

(1986) 02 PAT CK 0018

In the Patna High Court

Case No : Civil Writ Journ. Case No's. 1925, 1945 and 1946 of 1984

Ram Ballabh Pd. Singh and etc.

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 28-02-1986

Acts Referred:

Constitution of India, 1950 — Article 311(2)
Evidence Act, 1872 — Section 114

Citation : AIR 1986 Patna 218 : (1986) 34 BLJR 344 : (1986) PLJR 373

Hon'ble Judges : S.S. Sandhawalia, C.J.; Nagendra Prasad Singh, J.; Hari Lal Agrawal, J

Bench : Full Bench

Advocate : Balabhadra Prasad Singh, Ganesh Prasad Singh and Jainnandan Singh, for the Appellant; Ram Balak Mahto, Govt. Pleader No. 4, G.K. Prasad, Jr. Counsel to Govt. Pleader No. 4, M.D. Dwivedi, Jr. Counsel to Govt. Pleader No. 4 and Mukul Sinha, Jr. Counsel to Govt. Pleader No. 4, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Sandhawalia, C.J.—The two common significant questions in this set of three connected writ petitions, which are of frequent occurrence within this jurisdiction have been referred for adjudication by a larger Bench in the terms following .

"1. Whether the Headmaster of a school before it is taken over u/s 3(3) of the Act shall be deemed to be a teacher of that school for purpose of examination of his qualification and suitability because there is no specific mention of Headmaster of such school in Section 3(3)?

2. Whether even the Headmaster of the school taken over u/s 3(3) shall automatically "become Headmaster of the school after its take over in view of Section 4(2) without any scrutiny in respect of his qualification and suitability?"

2. The representative matrix of facts, which are admittedly similar, if not identical,

may be noticed briefly from C.W.J.C. 1946/84 (Bajinath Singh v. The State of Bihar and others) the petitioner began his service career with effect from 1st of March, 1969 as an Assistant Teacher in the Anugrah High School, Aurangabad. The Tapeshwari Kuer High School Dosma, in the district of Aurangabad, was started in the year 1980 and in pursuance to an advertisement made by the Managing Committee of the said school, the petitioner who was duly qualified was appointed (vide resolution of the Managing Committee No. 6 dated the 15th of March, 1980) as the Headmaster of the aforesaid school and joined the post on the 1st of April, 1980. Meanwhile the management of the school had already applied for permission to establish and such a permission was duly accorded by the Director-cum-Special Secretary, Department of Education (vide his memo No. 28348-51 dated 20th October, 1981). Later Special Board was constituted with the District Education Officer and one another officer to test the feasibility for the grant of permanent recognition to the school. The said Board after inspection of the school and complying with the other formalities recommended for the permanent recognition thereof and (vide memo No. 11318-27 dated 3rd of April 1982) the School was given permanent recognition and simultaneously taken over thereby.

3. The primary grievance of the petitioner is that in the aforesaid notification the petitioner's status was reduced from Headmaster to that of Assistant Teacher and it was stated that till the appointment of the permanent Headmaster in the school he would act as the Acting Headmaster (vide annexure 2). The petitioner represented against the alleged reduction of his status from Headmaster to that of an Assistant Teacher and Acting Headmaster to the authorities but to no avail. Consequently the present petition has been moved for a writ of mandamus directing the respondents to recognise and approve the services of the petitioner as a Headmaster of the school and fix his emoluments in the scale prescribed for the Headmasters and pay him the arrears of salary as well as the current salary in the said scale.

4. In the counter affidavit filed on behalf of the respondent State, the factual issues are not put in serious controversy. It is, however, the stand that the appointments by the Managing Committees were not valid until they were approved by the Secondary School Service Committee, which was regulated by circulars issued u/s 63 of the Bihar Secondary Education Board Act, 1976. It is the stand that the appointment of the petitioner as Headmaster was not approved by the Service Commission and there was no appointment of the petitioner as Headmaster by the Board of Secondary Education which alone was competent to make appointment to the post of a Headmaster in non-Government Secondary Schools. It has been averred that the mere mentioning of the petitioner's name as the Headmaster of the school in the communications does not confer upon him the rights of a Headmaster unless he is duly appointed in accordance with law. In fact, the position taken is that it is not within the competence of the Special Boards recommending the taking over of schools to determine the status of any of the employees. Reference is made to Government

circulars laying down that the services of Headmaster. Headmistress appointed by the Managing Committees would not be approved as such by the State Government while taking over the school and consequently no question of any reduction in rank of such persons arises. It is the case that the mere passing of some wrong orders by the district level officers, which were subsequently rectified, does not justify the perpetuation of such mistakes. The legal stand taken is that the only provision applicable in the petitioner's case is Section 3(3) of the Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act, 1981 (hereinafter to be referred to as the "Act") and Section 4(2,) thereof has no relevance to the instant case.

5. These writ petitions had earlier come up for hearing before a Division Bench. Before the said Bench diametrically opposite stands were taken on behalf of the petitioners and the respondent State. On behalf of the respondent State a firm stand was taken against any automatic appointment of Headmaster on the take over of a school and it was contended that Section 3(3) of the Act alone governed the issue. On the other hand, the petitioners basically relied on Sub-section (2) of Section 4 of the Act to claim that the services of such a Headmaster shall be deemed to have been transferred to the State Government as such from the date of the taking over. Noticing a sharp cleavage of judicial opinion within this Court and the significance of the matter, the cases were referred to a larger Bench for adjudication of the two significant questions mentioned at the outset.

5A. It is manifest that the core question herein turns primarily on the language and import of Sections 3 and 4 of the Act. However, before one turns to the relevant part of these provisions, it is not only and but, indeed, necessary to notice both the legislative history of the Act in general and the larger scheme thereof for a correct interpretation of these provisions. It would appear that the functioning of the widely proliferated non-government secondary schools within the State of Bihar proved such an endemic and wasteful problem that the Gordian knot could only be cut by imperative legislation. For our purposes, it is unnecessary to go back to the history of the provisions of the earlier Bihar Secondary Education Board Act of 1976. It suffices to mention that the Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Ordinance, 1980 (Ordinance No. 146 of 1980) (hereinafter to be called the "Ordinance") had to be promulgated by the Governor on the 11th of August, 1980. This was later enacted as the Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act 1981 (Bihar Act 33 of 1982), which is in terms identical with the provisions of the earlier Ordinance.

6. Chapter I of the Act, apart from its title, extent and commencement, primarily contains the definition Section 2 with as many as Clauses (a) to (m) thereof. In particular, it classifies and defines the wide variety of schools in the State into as many as six categories of "non-government secondary school, secondary school, minority secondary school, proprietary secondary school, centrally sponsored

secondary school and autonomous secondary school" which are precisely defined in Clauses (a), (b), (c), (d), (e) and (f) respectively. What is then of some significance is the fact that the words "headmaster", "teacher" and "non-teaching staff" are separately defined, which would need notice in extenso hereinafter. Chapter II is again a brief one containing two sections only. The first -- Section 3 -- as its very heading indicates, pertains to the taking over of management and control of nongovernment secondary schools by the State Government. Herein again these schools are to be in three distinct categories. Sub-section (1) deals with non-government secondary schools (other than the minority secondary schools based on religion or language, centrally sponsored, autonomous and proprietary secondary schools) which were already recognised permanently, provisionally or partially by the earlier statutes and the Bihar Secondary Education Board (hereinafter to be called the "Board"). These schools by the mandate of Sub-section (1) are to be deemed to have been taken over by the State Government with effect from the 2nd of October, 1980. It is plain that these form a class apart.

7. The second category in Sub-sections (2) and (3) pertains to recognised minority, proprietary or autonomous schools, the managing committees whereof may voluntarily make an unconditional offer to make over the schools to the State Government. The State Government may lay down conditions for taking over the management and control of such schools and before making over the management it would be binding for the managing committee to comply with and carry out the said conditions. There is no inflexible date for such taking over which may be done by notification in the official gazette from a date specified therein.

8. The third and the last but not the least and, indeed for our purposes, the most material category is dealt with by Sub-section (3) pertaining to schools which have either received permission of establishment from the Board or which have merely applied for permission of establishment, to the said Board prior to the date of the promulgation of the Ordinance. For lack of any authoritative or convenient terminology these two classes of schools may be labelled as unrecognised schools. The taking over of such schools is entirely discretionary and optional for the Government and this may be done on such terms and conditions as the Government may deem proper. This may further depend if the utility of such school is proved in the eye of the Government and if it further fulfils within three years of the promulgation of the Ordinance the conditions which the State Government may choose to lay down with regard to the land, building, furniture equipment and enrolment. In respect of this category of unrecognised schools (namely those which had secured or applied for permission of establishment) there is no automatic transfer of the services of the school personnel to the Government. The penultimate part of Sub-section (3) expressly mandates for the consideration of the qualification and suitability of teachers working against nine posts of the school, one clerk and two orderlies. These are to be considered by a Committee constituted by the State Government and if

found suitable they are to be appointed in the Government service.

9. The succeeding Section 4 specifically deals with the consequences of the taking over of management and control. For our purposes, the relevant sub-sections of this somewhat exhaustive Section 4 are Sub-sections (1), (2) and (3). They deal with three distinct situations. The first sub-section pertains to the movable and immovable assets and properties owned by the taken over school which shall stand transferred to the State Government and be automatically deemed to have come into its possession and ownership. Sub-section (2) refers to the services of every headmaster, teacher or other employees of the school taken over by the State Government. This material provision will need an elaborate consideration hereafter. Sub-section (3) provides for the conditions of service of such taken over employees and with particular reference states that the age of superannuation of all employees of the school shall be 58 years whilst the other terms and conditions of the service would continue to be the same as before the taking over until alterations are made therein by the State Government in the prescribed manner by the framing of rules. The subsequent Chapter III pertaining to the management of the schools and Chapter IV dealing with interim arrangement before taking over management and control and lastly Chapter V with regard to the recognition of minority secondary schools are hardly relevant for our purposes.

10. Inevitably one must turn in some detail to the language of the statutory provisions around which the whole controversy must revolve. These may be read at the very outset --

"2. Definition : In this Act unless there is anything repugnant in the subject or context :--

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(g) "Headmaster" means the head of the teaching staff of a nationalised secondary school by whatever name designated;

(h) "Teacher" means the teacher of a nationalised Secondary School;

(i) "Non-Teaching Staff means the whole time staff of a nationalised secondary school, other than the teachers;

XXX"

"3. Taking over of the management and control :

Taking over of the management and control of Non-Government Secondary schools by the State Government :

(1) and (2).....

(3) The State Government may, by notification in the official gazette take over the management and control of such schools and on such terms and conditions as the government may deem proper, which have already received permission of

establishment from the Bihar Secondary Education Board or of such schools imparting Secondary Education which have applied for permission of establishment to the said Board immediately before the date of promulgation of this Act and the utility of such school is proved in the eye of the government and which fulfil within 3 years of the promulgation of the Act the conditions laid down by the State Government with regard to land, building, furniture, equipment and enrolment.

The qualification and suitability of teachers working against 9 posts of the school, one clerk and two orderlies of such school before the promulgation of this Act, shall be examined by a committee constituted by the State Government for the purpose and if found suitable for appointment in government service they shall be appointed in the government service along with taking over the management and control of the school."

"4. Consequence of taking over management and control :

(1) All the moveable and Immovable assets and properties owned and possessed by Secondary Schools taken over by the State Government u/s 3 including land, building, documents, books and registers relating to the school shall stand transferred to the State Government and be deemed to have come into the possession and ownership of it.

(2) The services of every Headmaster, teacher or other employees of the school taken over by the State Government shall be deemed to have been transferred to the State Government, with effect from the date of taking over of the school and become employees of the State with such designation as the state Government may determine.

(3) The age of superannuation of Headmasters, teachers and other employees of the schools taken over by the State Government shall be 58 years. The other terms and conditions of their services shall continue to be the same as it was before taking over the management and control of the school until any alteration is made therein by the State Government in the prescribed manner.

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11. Adverting now to question No. 1 posed at the outset, it would appear that the core issue herein is whether the word "teachers" employed in the opening part of second paragraph of Section 3(3) includes within its sweep the Headmaster of the school as well who may be working against nine posts of the said unrecognised school. I must notice that the arena of controversy is narrowed down by the illimitable fairness of Mr. Balabhadra Prasad Singh, the learned counsel for the petitioners. He himself took the stand that necessarily a headmaster is also a teacher and thus squarely within the ambit of the larger phraseology and connotation of the word teacher" used in Section 3(3). He took the stand that at best the Headmaster was a persona designata out of the teachers in the school but merely because of that fact he is not out of the wide-

ranging definition of a teacher.

12. As a matter of abundant caution I would make it clear that I am in no way resting myself on the concession of counsel for arriving at a conclusion on this significant issue. Applying the well-known common parlance test, it would appear that a Headmaster not only is a teacher but is the first and foremost amongst that class in a school. As the very name indicates, he is the head teacher of a school. The relevant meanings to the words "teach" and "teacher" given in Chamber's Twentieth Century Dictionary and The New Oxford Illustrated Dictionary are as under respectively :--

Chambers' Twentieth Century Dictionary

"teach.... to impart knowledge or art to; to guide the studies of; to exhibit so as to impress upon the mind....."

"teacher -- one who gives instruction, esp. in a school or privately;"

The New Oxford Illustrated Dictionary

"teach -- give (person) instruction or lessons in (a subject); show or make know to person (how to do something); give instruction to, educate; explain, state by way of instruction;"

"teacher -- one who teaches in a school."

On the plain aforesaid dictionary meanings, can it be said that a Headmaster does not impart knowledge or art or does not give instruction or lessons or educates or explains by way of instruction to the students in a school? The answer must plainly be in the affirmative. Therefore, in the ordinary meaning of the term, a Headmaster is clearly a teacher as well and thus squarely within the ambit of the latter term.

13. Coming now to the defining Clauses (g), (h) and (i) in Section 2 of the Act, it may first be noticed that these are qualified by the well-known rule of "unless there is anything repugnant in the subject or context". Herein the definition of teacher is widely couched and unfettered by any limitation. It is only qualified as meaning teacher of a nationalised secondary school. Therefore, the ordinary dictionary meaning of the word "teacher" would obvious come into play. Once such a secondary school is nationalised, a person teaching therein is automatically within the ambit of the definition and it seems axiomatic that a Headmaster also teaches in such a nationalised secondary school. Indeed, to use a well-known phraseology the teacher is the genus of which the Headmaster is a species. As the definition of "Headmaster" in Clause (g) itself indicates, he is the head of the teaching staff of a nationalised secondary school. Can it possibly be advocated that the head of the teaching staff would himself not be a teacher? Indeed, he is the presiding genius of the teaching staff being a teacher himself. The separate definitions in Clauses (g) and (h) only draw a distinction between ordinary teacher and the head of the teaching staff. This may also have been

necessitated because the head of the teaching staff in some schools may be labelled as Principal or by some other designation and, therefore, it was thought necessary to define Headmaster separately and pinpoint that he would be so by whatever name he is designated. Therefore, the mere fact that the line of distinction between an ordinary teacher and the head of the teaching staff has been put in separate Clauses (g) and (h) cannot possibly mean that the two are in any way mutually exclusive. It would perhaps be tautologous to say that the Headmaster is not a teacher though he is in terms the head of the teaching staff and the very nature of his duties implies teaching and giving instruction as his vocation in a school. This view is further buttressed by Clause (i) of Section 2 which defines all non-teaching staff as a category other than the teachers. Surely enough the Headmaster cannot fall within the ambit of non-teaching staff. Viewing Clauses (g), (h) and (i) together and harmoniously, it seems manifest that whilst Clauses (g) and (h) are plainly within the teaching staff of the school Clause (i) deals with the whole-time non-teaching staff of a secondary school.

14. The matter may be viewed in the larger perspective of the second paragraph of Section 3(3). This expressly visualises a close scrutiny of the qualification and suitability of teachers working against nine posts of the school, one clerk and two orderlies. If the statute for the purpose of appointing the personnel of unrecognised schools to Government service required close scrutiny of even clerks and orderlies and equally all teachers, does it stand to reason that the Headmaster of the schools would be out of such a purview. It would be anomalous, if not wholly unreasonable, to hold that whilst the qualification and suitability of each teacher of an unrecognised school would call for close examination, those of the head of the teaching staff would go unscrutinised.

15. Undoubtedly there is some judicial opinion to the contrary typified by the latest judgment of the learned single Judge in *Narendra Kumar Singh v. State of Bihar*, LIR 1985 Pat 1128. Therein it has been said as a dictum that Section 3(3) does not confer power on the State Government to scrutinise the qualification and suitability of a Headmaster who has been separately treated and has a distinct position of his own in the scheme of the Act. With respect, it is not possible to subscribe to such a conclusion. I have already pointed out the patent reasons as to why separate definitions in Clauses (g) and (h) of Section 2 were necessary for defining a Headmaster and teacher. The anomalous results that would flow from holding that Section 3(3) clearly confers power on the State Government to scrutinise the qualification and suitability of not only teachers but all clerks and orderlies as well but not those of the Headmaster seems to be too patent to deserve further elaboration. With the deepest deference, this judgment on this point, and others taking a similar view, are not good law and are hereby overruled.

16. From whichever angle the matter may be viewed, it seems to be plain that both generically and on the definition clauses and the language of the statute, a Headmaster clearly comes within the wide-ranging terminology of teachers in the

second paragraph of Section 3(3). The answer to question No. 1 is thus rendered in the affirmative and it is held that the Headmaster of an unrecognised secondary school before its take over shall be deemed to be a teacher of that school for the purposes of examination of his qualification and suitability (for appointment to Government service) u/s 3(3) of the Act.

17. Once question No. 1 has been answered in the terms above, the same would go to the very root of the succeeding question No. 2 as well. Plainly enough, if the Headmaster is within the ambit of the "teachers" in the second paragraph of Section 3(3) then both his qualifications and his suitability are to be scrutinised by the committee constituted by the State Government, and it is only if he is found suitable for such appointment that he may be appointed in the Government service. Indeed, the larger question that emerges is that if the Headmaster is also one of the teachers working against nine posts of the school, then are the qualifications and suitability of all these teachers to be meticulously scrutinised before appointment to Government service? Or is it that all these teachers (including the Headmaster) automatically and ipso facto become Government servants and their services stand transferred to the State Government on the same terms and conditions as in the earlier unrecognised school? Second paragraph of Section 3(3) meticulously provides for the closest examination of both the qualifications and the suitability of these teachers. This is to be done by a committee constituted by the State Government for this purpose. It is only if these teachers are found suitable that they are to be appointed in the Government service and not otherwise when the management of the school is taken over. Is such scrutiny and detailed procedure to be reduced to a mere farce by the theory of automatic appointment to these posts on the take over? If what the second paragraph of Section 3(3) provides is a meaningful and purposeful scrutiny and assessment of first the basic qualifications and then the suitability of teachers in an unrecognised school for appointment to Government service then, obviously enough, there can be no question of the Headmaster of an unrecognised taken over school becoming automatically its Headmaster after it is taken over. To hold so would, in essence, be wiping away the second paragraph of Section 3(3) and rendering the whole process of the scrutiny of the qualification and suitability of these incumbents and the creation of a committee by the State Government wholly nugatory. In the context of teachers in general and the Headmaster in particular on the plain language of the second paragraph, therefore, there is not the least semblance of any teacher or Headmaster becoming automatically a Government servant thereunder. In particular, the post of a Headmaster in a school is too crucial to be thrown empirically into a mindless automatic routine that once the take over of the school is ordered, the existing Headmaster must necessarily become the Headmaster of the nationalised school in an integrated education service.

18. On a close reading of Sub-section (3) of Section 3 and in particular the second paragraph thereof, it appears to me that the said provision is the very antithesis of any theory of automatic appointment of Headmasters into

Government service and the nationalised schools. A plain reading of the second paragraph would indicate that it first hinges on the qualifications of the teachers working against the posts in an unrecognised school. The very eligibility for consideration and appointment to Government service would first depend upon the qualifications of such a teacher. Plainly enough, if the incumbent teacher does not satisfy even the test of the basic prescribed qualifications, the question of his appointment to Government service would have to be ruled out at the threshold. Any question of the automatic appointment or transfer of an unqualified teacher, to my mind, cannot simply arise under the second paragraph. Secondly, despite the test of qualifications being satisfied and the teacher being eligible for consideration, a further requirement of suitability is laid out by the statute. A teacher may be qualified and eligible and yet not suitable for appointment into permanent Government service. It was forcefully highlighted on behalf of the State by the learned Advocate-General that Section 3(3) deals with such unrecognised schools to the extent that they may have merely as yet applied for permission of establishment. In such private institutions empirically managed by the proprietors or managing committees, the possibilities of favouritism and nepotism for appointment to the post of teachers and Headmasters were not only there but indeed rampant within the State. It was highlighted that though the incumbent Headmaster may be qualified yet he may have an atrocious service record and be an established drunk or a debauch. Is such a person to be automatically appointed on take over in a nationalised school and become a permanent part of the educational set up of the State? The learned Advocate-General was thus right that yet a second hurdle of suitability has to be crossed despite the existence of the eligible qualifications. Thirdly, the test of qualifications and suitability has to pass through a crucible of a committee constituted by the State Government for the specific purpose of examining the same with regard to the unrecognised schools. Later on I would refer to the statutory instructions for the constitution of such a committee. It is only after such a statutory committee comes to a favourable conclusion with regard to the suitability of the incumbents that they would be considered for appointment in Government service. Fourthly, it appears from the language of the second paragraph that the opinion of the committee is not conclusive for an automatic transfer of such incumbents into Government service. Such persons are then to be expressly appointed in Government service at the time of take over. It deserves pointed highlighting that the language employed here is not of any automatic transfer of service but an express fresh appointment by the Government. It seems plain that Section 3(3) and the second paragraph thereof far from visualising any automatic transfer of services provides for the specific pre-conditions before an incumbent of the post of a teacher in an unrecognised school is to be raised to the status of Government service in a nationalised school.

19. The view I am inclined to take is buttressed -- if not conclusively supported -- when a reference is made to the preceding Sub-sections (1) and (2) and the situation is contrasted therewith. Now, Sub-section (1) pertains to the non-

Government secondary schools which stood duly recognised by the Board of Secondary Education. It is these schools which were automatically taken over by the State Government with effect from 2nd October, 1980. With regards to these schools, Sub-section (1) does not provide for any scrutiny of the qualification and suitability of the working staff or their express appointment to Government service. It is only in such schools that there is the automatic transfer of the school to the State Government by a deeming fiction of the law. Sub-section (1) has no provision even remotely parallel or corresponding to paragraph 2 of Sub-section (3). Plainly enough, the legal situation in Sub-section (1) and Sub-section (3) has to be different and distinct. Yet again in Sub-section (2) for lack of any other terminology, we may say that the take over is semi-automatic once the notification in the official gazette from a specified date is made with regard to the recognised minority or proprietary or autonomous secondary schools. Herein again it deserves highlighting that Sub-section (2) dealt with recognised institutions only. If the pre-condition of voluntary hand over by the managing committee was satisfied and equally the conditions laid out by the Government were complied with then a notification would issue taking over the school from a specified date. Sub-section (2) again in a way differs from Sub-section (1) in the sense of there being no automatic take over on the 2nd of October, 1980 by a deeming legal fiction. Equally Sub-section (2) has no corresponding or parallel provision to the second paragraph of Sub-section (3). The sharp contrast betwixt the already recognised schools taken over under Sub-sections (1) and (2) as against the unrecognised schools under Sub-section (3) and the particular provision of second paragraph thereof for the scrutiny of the qualifications and suitability of the incumbent staff for later appointment to Government service is too manifest and cannot possibly be ignored. It is clear that Sub-section (3) stands as a class by itself with regard to the unrecognised schools and to equate it with the position under Sub-sections (1) and (2) pertaining to the already recognised schools can only be done by virtually repealing the second paragraph of Sub-section (3) off the statute book and in flagrant violation of the language thereof and the salutary and settled canons of construction.

20. What next calls for notice is that the Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Ordinance, 1980 was promulgated on the 11th of August, 1980. Section 15 thereof conferred the power to frame rules on the State Government for the purpose of carrying out the purposes of this Ordinance and Section 16 again conferred on the State Government the power to remove any difficulties in giving effect to its provisions. It is common ground before us that no statutory rules u/s 15 of this Ordinance were framed. The said Ordinance was ultimately enacted as the Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act, 1981, which was published in Bihar Gazette (Extraordinary) dated 24th of January, 1982. The provisions of the Act were identical with the preceding Ordinance, and Sections 15 and 16 of the Act as well conferred identical powers to frame rules and to remove difficulties. It is common ground again that no

statutory rules were framed u/s 15 of the Act either. Now, a reference to Section 3(3) would indicate that it left huge unfilled gaps both for the purpose of the taking over of the unrecognised schools as also with regard to the appointment of incumbent staff thereof to Government service. The plain language of Section 3(3) would indicate that the widest discretion was left to the Government for prescribing the terms and conditions as it may deem proper for taking over the management and control of the unrecognised schools. Again it was left to the Government to determine whether the utility of such school is proved and further the conditions laid down by the State Government are fulfilled within three years of the promulgation of the Ordinance. Yet again in the crucial area of the taking over of the services of some of the incumbent staff of the unrecognised schools, the relevant qualifications had to be prescribed. The broad guideline for the suitability had to be spelt out, the procedure for the constitution of the committee for examining the qualification and suitability had to be laid down and finally on the recommendation of such committee the persons found suitable for appointment were to be identified and thereafter appointed to Government service. All these were matters which were left to the widest and even unguided discretion of the State Government by Section 3(3). No statutory rules having been framed, the State Government very rightly canalised these powers by the issuance of statutory instructions to govern all these matters. These are contained in notification No. 129 dated the 30th of November, 1981 (at pp. 644-47 of the Compendium to Important Orders and Circulars). This notification was, in terms, issued u/s 3(3) of the Ordinance of 1980 and stated at the very outset that the State Government after superseding the previous orders as to the establishment of the secondary schools, their recognition and taking over of management and control, etc., had now taken the following decision. It is unnecessary to quote the detailed notification in extenso herein and it suffices to mention that it first provided in terms for the conditions and procedure for approving the establishment of schools. Thereafter in conformity with the second paragraph of Section 3(3) of the Ordinance, the said notification in terms laid down as under:

"(ix) Teachers :-- There must be teachers of different subjects as per direction vide Govt. order No. 2064 dated 4-10-80. Such teacher who does not possess requisite qualification required for standard teaching staff or who is beyond the number of nine teachers, will not get grant of recognition of his service. There must be one clerk and two peons in the school.

(x) Headmaster :-- (i) It will be compulsory for the Headmaster of the school to possess the minimum qualification fixed for an ordinary teacher of a secondary school and at the same time minimum teaching experience of ten years in a recognised secondary school within the territory of Indian Republic.

(ii) It will be compulsory to get the certificate of teaching experience in the recognised secondary school of this State countersigned by the District Education Officer and also the certificate of teaching experience in the recognised

secondary school of other State countersigned by the Director, Education Dept. of that State.

The appointment of Headmaster will be made by authorised officer of the State Government on recommendation by Education Service Board.

4. After obtaining information as to the fulfilment of conditions of recognition by the managing agent of the school, verification report as to the fulfilment of condition will be obtained from the authorised officer of the department and thereafter Special Board will be constituted for extensive inspection of the school. The Special Board will consist of two members. One of the two members will be grade I officer of Bihar Education Service. Another member of the Board will be the Headmaster of Zila School of the adjacent district where the school is situate or the Headmaster of Govt secondary school having experience of at least 15 years or the Principal Training College.

5. The Director, Secondary Education, will select the members of the Special Board. Members of the Special Board will called information on the prescribed form. They will verify and send the report. They will submit pointwise clear report regarding the fulfilment of conditions to the Director, Secondary Education. On getting report and after the enquiry made by the sub-committee constituted under Article 2 (ga), the Govt. order will be obtained and then the school will be recognised and taken over.

6. Taking over the management and control of the school :--

(i) Taking over the management and control of the school will be made according to the conditions mentioned in Sections 3(2) and 3(3) of the Ordinance.

(ii) The committee constituted under Article 2(ga) of this rule will make enquiry as to the qualification and fitness of teachers. According to the conditions mentioned in Section 3(2) of the Ordinance, grant of recognition of the services of nine teachers, one clerk and two peons will be given after making enquiry as to their qualification and fitness for the post.

(iii) In the establishment of approved schools, the State Govt. or the authorised officers will consider the age limit up to the maximum of 35 years in case of appointed and working founder teachers and non-teaching staff and up to the maximum of 43 years in case of the Headmaster. The age of Headmaster, teacher, or non-teaching staff will be calculated from the date of taking over the management and control of the school.

7. In special circumstance, the State Goyt. shall be competent to give relaxation as to the fulfilment of conditions necessary for taking over the management and control and also for granting permanent recognition to the school.

8. From the date of publication of this notification, all the previous orders regarding grant of recognition to schools will be supposed to be superseded."

21. The learned Advocate-General on behalf of the respondent State rightly

placed firm and basic reliance on this notification No. 129. He forcefully took the stand that the same had statutory force and had been validly issued under the executive power of the State to fill in the wide gaps in Section 3(3) of the Act which as yet had not been provided for by the framing of any statutory rules u/s 15. The learned Advocate-General pointed out that apart from other things Sub-section (3) of Section 3 expressly visualises the qualifications of teachers, their suitability, the examination of such qualifications and suitability by a constituted committee and finally the opinion of the Government with regard to the suitability of individual teachers culminating in the exercise of the power of appointment to Government service u/s 3(3). All these significant matters could and, indeed, ought not to have been left to the whimsicality of individual members of the committee or Government officials and had, therefore, to be prescribed and spelt out by uniform and binding instructions in the shape of notification No. 129. Learned Advocate-General rightly highlighted both the prescription of the qualifications for holding the post of the Headmasters and equally the mode and procedure for their appointment laid out in the notification. Emphasis was placed on the necessary requirement of the minimum qualifications fixed for the ordinary teachers and at the same time a teaching experience of not less than 10 years in a recognised secondary school. Further the requisite certificates had to be furnished and the appointment of a Headmaster could be made only on the recommendation of the Education Service Board or an authorised officer of the State Government and not otherwise. Equally the age qualification of 45 years for Headmasters was also specified.

22. The stand taken by the learned Advocate-General with regard to notification No. 129 is patently meritorious. Plainly enough, these instructions have statutory force and were not only apt but, indeed, necessary to fill the gaps in the wide discretionary powers conferred on the State Government by Section 3(3). Indeed if it were not to be so done, the wide ranging discretion therein could well be assailed on the grounds of the vice of an unguided and uncanalised power. It must, therefore, be concluded that notification No. 129 was statutory and binding in its nature. Once it is so held as it inevitably must be, then the same would give the lie direct to the theory of any automatic transfer of the incumbent teachers and Headmaster of an unrecognised school into Government service. It is plain that under the second para of Section 3(3) the existing teachers had thus to fulfil all the requirements of the said provision as further elaborated by notification No. 129. Unless, every incumbent including the Headmaster was first tested on the anvil of these requirements and found suitable thereafter, no question of his appointment to Government service or the transfer of his service to the newly nationalised school could possibly arise.

23. Now, the basic reliance for the claim of the petitioners for an automatic transfer of the services of the Headmaster of- even an unrecognised school to Government service in the same rank is rested on Section 4(2). It was sought to be argued that from the date of the taking over the services of every

Headmaster even u/s 3(3) should be deemed to have been transferred to the State Government in the same rank. It was sought to be contended that this provision, by a deeming fiction, ipso facto transferred the Headmaster of even an unrecognised school to the newly nationalised school in the same post, designation and conditions of service.

24. To rebut the aforesaid stance of the petitioners, in the first instance and somewhat extreme stand has been taken on behalf of the respondent State. This is that Section 4(2) has no application whatsoever to the situation envisaged u/s 3(3) with regard to the unrecognised schools. It was contended that Section 3(3) is complete and is a Code by itself and is in no way connected with or overridden by Section 4(2) or even Section 4(3) and, therefore, the latter provisions have no relevancy at all in this context. According to the respondent State, Section 4(2) has applicability to Sections 3(1) and 3(2) only pertaining to recognised schools alone.

25. In elaborating the aforesaid stand, the learned Advocate-General and also Mr. Keshav on behalf of the respondent State, highlighted that Section 3(3) pertained to wholly, unrecognised schools which had either merely applied for permission of establishment or had already received such permission only. Reference was made to Section 29 of 1976 Act (The Bihar Secondary Education Board Act) which imposed a complete prohibition to run a school without previous governmental sanction. On these premises, Mr. Keshav forcefully labelled this class as not even schools as yet but as being merely proposed schools. Therefore, it was argued that Section 4(2) was applicable only to the recognised schools taken over under Sub-sections (1) and (2) of Section 3 because these provisions can apply only to cases where the services of the employees of those schools were transferred to the State Government. It was pointed out that u/s 3(2) there is no question of any transfer of these services because this provision envisages a new or fresh appointment into Government service after the examination of the qualifications, suitability and other factors by the authorities. Sharp distinction was sought to be drawn between a deemed transfer of services of school teachers under Sections 3(1) and 3(2) read with Section 4(2) as against a fresh appointment by the Government out of the existing staff working against nine posts of teachers, one post of clerk and two posts of orderlies in such school after assessing their qualifications and suitability to appropriate posts.

26. Though the argument on behalf of the respondent State in this context is not altogether devoid of plausibility, it is equally not possible to accede to the same in its extreme totality. Section 4, as its heading indicates, genetically pertains to consequences of taking over management and control. There are no peculiar provisions which can totally exclude its applicability to Sub-section (3) of Section 3 alone. If Section 3 as a whole covered the field of taking over management and control of the schools then Section 4 would equally cover the consequences of such a take over. Yet again, Sub-section (1) of Section 4 expressly mentions

Section 3 in its totality as being within its sweep. There is no limitation with regard to its applicability to land, building, documents, books and registers relating to the taken over school which shall stand transferred to the government and be deemed to have come into its possession and ownership in the eye of law. Plainly enough, this would equally apply to the case of unrecognised schools taken over u/s 3(3) as well.

27. Once Sub-section (1) of Section 4 is construed as such, to have its sweep over the whole of Section 3, there seems to be an impassable hurdle in construing the succeeding Sub-section (2) as excluding Section 3(3) from its applicability. It is significant to note that even the learned counsel for the State conceded that Section 4(2) is clearly applicable to Section 3(1) and (2). Now, once that is so, it is difficult to draw any finical distinction for holding that though it is obviously applicable to Sub-sections (1) and (2) of Section 3, it would not at all be attracted in the case of its Sub-section (3) alone. There is nothing whatsoever in Sub-section (2) from which such an inference may possibly be drawn. Clearly enough, either Section 4(2) is applicable to the whole of Section 3 or it is not, and carving Section 3(3) out of its ambit would, to my mind, be against the sound canons of construction.

28. Equally, it could not be denied that the provision of the succeeding Section 4(3) would be attracted to the totality of taken over schools u/s 3. Viewed from this angle also, it becomes very difficult to carve out any exclusion of Section 3(3). If both the preceding Sub-section 11) and the succeeding Sub-section (3) of Section 4 are applicable to the whole of Section 3, it is difficult, if not impossible, to hold that the middle Section 4(2) applies only to the first two sub-sections of Section 3 and not to the third sub-section thereof at all.

29. Even though the extreme stance of the respondent State seeking a total exclusion of Section 3(3) from the ambit of Section 4(2) must fail and is hereby rejected, yet this would, in no way, advance the case of the writ petitioners. It is significant to note that both serially and in the point of time Section 3 precedes Section 4. Obviously, the taking over of the management and control of the school comes first and then alone the resultant legal consequences of such take over as provided in Section 4. Therefore, Section 4(2) is not to be read in extreme isolation but on the soundest canons of construction Sections 3(3) and 4(2) have to be read together and harmoniously. Therefore, the stand of the writ petitioners resting themselves on Section 4(2) as if it stood entirely unrelated to the other provisions must also be rejected. A fair construction of Section 4(2) would indicate that it was one of general application having within its sweep all the three sub-sections of Section 3. Therefore, it had to be couched in wide terms to include within its ambit both the cases of employees whose services were automatically or semi-automatically transferred under Sub-sections (1) and (2) of Section 3 as also of employees who were to be appointed to Government service under Sub-section (3). Consequently Section 4(2) in its application to Section 3(3) inevitably pre-supposes a strict compliance with the provisions of its

second paragraph and the statutory instructions contained in notification No. 129 dated the 30th of November, 1981. Unless the pre-conditions therein are satisfied, plainly enough, Section 4(2) can hardly come into play. Therefore, if u/s 3(3) a particular Headmaster of an unrecognised school is neither qualified nor suitable and has neither been recommended by the constituted committee nor appointed by the State to Government service, then no question of such a person becoming a Headmaster of the newly nationalised school or the transfer of his services to the State Government can possibly arise. To put it in the converse, it is only after the State Government under the second paragraph of Section 3(3) finds the Headmaster of an unrecognised school suitable and expressly appoints him as such to the nationalised school that Section 4(2) would come to his aid. To say that Section 4(2) would nevertheless be applicable even, though the imperative pre-requisites and preconditions of the second paragraph of Section 3(3) are not satisfied, would, to my mind, be a classic example of placing the cart, before the horse.

30. Yet again, the extreme stand of the writ petitioners that u/s 4(2) a Headmaster of even an unrecognised school would automatically become the Headmaster of the newly nationalised school suffers from the grave fallacy of ignoring and virtually wiping off the statute book the meaningful words thereof, namely,--

".....and become employees of the State Government with such designation as the State Government may determine."

These words would leave no manner of doubt that even where the services of an employee are taken over, they may be against such a designated post as the State Government may choose to determine. Clearly enough, this substantive and meaningful part of Section 4(2) cannot be repealed or rendered otiose or meaningless. This clearly envisages the power of the State Government to first determine and then give what in its eye is the proper post and designation of the taken over employee. The word "determination" necessarily implies a proper consideration and meaningful scrutiny before deciding upon the designation. It cannot possibly be a question of a mere technical labelling of a significant public office. When read closely together, the concept of a determined designation expressly involves the power of the Government to consider and decide as to what position a taken over employee is fit to be allocated. Sub-section (2) of Section 4, to my mind, cannot possibly be read to mean that on the taking over of an unrecognised private school the services of its Headmaster must be technically converted to the Headmastership of the newly nationalised school even though such a person may not fulfil the pre-requisites of either being qualified or even remotely suitable for the post. Take a case of the Headmaster of an unrecognised school who does not possess the pre-requisite of ten years' experience in a recognised school. Would the State be compelled to appoint him to the nationalised school irrespective of even the absence of qualification and eligibility far from suitability. Not only there is no bar, but Section 4(2), therefore,

expressly envisages in such a situation that the State Government, if at all inclined to take over the services of such a Headmaster, may give him the appropriate designation of a teacher or an assistant teacher. It deserves highlighting that in the second paragraph of Section 3(3) it is open to the Government to not appoint any of the employees of the unrecognised school, if in its eye they are not suitable for appointment to Government service. Can it possibly be said that the Government, though having the undoubted power of not at all appointing the existing Headmaster of an unrecognised school (for even reasons of unsuitability or lack of qualification), yet it would have no power to appoint such a person in the designation of a teacher or an assistant teacher? To my mind, u/s 3(3) the plain power of not appointing or taking over the services of such employees includes the power to appoint them to a lower rank or to determine a designation of its choice. It bears repetition that the stand of automatic appointment taken on behalf of the petitioners would render nugatory a substantive portion of Section 4(2) and, as would be shown later, may well be fraught with public mischief.

30A. It appears that the framers of the Act did not intend that the Headmasters of the schools which had only received permission for establishment or had applied for permission of establishment to the Bihar Secondary Education Board immediately before the date of the promulgation of the Ordinance should automatically become the Headmasters of the schools after their take over. If this was the intention of the legislature instead of saying merely that "the qualifications and suitability of teachers working against nine posts of the school..... shall be examined....." there should have been a specific mention of Headmaster in the 2nd paragraph of Sub-section (3) of Section 3 of the Act, the necessary inference is, as already pointed out, that even the qualifications of the persons working as Headmasters in such schools before take over have to be examined under 2nd paragraph of Section 3(3) only as teachers of the schools. Perhaps, that is also the reason why u/s 4(2) power has been vested in the State Government to designate the employees of the schools taken over u/s 3(3) "with such designation as the State Government may determine". Reading Section 3(3) along with Section 4(2) harmoniously there should not be any difficulty in holding that qualifications and suitability even of the Headmasters of the schools to be taken over have to be examined as teachers of such schools and the State Government in the orders of take over can designate such Headmasters only as Acting Headmasters of the schools concerned. Thereafter regular Headmasters for such schools may be appointed in accordance with Notification No. 129 dated 30th November, 1981. In my opinion, it is not possible to hold on proper reading of Section 3(3) along with Section 4(2) that once the committee constituted by the State Government recommends for appointment of the erstwhile Headmaster, the State Government is bound by such recommendation.

31. In the aforesaid context of the taking over the services of the employees of an unrecognised school either in a different designation or a lower rank, the supposed theory of reduction in rank must also be repelled. The concept

obviously springs from the provision of Article 311. The contention, however, forgets that the pre-requisite of such a claim is rested on the substantive right to hold a particular civil post under the Union of India or the State. Unless a person has first an inflexible right to hold, such a civil post substantively, no question of any reduction in rank and nuances of Article 311 can be attracted. It deserves highlighting that employees of unrecognised schools before their take over were purely private employees and no part of the public service. Not even remotely can they be said to be member of the civil service of a State or holding a post under the Union or the State. Before the take over they would obviously be governed by the ordinary law of master and servant which brooks no concept of a reduction in rank and status in the term of Article 311. Secondly, to import the theory of reduction in rank with regard to the designation or post which the State Government may determine on deciding to take over the services of an employee of an unrecognised private school is wholly fallacious. Indeed, in the context of the take over of unrecognised private schools, it is undoubtedly a bonanza for a purely private employee to have the benefit of governmental status and the consequent security of State employment so deeply valued in this State. The threshold determination of what designation or in what capacity the taken over person is to be employed in the prestigious State service does not in any way involve or bring in the constitutional guarantee against reduction in rank for persons substantively holding civil post under the Union or the State. Indeed, such a take over by the Government only involves an upgradation from the tenuous and uncertain private employment to the secured status-orientated State employment. As was pointed out earlier, Section 3(3) clearly envisages the State Government's power to not appoint any of the employees of unrecognised schools which necessarily includes the right to appoint to any designation or post. It is significant to notice that in the second paragraph of Section 3(3) the arena of consideration is only of nine teachers, one clerk, and two orderlies of a school. In a large school there might be double the said number of staff in all the categories. Yet there is no guarantee or obligation to employ beyond the number prescribed in the second paragraph. Equally it is not-even obligatory to necessarily appoint against nine posts of teachers, one clerk and two orderlies if the requisite number of suitable persons is unavailable. Therefore, the determination of designation u/s 4(2) is not an empty formality or mere labelling of equivalent posts but a meaningful determination for deciding as to in which capacity the taken over employee is fit to serve. To import herein the doctrine of reduction in rank might bring credit to the ingenuity of the learned counsel for the petitioners but the submission is nevertheless patently fallacious.

32. Again where two constructions were possible, the learned Advocate-General forcefully highlighted the "anomalous results which would flow from accepting the stand on behalf of the petitioners and, therefore, avoiding such an interpretation. Our attention was drawn to Sections 39 to 42 of the Bihar Secondary Education Board Act, 1976. He forcefully pointed out that of all the existing Government schools and equally in all the recognised private schools the

appointments to the post of Headmasters were even earlier made only on the recommendation of the Bihar Secondary Education Board. The learned Advocate-General emphatically submitted that if it were to be held that all existing Headmasters of the privately run unrecognised schools on their take over are to automatically become permanent incumbents of the posts of Headmasters then this would lead to the gravest anomaly and even violation of Articles 14 and 16 and the right of equality of opportunity in employment. The submission was that where in the whole of the State Headmasters of the State and of recognised schools could be appointed only after valid advertisement and after consideration and recommendation of the Board, yet the fortuitous circumstance of being a Headmaster of an entirely privately run unrecognised school would make such a person a permanent incumbent of the post in the larger scheme of nationalised education within the State if Section 4(2) is to be interpreted as canvassed on behalf of the petitioners. It was contended that the very roots of the whole education system in the State would be shaken and polluted if the Headmasters of private unrecognised schools who more often were so appointed on no other basis but that of favouritism and nepotism, were to become permanent Headmasters in the nationalised education service and thus having an edge and irrevocable advantage over other persons already in the State service or those in the recognised schools. The learned Advocate-General highlighted the fact that eligibility is one thing but selection altogether another and merely because a person is eligible for a post does not entitle him as of a right to the post without considering the merits of others by adhering to the constitutional mandate of an equal opportunity of employment under Article 16. It may be that some of the incumbents of the post of Headmasters in the private unrecognised school may satisfy the test of qualification but that cannot possibly entitle them to a permanent right to the said post which must be conferred by either the process of open advertisement or the consideration of all eligible persons for promotion and selection therefrom. It was highlighted that earlier the recommendation of the Bihar Secondary Education Board was a pre-requisite for appointment as a Headmaster and no automatic appointment to the said post could accrue. It was for this weighty and historical reason that notification No. 129 in term provided that the appointment of a Headmaster will be made by an authorised officer of the State Government and only on the recommendation by the Education Service Board. Consequently this statutory instruction clearly authorised by Section 3(3) is not to be honoured in breach and by deviating from the firm and sound policy of affording opportunity to all eligible persons including the incumbent Headmasters of unrecognised schools (if taken over) for being considered by the Board and thereafter being appointed to the post of Headmasters. Equally the learned Advocate-General pointed out the fact that as long as the private unrecognised schools were in existence they necessarily functioned as a unit by themselves. Once these schools are nationalised, they come into the mainstream of the State's educational system and they cannot possibly function as isolated units but necessarily are homogenous parts of the educational system as a whole. Transferability of personnel from one school to another would be

necessarily inevitable in a nationalised system of education. The school as a unit concept could only co-exist with regard to privately run unrecognised school and would be wholly contrary to the concept of nationalised schools with a single or integrated cadre of educational service. In such a situation to give the fortuitous circumstance, of being the Headmaster of an unrecognised private school such interpretative pre-eminence as to automatically entitle him to be a permanent Headmaster in the State Education Service cannot but spell disaster to the organised educational set up as a whole. I am inclined to agree entirely with the stance of the learned Advocate-General in this context. For the added reason that anomalous and, indeed, mischievous results would flow from the stand canvassed on behalf of the petitioners, the interpretation sought for by them has also to be necessarily avoided.

33. Undoubtedly, there is some cleavage of judicial opinion within this jurisdiction on these issues. Indeed it was a welter of confusion created by judgments (some of them rendered at the admission stage itself on so complex an issue) which had necessitated this reference to the larger Bench. It, therefore, becomes unnecessary and, indeed, wasteful to refer to every judgment taking the contrary view and to distinguish or overrule the same. It would appear that the basic fallacy of the contrary view stems from the judgment of the learned single Judge in *Yogendra Khan v. State of Bihar*, 1983 Pat LJ 214 : (1983 Lab IC 116) which seems to have elaborately launched the theory of ipso facto and automatic transfer of even unrecognised schools' employees to the State service. Therein it was held that even the services of untrained teachers who were thus unqualified and ineligible for such posts in Government service would be transferred to the nationalised school as Headmaster In charge and Assistant Teacher. A perusal of the judgment would indicate that the major consideration for arriving at such a conclusion was that the Bihar Non-Government Secondary Schools (Taking Over Management and Control) Act, 1981 was in pari materia with the Bihar Non-Government Elementary Schools (Taking Over of Management and Control) Act, 1976. With respect, that is indeed not so because there are material and meaningful variations betwixt the two statutes and it is undoubtedly fallacious to say that a whole Act is in pari materia with another. It is possible for a section or at provision of different statutes to be in pari materia but to label two different statutes as in pari materia (unless they are pure carbon copy of each other) is inherently erroneous and inferences from such a presumption would necessarily lead to error. The learned Judge observed that since the two Acts were similar in scope, they may be called in pari materia. In matters of construction similarity is not identity, and no presumptions with regard to the purported policy of different statutes can be safely inferred or raised. What calls for pointed notice is that the material provisions of Section 3(3) of the Act and in particular the second paragraph thereof have no place or corresponding provision in the Bihar Non-Government Elementary Schools (Taking Over of Management and Control) Act, 1976. Yet again this judgment missed to notice the significant provisions of Sub-section (3) of Section 3 of the Act and its second paragraph- which is crucial to

the issue and sought to interpret Section 4(2) in isolation thereof. As has been noticed above, herein it is necessary to read these two provisions together and harmoniously. Much store was set on the word "every" in Section 4(2) but that can hardly be conclusive in the light of the earlier discussion in this judgment. The learned counsel for the parties were apparently remiss in not canvassing the provisions of Section 3(3) and the sharp distinction between recognised and unrecognised schools in that section. The concluding part of Section 4(2) which empowers the State Government to give a taken over employee such designation as it may determine went wholly unnoticed. The larger and the anomalous result which must necessarily follow such theory of ipso facto and automatic transfer of even untrained and unqualified teachers of private unrecognised secondary schools was not adverted to. Yet again notification No. 129 dated the 30th of November, 1981 which has been held above as statutory in character and supplemental to Section 3(3) was not even adverted to. With the deepest deference, I am constrained to hold that Yogendra Khan's case does not lay down good law and is hereby overruled.

34. Once the judgment in Yogendra Khan's case (1983 Lab IC 116) was rendered, the same learned single Judge reiterated the same view in Narendra Kumar Singh v. State of Bihar 1985 Pat LJR 1128 whilst holding that somewhat contrary view even by the larger Division Bench in Om Prakash Choubey v. Director (Secondary Education) cum-Additional Secretary, Govt. of Bihar LJR 1985 Pat 1110 : (1985 Lab 1C 1504) was per incuriam. In Narendra Kumar Singh's case the learned single Judge went further to hold that notification No. 129 transgresses the provisions of Section 3(3) and still further that it had no statutory force and its violation, could not be held to be stricken by the vice of statutory violation. Nevertheless he observed that the same notification can survive with respect to conditions laid down therein with regard to land, building, furniture, equipment and enrolment. With respect, this view of notification No. 129 is untenable and, as held earlier, it is a binding and statutory instruction which was apt and necessary to fill the gaps u/s 3(3) of the Act in the absence of any statutory rules framed u/s 15 of the Ordinance or the Act. I find no transgression of the provisions of Section 3(3) in the said notification which, indeed, is necessary and supplemental thereto. Again, the reliance of the learned single Judge on the Supreme Court judgment in The Workmen Vs. The Bharat Coking Coal Ltd. and Others, construing the altogether different provisions of Section 17(1) of the Coking Coal Mines Nationalisation Act, 1978, is, to my mind, hardly called for. With respect, the construction sought to be placed on Section 10(9) of the Act is, in my view, also not warranted by the language thereof. The material question -- whether the Headmaster would also be within the ambit of teachers in second paragraph of Section 3(3) was not even adverted to far from being adjudicated upon and decided. With the deepest respect, the judgment does not lay down the law correctly and must be overruled.

35. The same approach and line of reasoning as in Yogendra Khan v. State of Bihar (supra) has been adopted by the learned single Judge in C.W.J.C. 2825 of

1984 (Jainendra Kumar Jain v. Director, Secondary Education-cum-Additional Secretary, Deptt. of Education. Govt. of Bihar) 1983 PLJR 214. With respect, for the identical reasons given above, the said judgment must also be overruled.

36. In *Jai Prakash Prasad v. State of Bihar*, 1985 Pat LJR 566 a learned single Judge followed the view in 1983 PLJR 214 (*Yogendra Khan's case*) and LJR 1984 Pat 11 (*Jainendra Kumar Jain's case*). Consequently, with respect, the said judgment is also hereby overruled.

37. It would then appear that a Division Bench chose to take a similar view in C.W.J.C. 3922 of 1983 (*Smt. Shyam Lata Prasad v. State of Bihar*) decided on 6th November, 1985. The categorical views expressed in the said judgment would perhaps highlight the pit-falls in deciding intricate legal issues of wide-ranging ramifications at the motion stage itself. While construing Section 4(2) of the Act in splendid isolation, it has been observed that what had preceded the taking over of school is absolutely irrelevant and is not to be looked into by the Court. With respect, it is not so because Section 4(2) has to be necessarily read with Section 3(3) and the second paragraph thereof. Indeed, as already held, those provisions precede the application of Section 4(2) which can operate only with regard to those employees whose services have been found suitable or otherwise and the designation or post to which they have been allocated. The theory of ipso facto and, indeed, ipso jure transfer of the services of the school employees to State service has been advocated as a dictum flowing from the supposed legal fiction under Section 4(2). It was then observed that the conferment of the power of such designation as the State Government may determine on an employee has no bearing on the status and emoluments etc., to be drawn by a Headmaster. It was assumed that designation was merely an innocuous labelling of the post -- not a meaningful determination of the capacity of the employee to hold a particular post or not. It was concluded that the provisions of Section 3(3) of the Act have no bearing at all upon the construction of Section 4(2). With respect, I am inclined to take a diametrically opposite view to hold that both the provisions must be read together and harmoniously. On the theory that Section 4(2) warrants that a Headmaster of an unrecognised school becomes ipso jure the Headmaster of the nationalised school from the date of its taking over, it was concluded that there was demotion or reduction in rank. As I have already shown in this context, no question of the concept of reduction in rank under Article 311 arises or can be imported into. With the deepest deference, this judgment does not lay down the law correctly and is hereby overruled.

38. Yet again at the motion stage the Division Bench in C.W.J.C. 4430 of 1986 (*Arjun Prasad Singh v. State of Bihar*) decided on the 2nd December, 1985 followed the earlier judgment in C.W.J.C. 3522 of 1985 (83?) (*Smt. Shyam Lata Prasad v. State of Bihar*) and allowed the writ petition. For identical reasons, this judgment has also to be overruled.

39. It is unnecessary to advert to the innumerable other single Judge or Division Bench judgments (many at the motion stage), which have followed one or other

of the aforesaid cases. It suffices to say that for the exhaustive reasons recorded earlier they are not good law.

39A. On the other hand, it must be pointedly noticed that a parallel stream of judicial thought is typified by the judgment of the learned single Judge in *Mahakant Jha Vs. Special Secretary, Education Deptt., Patna and Others*, . Therein a mandamus was sought by a teacher to continue in the post and claim arrears of salary on the ground of long continuance even though the original appointment was irregular and, indeed, contrary to the statutory provisions. Categorically repelling such a claim, it was observed :--

"The petitioner undoubtedly has laboured under the impression that he was appointed as an Assistant Teacher in the School by the Competent authority and his appointment was approved by the competent authority but as pointed out in the case of *University of Kashmir* the appointment of the petitioner was always stricken by the vice of the statutory violation which cannot be cured by the acts of administrative drifts.

10. On the facts and in the circumstances, I am of the view that the petitioner has got no case for interference by this Court and a mandamus cannot issue for either of the reliefs claimed by him in the present writ application."

40. The aforesaid line of reasoning has then been reiterated by the Division Bench in *Om Prakash Choubey v. Director (Secondary Education) cum Additional Secretary, Govt. of Bihar*, LJR 1985 Pat 1110 : (1985 Lab IC 1504). Therein the claim was by untrained teachers appointed by the sponsors of the school to get their services transferred to the nationalised schools on their previous service conditions. The Division Bench was pressed with a host of earlier judgments advocating the theory of automatic and ipso facto transfer of the services of the employees of unrecognised schools. However, refusing to toe that line and repelling the argument it was observed as under (at pp. 1510-11 of Lab IC):--

"To mention only a few of such cases which were decided by this Court I may refer to judgments in *C.W.J.C. Nos. 413 of 1978* disposed of on 6-9-1979 by L.M. Sharma, J. 3430 of 1978 disposed of on 7-8-1979 by S. Ali Ahmad, J. 2613 of 1983 (1980?) disposed of on 6-5-1983 by R.P. Sinha, J., 159 of 1981 and (160) of 1981 disposed of by B.P. Sinha, J. on 3-9-1983 and 10-9-1983 respectively and the cases of *Chandra Kumar Chakravarty v. Dy. Director of School Education*, *Krishna Prasad v. State of Bihar*, *Yogendra Khan v. State of Bihar* (1979 BBCJ 378, 1981 BBCJ 387 : LJR 1982 Pat 214 : (1982 Lab IC 152), 1983 BBCJ 139 : LJR 1983 Pat 214 : (1983 Lab IC NOC 116) respectively.

"In all these cases the facts noticed are that the petitioners were appointed by the Management of the Schools on the post of teacher before its recognition by the Board, Circulars prevailing at the relevant time provided that their services were to be recognised if they satisfied the condition that they were appointed as teachers before the recognition and were willing to get themselves trained and the respondents gave to other teachers similarly situate opportunity to continue

as teachers subject to their obtaining necessary training/training or improving their qualification. Unfortunately, for this Court at no time relevant rules were brought to its notice and since the respondents extended their favour to some, this Court always thought it proper to give to other complaining of discrimination at the hands of the respondents same benefits. By extending helping hands to those who were recruited in violation of the rules the respondents not only perpetuated and encouraged recourse to appointments in violation of the rules but provided opportunity to those having right links to sponsor such schools, appoint their unqualified favourites and get their services regularised, leaving a number of qualified persons on the streets running from department to department and from one employment exchange to another employment exchange for getting their names registered in the list of the unemployed person. A mere glance to the contents of the Circulars and instructions would convince that a constitutionally responsible Government of the State and the Board created under a legislative sanction give no thought to the rule of law and acted as if their authority accepted no discipline of law. A censor of their conduct, however, is of no help to this Court and the question raised on behalf of the petitioners have to be decided in accordance with law. I have already noted that the cases decided on the point and brought to our notice provide no guidance and perhaps now abstract realism also shall give no help to this Court. It is plain and clear that the petitioners who are not trained graduates, do not possess minimum qualifications for appointment as teachers."

Ultimately, in line with the above, both the writ petitions were dismissed. I would wish to record that I agree with both the approach and the conclusion of the Division Bench in these cases.

41. To finally conclude, the answer to question No. 2 posed at the outset is rendered in the negative. It is held that the Headmaster of a school taken over u/s 3(3) does not automatically become the Headmaster of the school after its take over u/s 4(2) of the Act.

42. Now it is common ground that at no stage whatsoever the case of the petitioners had been referred to the Education Service Board far from there being any recommendation by such Board in their favour of any appointment as such by the authorised officer of the State Government. To hold otherwise that the petitioners became the Headmasters of the newly nationalised schools would thus be running into the teeth of the categorical statutory instructions and in violation of the letter and spirit of the standard methodology of appointing Headmasters to the Government or nationalised schools. It remained undisputed before us that earlier the Headmasters of all Government schools and equally of recognised private schools could only be appointed on a reference to and recommendation by the Service Board. On larger policy that is an eminently meritorious one and the same has now been codified by statutory instructions on the point. Equally reference must also be made to Section 10 of the Act which provides for the establishment and function of School Service Board A reading of

its 10th sub-section leaves no manner of doubt that the larger purpose of this section is that appointments or promotion of Headmasters of nationalised schools are not to be made empirically but after consideration and recommendation of such statutory Board. The relevant part of Sub-section (9) provides as follows : --

"(9) The Board shall make recommendations for appointment of teachers and for appointment or promotion of Headmasters of nationalised secondary schools to the Director in accordance with this Ordinance and the rules framed thereunder.

Provided that for promotion of teachers to the selection grade post the recommendation of the Board shall not be necessary :

Provided further that in the absence of the recommendation of the Board, and in special circumstances and in anticipation of the recommendation of the Board, the State Government shall be competent to make ad hoc promotion to the post of Headmaster for a period not exceeding six months and to make ad hoc appointment in the prescribed manner to the post of teachers for a period not exceeding six months.

XXXXXX"

To my mind, both letter and spirit of this provision indicate that there is no automatic transfer of the existing Headmasters of the private unrecognised schools as the Headmasters of the nationalised schools as well. Such a finding would be the antithesis of the process of selection and recommendation by an expert body like School Service Board.

43. It is in the light of the aforesaid statutory provisions that the firm stand of the respondent State has to be noticed. In paragraph 5 of the counter-affidavit in C.W.J.C. 1946 of 1984, it is clearly stated that the appointment of the petitioner as Headmaster was not approved by the Service Board and there was no appointment of the petitioner by the Board of Secondary Education, which alone was competent to make the appointment to the post of Headmaster in any non-Government Secondary School. It thus seems plain that the respondent State has legitimately arrived at a policy decision against any automatic and ipso facto transfer of the services of existing Headmasters of unrecognised schools after their take over. The policy to make such appointments only after reference to the School Service Board and on the basis of their recommendation the appointments made by the Government at the State level are wholly in accordance with justice and, indeed, mandate of Article 16. No quarrel can possibly be made with such a decision.

44. In the light of the aforesaid exhaustive discussion, there is no merit in any of the three civil writ jurisdiction cases, which are hereby dismissed. However, in view of some conflict of precedents within the Court, I would leave the parties to bear their own costs.