon India Ltd. (supra) relied by Mr. Giri which in fact even otherwise does not support his submission. If however for a moment, (for the sake of argument only) it is accepted that the provision relating to engagement of Panchayat Shiksha Mitra was an enactment even then after repeal of the circular relating to engagement of Panchayat Shiksha Mitra as it was followed by a fresh legislation by way of 2006 Rules from which an entirely different intention with regard to engagement on the post of Panchayat Teacher appeared and there would be no question of preserving of any right of Panchayat Shiksha Mitra.

109. Relevant portion of 2006 Rules have been already quoted above, and its bare comparison with the earlier executive instruction relating to Panchayat Shiksha Mitra, also quoted above, will leave nothing for speculation that with a view to implement the constitutional mandate of free and compulsory education, a large number of schools at Panchayat level were to be established and for its functioning, the Panchayat Teachers and Prakhanda Teachers were to be appointed. Such teachers were not only general teachers but also Urdu teachers, Physical Trained Teacher with a different qualification and different mode of selection. Their salary and other service conditions as incorporated in the 2006 Rules also cannot be even remotely compared, inasmuch as, whereas the earlier engagement of Panchayat Shiksha Mitra was only for a period of eleven months with a monthly stipend of Rs. 1500/- per month, the Panchayat Teacher were to continue in service till sixty years of age and with fixed remuneration of Rs. 4,000/- (now to Rs. 7,000/-) as also periodical enhancement. If these provisions are closely taken into account, the following passage in the case of Gammon India Ltd. (supra) far from supporting Mr. Giri would actually go against him.

46. The principle which has been laid down in this case is that whenever there is a repeal of an enactment, the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh

legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purposes of determining whether they indicate a different intention. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore, subscribe to the broad proposition that Section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section.

110. I would examine the submission of Mr. Giri yet from another angle. It is now an admitted position in the order of the District Magistrate dated 26.6.2010 that the first application by the appellant making a complaint with regard to the anomaly in the selection and appointment of the writ petitioner on the post of Panchayat Shiksha Mitra was filed on 14.9.2006. On 14.9.2006, the 2006 Rules had already come into force and, therefore, no right had accrued to the appellant on the basis of the repealed executive instruction relating to engagement on the post of Panchayat Shiksha Mitra which could have been saved in terms of Section 6 of the General Clauses Act. The distinction between what is, and what is not a right preserved by the provisions of Section 6 of the General Clauses Act is often one of great fineness. What is unaffected by the repeal of statute is a right acquired or accrued under it and not a mere "hope of expectation of", or liberty to apply for, acquiring a right.

111. Lord Morris speaking for the Privy Council in the case of Director of Public Works v. Ho Po Sang reported in (1961) 2 All. E.R. 721 had held as follows:-

that it may be, therefore, that under some repealed enactment, a right has been given but that, in respect of it, some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should be or should not be given. On a repeal, the former is preserved by the Interpretation Act. The latter is not.

112. This view of Privy Council has also received approval of the Apex Court in the case of M.S. Shivananda Vs. Karnataka State Road Transport Corporation and Others, .

113. Thus, when the appellant on her own showing till coming of 2006 Rules came into force did not even question the appointment of the writ petitioner on the post of Panchayat Shiksha Mitra, she had no right accrued under the repealed circular of Panchayat Shiksha Mitra much less right to get herself appointed in place of the writ petitioner. It is well settled that the power to take advantage of an enactment may without impropriety be termed a "right", but the question is whether it is a "right accrued". Lord Herschell said in Abbott v. Minister of Lands reported in 1895 A.C. 425 had said that mere right (assuming

it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a "right accrued." This view has also been received approval in India in the judgment of the Apex Court in the case of Lalji Raja and Sons Vs. Firm Hansraj Nathuram, , in the case of Hungerford Investment Trust Ltd. (in voluntary Liquidation) Vs. Haridas Mundhra and Others, and in the case of Zohrabi Vs. Arjuna and Others, .

114. In view of the settled law as discussed above, I will have no difficulty in coming to a conclusion that the appellant, on the basis of her so-called empanelment on the post of Panchayat Shiksha Mitra in the year 2003 (after repeal of the entire scheme of Panchayat Shiksha Mitra with effect from 1.7.2006), could have either brought a dispute by filing her complaint in Janta Darbar on 14.9.2006 or could have sought any direction for her appointment on the post of Panchayat Shiksha Mitra. That was infact simply impermissible in view of Rule 20(i) of the 2006 Rules.

115. The reliance placed by Mr. Giri on a Division Bench judgment in the case of Kishori Prasad (supra) is also wholly misplaced. First of all, the Division Bench in the case of Kishori Prasad (supra) did not hold that upon abolition of the post of Panchayat Shiksha Mitra, one, who had never been appointed on the post of Panchayat Shiksha Mitra, could still be appointed after enforcement of the 2006 Rules. To that extent, the three cryptic paragraphs order of the Division Bench in the case of Kishori Prasad (supra) does not decide any law.

116. As a matter of fact, from reading of the order of the Division Bench judgment in the case of Kishori Prasad (supra), it would become clear that it was actually a case of extension of the working Panchayat Shiksha Mitra who already was engaged on 12.5.2003 and was terminated on 21.7.2005. The issue before the Division Bench was that whether his such termination on 21.7.2005 was valid and/or justified. Thus, whatever was stated by the Division Bench as with regard to his reinstatement will not at all be applicable to the facts of the case of the petitioner because he was never appointed even for a day on the post of Panchayat Shiksha Mitra and her appointment was directed only by the impugned order passed by the District Magistrate, Samastipur on 26.6.2010. In any event, the inferential support being sought by Mr. Giri from the case of Kishori Prasad (supra) will also be of no avail because the Division Bench had not even noticed any statutory provision much less Rule 20 of the 2006 Rules and, therefore, it cannot be held to be a good law.

117. In this regard it has to be also mentioned here the first part of the judgment in the case of Kishori Prasad (supra) has already been dissented and disapproved by yet another Division Bench in the case of Kedar Nath Tripathi Vs. The State of Bihar and Others, . The order of the Division Bench in the case of Kishori Prasad (supra) actually runs into 3 paragraphs, first one of which deals that no writ application should be dismissed on merit in absence of the learned

counsel for the petitioner and should only be dismissed for default. This part has already been explained and not followed in a subsequent Division Bench judgment in the case of Kedar Nath Tripathi (supra) wherein it was held as follows:-

We heard Mr. Kamal Nayan Choubey, Senior Counsel for the appellant. He vehemently contended that when the petitioner or his counsel did not appear, the Single Judge had two options viz.:(i) adjourn the case; or (ii) dismiss the case for default. He would, thus, contend that because of non-appearance of the petitioner or his counsel, the Single Judge could not have considered the matter on merit. He placed heavy reliance upon a Division Bench decision of this court in the case of Kishori Prasad Vs. The State of Bihar and Others, , more particularly, paragraph 3 of the report. That reads thus:-

We have also earlier made it clear and we again make it clear that where the learned counsel for the petitioner is not present, the ordinary course is either to postpone the hearing or to dismiss it for want of prosecution but in no circumstances it is to be decided on merit. The same view has also been taken by the Hon''ble Supreme Court in number of matters.

In our view, the aforesaid observations cannot be said to laying down an absolute proposition that in absence of the party or his counsel, writ petition cannot be decided on merits. It could not have been because there is no such fetter imposed upon the Single Judge exercising high prerogative jurisdiction under Article 226 of the Constitution of India. It needs no elaboration that the proceedings under Article 226 of the Constitution are not governed by the Code of Civil Procedure, 1908. Section 141 of the CPC excludes the applicability of the provisions contained in the CPC to the proceedings under Article 226 of the Constitution. No judgment of the Supreme Court has been brought to our notice holding otherwise in so far as writ jurisdiction under Article 226 of the Constitution of India is concerned.

We are, thus, of the view that in writ jurisdiction, even in absence of the party of his counsel, it is open to the Court to proceed with the matter on merits and decide accordingly.

118. Having thus given my anxious consideration, I am of the view that after 1.7.2006, no person, who was earlier an aspirant for the post of Panchayat Shiksha Mitra, can be appointed only because his or her name figured in the panel of Panchayat Shiksha Mitra. The post of Panchayat Shiksha Mitra has been abolished with effect from 1.7.2006 and after abolition of the post, no one can be appointed on the post of Panchayat Teacher on the basis of his mere empanelment of Panchayat Shiksha Mitra. The view taken in the judgment of the Division Bench in the case of Smt. Renu Kumari Pandey (supra) is a good law. I will have no hesitation in holding that the earlier Division Bench judgment in the case of Kishori Prasad (supra), for the reasons indicated above, has not correctly decided the law and is, accordingly, overruled.

119. In the result, this appeal fails and is, accordingly, dismissed with cost as quantified by Hon"ble the Chief Justice.

Ashwani Kumar Singh, J.

120. I agree.