
(1988) 03 PAT CK 0048

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 2159 of 1982

Smt. Pratibha Singh and Another

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 08-03-1988

Acts Referred:

Bihar Non-Government Elementary School (Taking Over of Control) Act, 1976 —
Section 3, 4(2)

Citation : (1988) PLJR 646

Hon'ble Judges : S.B. Sinha, J

Bench : Single Bench

Advocate : K.B. Sharma, for the Appellant; R.B. Mahto, (A.G.), J.N. Pandey, (Addl. A.G.) and B.N. Mishra, (J.C. to Addl. A.G.), for the Respondent

Judgement

S.B. Sinha, J.—This writ application involves a question with regard to the interpretation of sub-section (2) of section 4 read with section 3 of the Bihar Non-Government Elementary Schools (Taking over of Management and Control) Act, 1976, hereinafter called and referred to as "1976 Act". The facts of the case lie in a very narrow compass and are not much in dispute. The petitioners were appointed as teachers in untrained metric scale of pay on 1.4.1974 and 1.1.1975, respectively, in the Middle School, Dewarika Kothi, Anchal Paru, in the district of Muzaffarpur. It is asserted that the said school is in existence from before 1949. It is an admitted fact that the aforementioned school was taken over in terms of the provisions of the said Act by a notification dated 26.1.1975. It is also admitted that the names of the petitioners were not included in the list of the teachers while the said school was taken over allegedly on the ground that the petitioners had been working against the unsanctioned post.

2. The various authorities including the Headmaster of the said school and the District Superintendent of Education recommended that the services of the petitioners be regularised but allegedly the respondents refused to do so.

3. In the instant case, a counter-affidavit has been filed on behalf of the

respondents, from a perusal whereof, it appears that, the petitioners' names were not included in the list of the teachers at the time of taking over of the said school on two grounds, namely, (a) they were untrained metric teachers and (b) they had been working on unsanctioned posts.

4. The learned counsel appearing on behalf of the petitioners submitted that the phraseology used in sub section (2) of section 4 of the 1976 Act is absolutely clear and, in that view of the matter, there is no reason as to why the impugned order should not be quashed and the petitioners be not paid their salaries.

Learned counsel further drew my attention to various documents, from a perusal whereof it appears that the authorities of the State of Bihar also recommended the case of the petitioners for being absorbed in the said school. The learned counsel for the petitioner in support of his contention placed strong reliance upon Chandra Kumar Chakarvarty v. the Deputy Director of School Education reported in 1979 B.B.C.J. 378; Krishna Prasad v. State of Bihar and others reported in 1981 B.B.C.J. 387 : 1982 PLJR 214; Smt. Maya Raman Vs. State of Bihar and Others, ; as also an unreported decision of this Court in Anand Kumari v. State of Bihar and Others (Letters Patent Appeal No. 64 of 1983) disposed of on the 11th January, 1985.

In the aforementioned decisions of this Court, it has been held that, if any person had been working as a teacher at the time when the school was taken over, he automatically becomes an employee of the State of Bihar in terms of the provisions of Subsection (2) of section 4 of the 1976 Act.

5. The learned Advocate General appearing on behalf of the respondents, however, placed strong reliance upon a recent Division Bench judgment of this Court in Tarkeshwar Singh and others v. State of Bihar and others reported in 1987 P.L.J.R. 1017, wherein it has been held that the minimum qualification for appointment of a teacher in a primary school being metric trained; in absence of the requisite qualification aforementioned, a teacher does not acquire any legal right to become an employee of the State of Bihar and further held that the word "teacher" means a qualified teacher.

In the said judgment, the Division Bench have followed the Full Bench decision of this Court in Ram Ballabh Pd. Singh and etc. Vs. State of Bihar and Others, and another Division Bench decision of this Court in Om Prakash Choubey Vs. The Director (Secondary Education)-Cum-Additional Secretary, Government of Bihar and Another, .

6. In the said decision, it has further been held that, if an untrained teacher, who was wrongly appointed, has been allowed to continue in services, he is not entitled to any relief whatsoever. In the said decision, an earlier Division Bench decision of this Court in Anandi Kumari v. State of Bihar and others (L.P.A. No. 64/83) disposed of on the 11th January, 1985, was sought to be distinguished but in the said decision the Division Bench decision in Krishna Prasad's case (supra) and other Single Bench decisions, as referred to hereinbefore, were not

cited.

The learned Advocate General, on the basis of the aforementioned decision, submitted that this writ petition must be dismissed.

7. As noticed hereinbefore, the decision in Tarkeshwar Singh's case (supra) is based on a decision of the Full Bench decision of this Court in Ram Ballabh Prasad Singh's case (supra) although the ratio in both the decisions appears to be the same; but the distinctive feature is that the decision in Tarkeshwar Singh's case has been rendered in respect of a teacher, the school whereof was taken over under the provisions of the Bihar Non-Government Elementary School (Taking over of Management and Control) Act, 1976, whereas in Ram Ballabh Prasad Singh's case the petitioner concerned was a teacher in respect of a school which was taken over under the provisions of the Bihar Non-Government Secondary School (Taking over of Management and Control) Act, 1981 (for the convenience both the Acts shall hereinafter referred to as 1976 Act and 1981 Act, respectively).

8. In Tarkeshwar Singh's case (supra) as noticed hereinbefore, Ram Ballabh Prasad Singh's case (supra) had not only been merely noticed but its distinctive features were also taken into consideration; but, in spite of the fact that, in Ram Ballabh Prasad Singh's case, the Full Bench was considering the provisions of 1981 Act, the Bench followed the said decision on the basis that the provisions of section 4(2) of 1976 Act is in pari materia with section 4(2) of 1981 Act.

9. It is relevant to mention here that before the Full Bench in Ram Ballabh Prasad Singh's case (supra) strong reliance was placed upon a Division Bench of this Court in Yogendra Khan and Others Vs. The State Of Bihar and Others, . Hon''ble the Chief Justice S.S. Sandhawalia while distinguishing the aforementioned decision held as follows:--

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 of 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 between 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 a provision of different statutes, to be in part 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. (underlining is mine).

However, in Tarkeshwar Prasad Singh's case (supra), A.K. Sinha, J., with whom the Chief Justice S.S. Sandhawalia agreed in paragraphs 10 and 11 of the judgment observed as follows:--

Though it is true that, in the case of Ram Ballabh Pd. Singh and etc. Vs. State of Bihar and Others, , it has been held that the two Acts are not in pari materia with another yet it has been held that it is possible for a section or provision of different statutes to be in pari materia. Section 4(2) of the Bihar Non-Government Secondary Schools (Taking over of Management and Control) Act. 1981, was considered in the Full Bench case of Ram Ballabh Prasad Singh v. State of Bihar (supra) and on full examination of that Act as a whole it was held that, in spirit of legislation, examination of qualification and suitability of a Headmaster was a precondition for appointment to Government service and there was no automatic transfer of the service of school personnel to the Government. It was further held in that case that a Headmaster was clearly a teacher as well and thus squarely within the ambit of latter term.

Looking to section 4(2) of the Bihar Non-Government Elementary Schools (Taking over of Management and Control) Act, 1976 (Act 30 of 1976) and section 4(2) of the Bihar Non-Government Secondary Schools (Taking over of Management and Control) Act, 1981, I hold that one is in pari materia with the other. In that view of the matter the point in issue in the instant case, in my opinion, is fully covered by the Full Bench decision in Ram Ballabh Prasad Singh v. State of Bihar (supra).

10. The learned judge in paragraph 13 of the judgment repelled the contention that 1976 Act and 1981 Act are not in pari materia and held that section 4(2) of both the Acts are in pari materia. Paragraph 13 of the aforementioned judgment reads as follows:--

The learned counsel for the petitioners, however, tried to distinguish the Full Bench case in Ram Ballabh Prasad Singh v. State of Bihar (supra) and submitted that section 4(2) of the Act is not in pari materia with section 4(2) of the Bihar Non-Government Secondary Schools (taking over of Management and Control) Act, 1981 and hence, it was submitted that the ratio decided in the Full Bench case, could not be applied in the instant case.

There is no force in this submission advanced by the learned counsel for the petitioners, I hold that whether school is a recognised school or unrecognised school, it makes no distinction and hence the principles decided in the Full Bench case is fully applicable in the present case also.

11. Plainly enough, the decision in Tarkeshwar Singh's case is contrary to and not in consonance with the Full Bench judgment in Ram Ballabh Prasad Singh's case (supra). What has been held in Ram Ballabh Prasad Singh's case is not the

effect of section 4(2) of both the 1976 Act and 1981 Act but the effect of section 3(3) of 1981 Act vis-a-vis section 3 of 1976 Act read with section 4(2) thereof. Section 4 of both the Acts merely provides for the consequences of vesting inter alia to the effect that the services of teaching and non-teaching staff of the school which have been taken over in terms of the aforementioned Acts shall be deemed to have been transferred to the State Government with effect from the date of taking over of the school and that they would become the employees of the State, with such designation as the State Government may determine. In my opinion, the consequence of vesting as mentioned in section 4(2) of both the Acts is immaterial if the conditions of taking over the school under the said Acts are different.

12. Even in Ram Ballabh Prasad Singh's case, as noticed hereinbefore, in paragraph 19 of the judgment a distinction has been made in respect of those schools which have been taken over under sub-section (1) and (2) of Section 3 of 1981 Act and those schools which have been taken over under sub-section (3) of Section 3 thereof. So far as such schools, management whereof has been taken over under sub-section (3) of Section 3 of 1981 Act are concerned, it has been held in Ram Ballabh Singh's case that in relation to those schools, the transfer of the services of a teacher to the State of Bihar is not automatic, whereas in respect of those schools which come within the purview of sub-section (1) and (2) of section 3 of the said Act, the transfer of the services of the teaching and non-teaching staff would be automatic.

In my opinion, therefore, the conclusion arrived at in Tarkeshwar Singh's case that section 4(2) of both the Act are in pari materia and as such even in respect of primary schools only trained teacher could be appointed is clearly not correct. In view of the fact that the said Division Bench runs contrary to Full Bench decision, I am not bound thereby as I am bound to follow the Full Bench decision.

13. Further, as noticed hereinbefore, the decision in Tarkeshwar Singh's case (supra) is contrary to the decision of an earlier Division Bench of this Court in Anandi Kumari's case (supra) in which again the Chief Justice S.S. Sandhawalia was a party.

In paragraph 7 of the judgment in Tarkeshwar Singh's case (supra), Anandi Kumari's case (supra) has been dealt with. Paragraph 7 of the said decision reads as follows:

The certified copy of the judgment in Anandi Kumari's case was produced by the learned counsel for the petitioners for perusal of the Court. I have carefully gone through the judgment. It is enough to say that the point involved in the instant case, as indicated in paragraph 2 above, was neither the point to be considered in that case nor has it been considered/answered in that judgment. In the judgment of Anandi Kumari's case (referred to above) it has nowhere been held that even untrained teachers and unconfirmed teachers had the statutory right to continue and be recognised as teachers in the State Service with effect from the

date of take over. It has also not been held in that case that even such teachers who do not satisfy even the test of basic prescribed qualification (i.e. eligibility) for the appointment to the post but having been appointed automatically and ipso facto become Government servant and their services stand transferred to the State Government.

In Anandi Kumari's case primarily it was the order of transfer passed by the District Superintendent of Education, transferring respondent No. 5 of that case as Headmaster of Sri Muneshwar Ramrati Mala Balika Middle School, Gaya (where Anandi Kumari was already working as Headmistress of that school). It was this order of transfer which was under challenge.

Thus Anandi Kumari's case in L.P.A. No. 64 of 1983) (referred to above), the point in issue in the instant case has not been dealt with at all and, in my opinion, reliance placed upon the judgment in the aforesaid L.P.A., filed by Anandi Kumari is under total misconception. I hold that the point in issue in the instant case having not been decided in that case, the judgment in that case is not applicable in the present case.

Thus, the submission advanced by the learned counsel for the petitioner fails.

14. From a perusal of the aforementioned paragraph, it would be evident that the Bench deciding Tarkeshwar Singh's case (supra) proceeded on the footing, that in Anandi Kumari's case (supra), merely the transfer of respondent No. 5 thereof was in issue. What has been missed in Tarkeshwar Singh's case (supra) was that the petitioner thereof was claiming herself to be the Headmistress of the school in question in terms of section 4(2) of 1976 Act and on that ground she questioned the legality of order of transfer of respondent No. 5 as Headmistress of that school in her place.

15. In Anandi Kumari's case the Division Bench clearly held that the petitioner thereof had a right to continue as a Headmistress in view of section 4(2) of 1976 Act.

In Anandi Kumar's case, the Division Bench was concerned not merely with the order of transfer of respondent No. 5; but the real issue involved therein was as to whether the petitioner thereof acquired a legal right to continue as a Headmistress of the school in question in terms of the provisions of section 4(2) of 1976 Act. In other words what fell for consideration in Anandi Kumari's case was the construction of section 4(2) of 1976 Act itself.

16. The aforementioned view will be evident from paragraphs 4 and 10 of judgment which read as follows:

Paragraph 4 The appellant was working as Headmistress since 1970 in the aforesaid Middle School. The appellant had been appointed as Headmistress by the Managing Committee of the school. At the initial stage, he was granted pay scale of an untrained metric teacher. By Annexure 6, she was granted the pay scale of an untrained graduate teacher. In other words by Annexure 6 she was

granted the scale of Rs. 785-1210 Annexure 6 is dated 22nd April, 1982. The Education department admitted her to be the Headmistress of the aforesaid Middle School. It is, therefore, an admitted position that she had been working as Headmistress of the said Middle School from 1970 to April, 1982. It is also admitted in paragraph No. 5 of the counter affidavit of respondents No. 1 to 4 that she was holding the post of Headmistress before the taking over of the school by the Government.

Paragraph 10 The school was taken over by the State Government on the 24th January, 1981. Since 1970, the appellant has been holding the post of Headmistress and she continued to hold that post till 24th January, 1981. After taking over of the she continued to hold the post of Headmistress till April, 1982. Therefore, in view of section 4(2) of the Act, she continued to be the Headmistress even after the taking over of the school. Therefore the authorities illegally issued Annexures-1 and 2 in contravention. of section 4(2) of the Act-1, therefore, quash Annexures-1 and 2 and she will continue to hold the post of Headmistress of the aforesaid Middle School. The State Government should make necessary arrangement for her training. (Underlining is mine)

17. Further in Tarkeshwar Singh's case (supra), Anandi Kumari's case (supra) was sought to be distinguished on the ground that, in the said judgment, it has nowhere been held that, even untrained teachers and unconfirmed teachers had the statutory right to continue and should be recognised as teachers in the State Service with effect from the date of take over.

18. However, the very fact that in paragraph 10 of the judgment in Anandi Kumari's case (supra) it was directed by the Division Bench that the State Government should make necessary arrangement for her training is a clear pointer that the petitioner of the said petition was not a trained teacher. Even in paragraph 4 of the aforesaid judgment it has been observed as follows:--

She was granted pay scale of an untrained metric teacher. By Annexure 6, she was granted the pay scale of untrained Graduate teacher.

19. The learned Advocate General, when questioned, as to whether a minimum qualification of being a trained teacher has been laid down by the State of Bihar by reason of the provision of any statute or otherwise in respect of the appointment of a teacher in primary school before the 1976 Act came into force, conceded that there had been no such statutory order or circular.

20. Learned Advocate General, however, drew my attention to a copy of the letter No. PL/PI-06/63-1726, dated 3.4.1964 issued by Sri S. Sahay, Secretary to Government, to all District Superintendent of Education, wherein it has been directed that no untrained person should be appointed, as trained teachers are available in plenty. It has, however, been mentioned therein that an untrained teacher can be appointed on temporary basis and should be made subject to the certain conditions mentioned therein. By the said letter the District Superintendent of Education was fastened with the responsibility to ensure that

the conditions mentioned in the aforementioned circular are incorporated in the appointment letters which may be issued to untrained persons.

21. From the aforementioned circular letter it does not appear that the conditions laid down therein had any application in respect of the primary schools which were being privately managed. At the relevant point of time the District Superintendent of Education was the controlling authority in respect of the schools run and managed by the District Boards.

Further, in view of the fact that the primary schools were not to obtain recognition nor was it necessary for them to be affiliated with any Board or any statutory organisation, the State of Bihar was not empowered by reason of the provisions of any statute or any other instrument having the force of law to lay down the conditions of service of a teacher appointed in a primary school owned and managed by private organisations. It is, thus, not at all clear as to whether the said circular letter was meant to be applied in relation to the primary schools established and managed by private bodies or organisations. To me, it appears that the said circular letter was issued only in relation to the school established or managed by the Government or other semi-Government organisations.

22. Further, from a notification bearing No. 928 dated 31.7.1970 it appears that the provisions were made for short course training of such teachers who were untrained at the time of appointment. The State of Bihar further issued a circular bearing No. 3406 dated 4.6.1973 wherefrom it appears that even scales of pay were fixed in respect of the Non-Government Elementary School Teachers as on 1.1.1971 even for middle untrained teachers.

By reason of the aforementioned circular letter, scales of pay of even untrained teachers were fixed. It may be mentioned here that the aforementioned circular letter had to be issued for the purpose of giving higher scale of pay in respect of these teachers working in the schools which were taken over by reason of the provisions of the said Act with effect from 1.1.1971.

23. The very fact that even the State of Bihar decided to increase the salary of untrained teachers on an ad hoc basis goes to show that possession of a degree or diploma in teachers training was not a pre-requisite for appointment of a teacher in a primary school.

Further, by a circular letter dated 15.12.1976 bearing No. G/M7-074/76 Ed. 4557 it was directed that if trained teachers are not available then untrained teachers can also be appointed and a seniority list of such untrained teachers should be prepared after trained candidates in accordance with the merit and marks obtained by them.

Apart from the fact that there are several circulars and letters issued by the State Government recognising the services of untrained teachers in elementary schools, it may be un-useful to refer to the report of the Fourth Pay Revision Committee wherein at pages 241 and 242, the scales of pay of metric untrained,

Intermediate Untrained and Graduate Untrained have been fixed.

From the facts aforementioned, it is evident that the State of Bihar never laid down the minimum qualification for appointment of a teacher in a primary school. From the various circulars as referred to hereinbefore, it is also evident that the State Government recognised the services of the untrained teachers and at no point of time it took a policy decision that the minimum qualification for appointment of a teacher in a primary school would be metric trained.

24. The learned Advocate General also drew my attention to the resolution dated 31st December, 1982 bearing No. S/B 3-204/81 Ed. 2501. This resolution was issued by the State of Bihar in purported exercise of its power conferred upon it u/s 8 of the 1976 Act.

25. The said purported resolution lays down that the minimum qualification of a teacher of a primary school will be metric trained. The said purported resolution has further been given a retrospective effect and retroactive operation with effect from 1.1.1971 from which date the 1976 Act itself came into force.

26. In the instant case, the petitioners had been appointed on 1.4.1974 and 1.1.1975 respectively and the school in question was taken over on 26.1.1975.

27. Learned Advocate General, on the basis of the aforementioned resolution, contended that as the same has been given a retrospective effect and retroactive operation, it must be held that at all material times the basic minimum requirement for appointment was metric trained. However, when the attention of the learned Advocate General was drawn to a recent Full Bench decision in *Krishnadeo Mishra Vs. The State of Bihar and others*, , he contended that the aforementioned Full Bench decision does not lay down the correct law and is not in consonance with the decisions of the Supreme Court in *Sant Ram Sharma Vs. State of Rajasthan and Another*, and in *Union of India (UOI) Vs. K.P. Joseph and Others*, and various other decisions.

28. The aforementioned decisions of the Supreme Court of India have been followed in a large number of cases including a Division Bench decision of this Court in *Man Singh Vs. State of Bihar and Others*, .

29. It is now a well settled principle of law that the conditions of service of an employee can be laid down by the State in the following manner:

(a) By framing a rule under proviso to Article 309 of the Constitution of India.

(b) By framing a rule under the provisions of any statute governing the services of the employees.

(c) By reason of executive instructions by the State of Bihar in exercise of its power conferred upon it under Article 162 of the Constitution of India.

30. It is also well settled by reason of various decisions of the Supreme Court of India including *Santram's case* and *Joseph's case* (*supra*) that any executive

instruction issued by the State shall have the force of law; but the same shall be subject to the provisions of any legislative Act or any rule framed either Article 309 of the Constitution of India or under the provisions of any statute.

31. It is further well settled that executive instructions would operate in the field uncovered by the rules framed under Article 309 of the Constitution of India or under the provisions of any statute. But the Government can-not alter the conditions of service prescribed by the rules by issuing an administrative instruction (see *State of Haryana, Vs. Shamsher Jang Bahadur, etc. etc.*,

32. It is further well settled that whereas a rule made under Article 309 of the Constitution of India may have a retrospective effect but an executive instruction cannot operate retrospectively. It is also well settled that even in a case where a rule was framed after complying with all the conditions of framing a rule in terms of Article 309 of the Constitution of India, such a rule shall have the force of law irrespective of the fact as to whether it has been termed as a rule or not.

In the case of *Basistha Narain Chaudhary Vs. Commissioner of Income Tax and Others*, , a Bench of this court held as follows:

Apart from this objection, neither Article 309 nor any other provision of the Constitutional expressly lays down any particular form in which a rule under an Article of the Constitution should be made. Even if the word "rule" has been used by the Home Ministry in the said notification nevertheless so long as the power admittedly exists by virtue of the proviso to Article 309, the Notification will not become invalid merely because it uses the word "orders" and not "rule". In these matters the substance is more important than the form.

Reference in this connection may also be made to the decision of the Supreme Court in *E. Venkateswara Rao Naidu Vs. Union of India (UOI)*, . Paragraph 6 of the aforementioned decision reads as follows:

The first of three points urged before us is that the notice retiring the appellant compulsorily is invalid as the office memorandum on the strength of which it was issued, did not have the force of rule made under Article 309 of the Constitution is based on paragraph 8 of the Memorandum which provided that the amendment of relevant rules covering the all India Services so as to make these orders applicable to the members of those services is being undertaken in consultation with the State Government. We see no merit in the contention. Article 309 provides that subject to the provisions of the Constitution, Acts of the appropriate legislature may regulate the recruitments and conditions of service of persons appointed to Police Services and post in connection with the affairs of the Union or State. In regard to services and posts in connection with the affairs of the Union, the proviso to Article 309 empowers the President to make rules regulating the recruitment and conditions of service of servants appointed to such services and posts until provision in that behalf is made under an Act of the appropriate Legislature. The rules so made by the President are effective subject to the provisions of any such Act. Paragraph 2 of the office

Memorandum in terms recites that the president is pleased to direct that the age of compulsory retirement of Central Government servants should be 38 years, subject to certain exceptions. Paragraph 8 of the Memorandum merely restates with particularity the true legal position which obtains under the proviso to Article 309. Nothing stated in that paragraph is capable of the construction that the office Memorandum was not to be effective until fundamental Rules were consequently amended. If fact, by paragraph 7 the provision of the Memorandum were given express effect from December 1, 1982.

The aforementioned decision has been cited with approval by a Division Bench of this Court in C.W.J.C. No. 4791 of 1983 (Rakesh Prasad Singh and others v. The State of Bihar and others) disposed of on 20th November, 1984 reported in 1985 PLJR (NOC) 14.)

33. In this connection, it may also be useful to notice another well settled principles of law that where there are two sources of power vested in an authority to frame rules or issue instructions, even if it be found that in certain circumstances one source of power was not available at the time of framing such rule or issuing such direction; such action does not become invalid if it is found that there had been another valid source of power available to the maker of the rule or the statutory instruction for the said purpose.

34. It is also well settled that wrong labelling of a statutory provision in the notification or circular as a source of power to issue the same is wholly immaterial, if in fact there exists a power referable to such action Apart from Basistha Naraia Choudhary's case (supra), reference in this connection may be made to P. Balakotaiah Vs. The Union of India (UOI) and Others, .

In Afzal Ullah Vs. The State of Uttar Pradesh, , the Supreme Court held as follows:--

It is true that the preamble to the byelaws refers to clauses A(a), (b) and (c) and J(d) of section 298 and these clauses undoubtedly are inapplicable; but once it is shown that the impugned bye-laws are within the competence of the Municipality, the fact that the preamble to the bye-laws mentions clauses which are not relevant, would not affect the validity of the byelaws. The validity of the bye-laws must be tested by reference to the question as to whether the Board had the power to make those bye-laws. If the power is otherwise established, the fact that the source of the power has been incorrectly or inaccurately indicated in the preamble to the bye-laws, would not make the bye-laws invalid.

In J.K. Steel Ltd. Vs. Union of India (UOI), in paragraph 45 at page 1188, it has been held by the Supreme Court as follows:--

There is no dispute that the officer who made the demand was competent to make demands both under Rule 9(2) as well as under Rule 10. If the exercise of a power can be traced to a legitimate source, the fact that the same was purported to have been exercised under a different power does not vitiate the

exercise of the power in question. This is a well settled proposition of law.

In *N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd.*, in paragraph 14 it has been held as follows:--

Dr. Syed Mohammad is, no doubt, well founded in his contention that, if the appellants have power to issue notice either under Rule 10A or Rule 9(2), the fact that the notice refers specifically to a particular rule, which may not be applicable, will not make the notice invalid on that ground.

35. The aforementioned principles of law could not be assailed by the learned counsel appearing for the petitioner.

Santram Sharma's case has been quoted with approval in *Krishnadeo Mishra's* case (*supra*) itself. As a matter of fact in the aforementioned decision an administrative instruction conferring disciplinary power upon the District Superintendent of Education by reason of an executive instruction was found to be valid. Santram Sharma's case has been referred to in *Krishnadeo Mishra's* case (*supra*) in the following terms:--

It is true that there is no specific provision in the Rules laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the officers concerned to selection grade posts. It is true that Government cannot amend or supersede statutory Rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.

36. The decision of the Supreme Court of India in *Joseph's* case (*supra*) has been followed by this court in *Man Singh's* case (*supra*). This court in paragraph 9 held as follows:--

I first take up the question as to the true nature of Annexure 5. Rules relating to the services can be framed in exercise of powers under Article 309 of the Constitution. There are number of service rules which have been made, or have the force of rules made, under Article 309 of the Constitution. The question as to what should be the policy in relation to transfer of Government employees could, in my view, be surely laid down by a proper service rule made under the Article aforesaid. So also the procedure But, we find that State has not made any service rules relating to transfer and postings of Government employees. In this situation it was open to the State Government to issue executive instructions which would supplement the rules already in existence. This is well settled by the decisions of the Supreme Court in *Sant Ram Sharma v. State of Rajasthan* and *Union of India v. V.K.P. Joseph* and other cases taking the same view. It is only where the executive instructions attempt to supplant the rules that it can have

no legal force. Such is not one Position here. I here is no conflict between Annexure 5 and any of the rules framed under Article 309 of the Constitution. The instruction, therefore, in my view, would govern the conditions of service in relation to the policy and procedure for the transfer of Government employees. (Underlining is mine).

37. Even in the Full Bench decision of this court in Ram Ballabh Prasad Singh's case (supra) (upon which counsels for all the parties placed reliance) Chief Justice, S.S. Sandhawalia in his leading judgment held as follows:--

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 gap 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 the exercise of the power of appointment to Government service u/s 3(3). All these sign fact matter 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 & teaching experience of not less than ten years in a recognised secondary school. Further, the requisite certificate 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.

Paragraph 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 gap in the wide discretionary powers conferred on the State Government by section 3(3). Indeed if it were left to be so done, the wide ranging discretion therein could well be assailed on the grounds of 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 (sic), 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 paragraph 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 the Government service or the transfer of his service to the newly nationalised school could possibly arise.

38. It may be mentioned here that in the aforementioned Full Bench decision this court was considering as to whether minimum qualification of B.A. Trained is prerequisite for the purpose of appointment of a teacher under the provisions of the Bihar Non-Government Secondary School (Taking Over of Management and Control) Act, 1981. The notification laying down the qualification of a teacher under the 1981 Act was also issued by way of executive instructions. In view of what has been found hereinbefore, the submissions of the learned Advocate General has much force.

39. Further it is well known that even an executive instruction made under Article 154(1) or 162 of the Constitution of India is enforceable in a court of law as the same has the force of law. The executive power of the State executive is co-extensive with legislative power of the State and as such it necessarily follows that the State may make rules regulating any matter within the legislative competence of the State legislature in absence of any appropriate legislation in that regard.

40. Such rules (made under Article 162 of the Constitution) are made under the authority of the Constitution and not in exercise of any power delegated by the legislature (see A.I.R 1987 S.C. 400).

In State of Madhya Pradesh and Another Vs. Kumari Nivedita Jain and Others, , a Bench of the Supreme Court in paragraph 23 held as follows:--

Under Article 162 of the Constitution the Executive power of a State, therefore, extends to the matter with regard to which the legislature of a State has power to make laws. As there is no legislation covering the field of selection of candidates for admission to medical colleges, the State Government would, undoubtedly, be competent to pass executive orders in this regard.

In Bishambhar Dayal Chandra Mohan and Others Vs. State of Uttar Pradesh and Others, a Division Bench of the Supreme Court held as follows:--

The State in exercise of its executive power is charged with the duty and the responsibility of carrying on the general administration of the State. So long as the State Government does not go against the provisions of the Constitution or any law, the width and amplitude of its executive power cannot be circumscribed. If there is no enactment covering a particular aspect, certainly the Government can carry on the administration by issuing administrative directions or instructions, until the legislature makes a law in that behalf.

Such executive power is not abridged by Article 309 of the Constitution (See Swaran Lata Vs. Union of India and Others,).

Reference in this connection may also be made to B.N. Nagarajan and Others Vs. State of Mysore and Others, where the Supreme Court held as follows:--

Assuming that the State Government could not make retrospective rules under the proviso to Article 309 of the Constitution and that the Mysore Public Works Engineering Department Services (Recruitment) Rules, 1960, (as amended on 23rd August, 1961) were void so far as they were made to operate retrospectively the appointments of Assistant Engineers in the Public Works Department made by Mysore Government Notification, dated 31st October, 1961, could be considered to have been validly made in exercise of the executive power of the State, under Article 162 of the Constitution. The three notifications issued by the Public Service Commission, namely, Notification, dated 1st October, 1958 Notification, dated 4th May 1959 and Notification dated 1st April, 1960, must be treated to have been issued with the consent of the State Government and were executive notifications and not rules made under Article 309 of the Constitution. There were no statutory rules to govern the appointments, Rule 3 of the Mysore State Civil Service (General Recruitment) Rules, 1957, did not prevent the State from exercising its executive power of appointing Assistant Engineers and determining their conditions of service by executive order.

Reference in this connection may also be made to Dayaram Asanand Gursahani Vs. State of Maharashtra and Others, .

41. The purpose of conferring such a power upon the State is now well known. A modern State is certainly not expected to engage in all activities necessary for the promotion of the social and economic welfare of the community.

In exercise of its jurisdiction under such a provision the State is evidently empowered to issue executive instructions laying down the conditions of service and other matters; such executive instructions, evidently have the force of law As a matter of fact, so far as the State of Bihar is concerned, it has issued various notifications in purported exercise of its power conferred upon it u/s 8 of 1976 Act. Such notifications cover almost the entire field relating to the terms and conditions of employment of teachers working in the primary schools. The said notifications lay down the procedure for appointment, promotion, transfer and other matters including the disciplinary proceedings of a teacher working in primary school.

42. Learned Advocate General has submitted that the Full Bench decision would create chaotic condition if the aforementioned decision is held to have laid down a good law as in that event neither any teacher can be appointed nor any teacher can be given a higher scale of pay, promoted transferred and even no disciplinary action can be taken against the erring teachers.

43. From a perusal of the aforementioned Full Bench decision, it is evident that therein the question is as to whether the State has the power to frame rule in purported exercise of its power u/s 8 of the 1976 Act was merely considered. Section 8 of the 1976 Act merely provides for the power to remove defect;

whereas the substantive power to frame rules lies in section 7 thereof.

It is useful to mention here that even in the aforementioned Full Bench decision an executive instructions laying down the power of suspension of a teacher has been upheld as having the force of law. In the aforementioned circular it was not stated that the same was issued by the State of Bihar in exercise of its power conferred upon it u/s 8 of the said Act.

Further, it appears that the contentions raised in this writ application were not raised in Krishnadeo Mishra" case (supra)

44. Further, in Krishnadeo Mishra"s case, authoritative pronouncements of the Supreme Court in Joseph"s case (supra) and other decisions of the Supreme Court were neither brought to its notice nor their effect was considered.

In view of the various Supreme Court decisions referred to hereinbefore, it must be held that even if the notification in question could not have been issued by the State in exercise of its power conferred upon it u/s 8 of 1976 Act; the same is and has to be treated as executive instructions issued by the State of Bihar in exercise of its power conferred upon it under article 162 of the Constitution of India.

Further the various decisions of the Supreme Court wherein it has been held that labelling of a notification or a circular is not relevant and if there are two sources of power for issuing an order, in the event if it be found that one of those powers was not applicable, but the authority for the same could be traced from another source, in such an event the notification/circular issued by the State would not be invalid, had not been brought to the notice of the Full Bench in Krishnadeo Mishra"s case.

45. In terms of Article 141 of the Constitution, I am bound to follow the law declared by the Supreme Court, which is law of the land and further decision of the Supreme Court laying down and/or clarifying the position in law is binding on all courts.

46. As noticed hereinbefore, in Krishnadeo Mishra"s case even the earlier Full Bench decision of this Court in Ram Ballabh Prasad Singh"s case (supra) was not considered and as such the latter Full Bench decision in which the earlier Full Bench decision was not noticed must be held to be hit by the "doctrine of per incuriam".

Reference in this connection may be made to Jai Kaur and Others Vs. Sher Singh and Others, , Mamleshwar Prasad and Another Vs. Kanhaiya Lal (Dead) through L. Rs., and Ram Krishna Mission Ashram v. Amala Kant Chondhary and others (1987 B.B.C.J. 498).

Recently, in Duke v. Reliance System Ltd. (1987 2 All ELR 850) Sir John Donaldson MR at page 860 held as follows:--

I have always understood that the doctrine of per incuriam only applies where

another Division Bench of this court has reached a decision in the absence of knowledge of a decision binding on it or a statute, and that in either case it has to be shown that, had the court had this material, it must have reached a contrary decision.

47. It is also a well settled principle of law that a co-ordinate Bench is bound by the judgment of the earlier co-ordinate Bench.

Reference in this connection may be made to Sri Venkateswara Rice, Ginning and Groundnut Oil Mill Contractors Co. and Others Vs. State of Andhra Pradesh and Others, .

Recently, a Full Bench of this Court in Ram Sagar Pandey and another v. Anchal Adhikari and others (1987 P.L.J.R. 679) where Chief Justice S.S. Sandhawalia was also a party; "law of precedent" has firmly been laid down and it is useful to refer various paragraphs thereof:--

Paragraph 10:--It seems necessary to go to the American Law and that of the Common Wealth countries of Canada and Australia, because admittedly they follow the same rules and principles with regard to the doctrine of precedent. As in England so in India, the legal position herein is identical and indeed it would appear that the doctrine of precedent has been placed at the highest pedestal by giving it a constitutional status. Article 141 now promulgates as under:--

141. Law declared by the Supreme Court to be binding on all courts. The law declared by the Supreme Court shall be binding on all courts within the territory of India.....

Later in Addagada Raghavamma and Another Vs. Addagada Chenchamma and Another, it was held as well settled that even a Division Bench was bound by the decision of another Division Bench. Still later, in Tribhavandas Purshottamdas Thakkar v. Badilal Patel and others (AIR 1968 S.C. 302), whilst setting all veiled doubts raised Raju, J. in the judgment of the High Court with regard to the theory of precedent, it was held:--

Precedents which enunciated rules of law from the foundation of an administration of justice under our system.....

Paragraph 11.--It would thus follow that once a precedent is held to be a binding one then no deviation therefrom is permissible within the judicial polity except in the well accepted categories of cases enumerated hereinafter.

Paragraph 12:--No, apart from the decision of a larger Bench being binding on smaller Bench, it will appear that even judgments of co-ordinate Bench, of the same High Court or in a limited way are binding in the sense that no judgment on merits can be rendered contrary to the earlier decision of a co-equal Bench.....

48. Recently, a special Bench of this Court in Gajendra Swaroop Srivastava Vs. Baleshwar Prasad Kesari, followed an earlier Full Bench, which had the field for a

long time. In this connection reference may be made to *Raj Narain Pandey and Others Vs. Sant Prasad Tewari and Others*, , *Mattulal v. Radhe Lal* (1974 Unreported Judgment, Supreme Court 348) and *Ram Jivan Vs. Smt. Phoola (Dead)* by Lrs. and Others, .

48A. The notification dated 31.12.1982, evidently has been issued by the State in purported exercise of its power conferred upon it u/s 8 of 1976 Act. In terms of the rules of executive business the procedure for issuing administrative instruction in terms of Article 162 of the Constitution or otherwise has been laid down. As the notification has been issued by the State a presumption arises that all the formalities for issuing a notification under Article 162 of the Constitution has been fulfilled. In any event, in view of Joseph's case (supra) the same being an executive instruction will have the force of law. The said notification is also duly authenticated and has been issued under the orders of the Governor.

49. Taking into consideration, therefore all aspects of the matter and in view of the aforementioned judgments of the Supreme Court and the earlier Full Bench decision in *Ram Ballabh Prasad's* case (supra) it must be held that *Krishnadeo Mishra's* case is not a binding precedent having rendered per incuriam and also being not in consonance with the judgment of the Supreme Court of India and earlier Full Bench decisions.

50. Consequently, it is held that the notification dated 31.12.1982, issued by the State of Bihar, although purported to have been issued u/s 8 of the 1976 Act, is legal and valid in law.

51. However, the matter does not rest there. As seen hereinbefore: the petitioners were appointed in 1974 and 1975; whereas the notification in question was issued on 31.12.1982. I have already held hereinbefore, that the circular of the year 1964 does not have any statutory force nor the same was an executive instruction in terms of Article 162 of the Constitution and was meant to be an administrative instruction only.

51A. Even from a letter dated 2nd May, 1980 being No. 1167 issued by Sri Narendra Pal Singh, Special Secretary of the State of Bihar (Department of Education) to the Director (Elementary Education) Bihar, it appears that the State Government itself directed that all the trained teachers shall be paid salary in the scale of pay admissible to a metric trained teacher but those teachers, who were untrained would receive a salary admissible to a metric untrained teacher unless they obtain requisite training therefore. The said letter has been issued in view of the Government order bearing No. 104 dated 23.1.1980 purported to have been issued u/s 3(4)(a) read with section 8 of the 1976 Act. Evidently, therefore, the Government itself recognised the services of the untrained teachers.

52. The said circular of 1964 was also evidently at a later stage deviated from and/or modified by the State of Bihar itself as has been indicated hereinbefore.

53. It is also well settled by now that the State may modify its earlier decision unilaterally. Reference in this connection may be made to *Indradeo Choubey and others Vs. The State of Bihar Home (Police Department), Patna and Others*, . It is, therefore, clear that the aforementioned 1964 circular-letter has no application to the facts and circumstances of the case.

54. Learned Advocate General, however, contended that circular of the year 1982 having been given retrospective effect and retroactive operation, the same shall also apply in relation to the condition of service of the petitioners including the minimum educational qualification prescribed for making appointments in the post of teachers. He submitted that the State of Bihar is empowered to issue a rule with retrospective effect. In this connection, he has drawn attention to the fact that the 1976 Act itself was given a retrospective effect and retroactive operation with effect from 1.1.1971 and in that view of the matter, it had the requisite power to issue a rule retrospectively with effect from 1.1.1971. The learned Advocate General in support of his submission has placed strong reliance upon a Division Bench decision of this court in *The Associated Cement Companies Ltd. and Others Vs. The State of Bihar and Others*, .

However, the aforementioned contentions of the learned Advocate General cannot be accepted for more than one reasons.

55. It is well known that a rule may operate retrospectively only if the same is issued in terms of proviso to Article 309 of the Constitution of India. There is nothing to show that before issuing the circular in question all the requirements for making a rule in terms of proviso to Article 309 of the Constitution of India were satisfied. It has been noticed hereinbefore that the said rule could not even have been made u/s 8 of 1976 Act, but can at best be treated as an executive instruction.

It is well known that such executive instruction framed by the State of Bihar in exercise of its power conferred upon it under Article 162 of the Constitution of India cannot be given a retrospective effect.

56. Further, it is also a well settled principle of law that normally a subordinate legislation operates prospectively unless power is conferred upon the rule making authority by reason of the provisions of the statute itself to frame a rule with retrospective effect. Reference in this connection may be made to *Life Insurance Corporation of India Vs. Escorts Ltd. and Others*, .

It is also well known that terms and conditions of service cannot be altered with retrospective effect. Reference in this connection may be made to *T.R. Kapur and Others Vs. State of Haryana and Others*, , *Ex-Major N.C. Singhal Vs. Director General Armed Forces Medical Services, New Delhi and Another*, , *Union of India (UOI) and Others Vs. M. Ravi Varma and Others*, and *Shyam Dayal Panday vs. The State of Bihar and others* (1976 1 S.L.R. 407)

57. It is further well settled that a vested right cannot be taken away even by a

rule framed under Article 309 of the Constitution of India by giving a retrospective effect thereto inasmuch as by such retrospective amendments the vested rights of an employee cannot be taken away. Such rule must also be reasonable, not arbitrary or discriminatory violating Articles 14 and 16 of the Constitution of India.

58. In this case the petitioners were appointed in the years 1973 and 1974. The petitioners had thus acquired a vested right to become an employee of the State of Bihar in terms of the provisions of section 4(9) of the 1976 Act. In the year 1975, when the school was taken over such vested right cannot in any circumstance be taken away by issuing a circular/notification with retrospective effect. Such circulars, so far as the same operate retrospectively, can neither be said to be reasonable but are arbitrary and discriminatory violating Articles 14 and 16 of the Constitution of India.

Reference in this connection may be made to S.B. Patwardhan and Another Vs. State of Maharashtra and Others, . T.R. Kapur and Others Vs. State of Haryana and Others, and P.D. Aggarwal and Others Vs. State of U.P. and Others,

59. The decision in A.C.C. Cement Ltd. vs. State of Bihar (supra) relied upon by the learned Advocate General has absolutely no application in the facts and circumstances of the present case inasmuch by the said notification the rate of cess was notified wherefore requisite powers existed under the provisions of the Act itself.

60. Further, it is well known that the qualification of a person in order to make him eligible for appointment is to be adjudged as on the date, on which such appointments are made and not on a subsequent date.

61. Further, when a person is validly appointed he is entitled to receive salary. Such right to receive salary amounts to right to hold property. Such a right of property fall within Article 300A of the Constitution and as such the State Government while issuing an executive fiat cannot deprive a person of his right to hold property.

62. Article 162 of the Constitution is subject to other provisions of the Constitution. It is, therefore, necessary also subject to Article 300A of the Constitution. Reference in this connection may be made to Bishambhar Dayal Chandra Mohan and Others Vs. State of Uttar Pradesh and Others, .

In R.N. Nanjundappa Vs. T. Thimmiah and Another, it has been held that if an appointment is illegal and unconstitutional the same cannot be regularised by issuing an instrument under Article 162 of the Constitution of India. If an illegal appointment cannot be validated by an executive instruction, there cannot be any doubt that a legal appointment cannot be invalidated thereby.

63. Only because the 1976 Act was given a retrospective effect, it does not necessarily follow that the rules purported to have been framed for giving effect to the said Act could also be given a retrospective effect with effect from

1.1.1971.

64. From a perusal of section 3(1) of the 1976 Act itself it will be evident that the said Act had to be given a retrospective effect only because the schools falling within the scope and ambit of sub-section (1) of section 3 of the 1976 Act, were to be taken over retrospectively with effect from that date and only in that view of the matter the Act had to be given a retrospective effect with effect from 1.1.1971.

65. So far as other schools are concerned, like the school, in which the petitioners had been working as teachers the same were taken over at a later date and as such, in my opinion, it would be fallacious to say that although the school in question was taken over in the year 1975, the terms and conditions of the teachers who became the Government servant only upon the taking over of the said school by the State of Bihar under the provisions of section 3 of the 1976 Act would be operative with retrospective effect from 1.1.1971. Evidently, the State of Bihar had no such power.

66. After taking into consideration all facts of the matter, I am of the opinion that 1982 notification cannot have any retrospective effect or retroactive operation with effect from 1.1.1981 (sic), and the same merely operates prospectively. In this view of the matter in my considered view even the 1982 notification has no application to the facts and circumstances of the case.

67. For the purpose of interpreting the effect of sub-section (2) of section 4 of 1976 the scheme and the object thereof may now be taken into consideration.

68. The said Act was enacted to provide for the taking over of non-Government Elementary Schools under the State Control for better organisation and development of elementary education in the State of Bihar. The aforementioned Act although was enacted in the year 1976, but the same was given retrospective effect and retroactive operation with effect from the 1st January, 1971. In the said Act elementary school has been defined and means a school of different grades upto Class VII and includes:

(i) A school established and administered by the District Board and Zila Parishad under the provisions of the Bihar and Orissa Local Self Government Act of 1885 (Ben. Act 3 of 1885).

(ii) A school established and administered by the municipal Board under the provisions of the Bihar & Orissa Municipal Act, 1922 (Bihar & Orissa Act VII of 1922).

(iii) A school established and administered by the Patna Municipal Corporation under the Provisions of the Patna Municipal Corporation Act 1951 (Bihar Act VIII of 1951).

69. Aided elementary school and unaided elementary school have been defined in section 2(c) and 2(d) of the said Act respectively which read as follows:--

(2c) "Aided Elementary School" means a private school which has been in receipt of Government grant prior to its being taken over by the State Government and which is administered by a managing Committee;

(2) "Unaided Elementary school" means a private school recognised by the Government and which is not in receipt of any Government grant.

70. From a perusal of section 3 of the said Act it would appear that schools of various categories were to be taken over in terms of the provisions contained in section 3 thereof.

71. In terms of sub-section 1 of section 3 of the 1976 Act Elementary Schools managed by the District Board, Zila Parisad, the Municipal Board, the Patna Municipal Corporation and those opened under the Expansion and Improvement Scheme would be deemed to have been taken over by the State Government with effect from the 1st day of January, 1971.

72. Under sub-section 2 of section 3 of the said Act aided elementary schools, the managing committee of which have handed over voluntarily the control of the school to the Government, shall be taken over by the State Government with effect from the date which shall be determined by the District Committee in terms of sub-section (4) of section 3 of the said Act for that purpose.

73. In terms of sub-section 3 of section 3 of the said Act, Elementary School administered by any public or private undertakings have to be taken over by the State Government by publication of a notification in the official gazette with effect from the date to be specified therein.

74. With regard to the taking over of elementary school in terms of sub-section (3) of section 3 of the said Act, a District Committee in each district consisting of the persons mentioned therein was to be constituted for examining the feasibility of taking over of such Schools by the State Government.

75. Section 4 of the said Act which is very important for the purpose of determination of the issues involved in these writ petitions provide for consequences of taking over of the school.

Sub-sections (1) and (2) of section 4 of the said Act reads as follows:--

(1) All the assets and properties whether movable or immovable owned by the schools taken over by the State Government u/s 3 including lands, buildings, documents, books and registers relating to the schools shall stand transferred to and be deemed to have come into the possession and ownership of the State Government.

(2) Every officer, teacher or other employee holding any office or post in the school taken over by the State Government shall be deemed to have been transferred to and become an officer, teacher or employee of the State Government with such designation as the State Government may determine and shall hold office by the same tenure, at the same remuneration and on the terms

and conditions of service as he would have held before the taking over the said school and shall continue to do so unless and until such tenure remuneration, terms and conditions of service are duly altered by the State Government.

76. Section 7 of the said Act provides for the power of the State Government to make rules. It is admitted that uptil now no rule whatsoever has been framed by the State of Bihar in terms of the aforementioned provision.

77. Section 8 provides for a power to remove difficulties. Various circulars, letters and executive instructions were issued by the State of Bihar pursuant to section 8 from time to time.

78. The effect of the various provisions of the Act in question vis-a-vis the condition of service, discussed hereinbefore, have been taken note of, in various decisions of this Court.

79. From a perusal of the provisions of sub-section (2) of section 4 of the said Act it would be absolutely clear that the teachers, officers and other employees of the schools are entitled to hold the office by the same tenure, at the same remuneration and on the same terms and conditions as he would have before the taking over of the said school and shall continue to do so unless and until such tenure remunerations and terms and conditions of service are duly altered by the State Government.

80. It is admitted that neither the tenure nor the remunerations nor the terms and conditions of the officers, teachers and other employees of the school have been prescribed nor any order has been passed, duly altering the tenure, remunerations and conditions of service of such officers, teachers and other employees of the school which have been taken over by the State Government.

81. As a matter of fact, as stated hereinbefore, no rule whatsoever has been framed by the State of Bihar although 11 years have elapsed after enactment of the said Act. In my view the wording of sub-section 2 of section 4 of the said Act are absolutely clear and unambiguous and two interpretations there of are not possible.

82. The learned Advocate General, however, submitted that from the fact that the State of Bihar has been empowered to change the designation of the officers, teachers and other employees of the taken over schools; the same by necessary implication empowers the State Government to accept the services of such officers, teachers and other employees on such remunerations and in such posts as the State Government may deem fit and proper.

In my opinion, the submissions of the learned Advocate General cannot be accepted, By reason of the provisions of the aforementioned statute, the State of Bihar cannot be said to have been conferred with an arbitrary power to pick and choose any employee, officer or teacher and leave out the others while purporting to change the designation of such teachers, officers or other employees. Such a construction of sections 3 and 4 of the 1976 Act; if put, shall

lead to manifest absurdity and would further be violative of Articles 14 and 16 of the Constitution of India.

The Supreme Court recently has held that provisions which enable the governmental authorities power to terminate any employee's services on notice or in lieu there of salary of a few months are arbitrary and violative of constitutional pledge of equality. See *West Bengal State Electricity Board and Others Vs. Desh Bandhu Ghosh and Others*, *Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another*, , *O.P. Bhandari Vs. Indian Tourism Development Corpn. Ltd. and Others*, and *M.K. Agarwal Vs. Gurgaon Gramin Bank and Others*, .

Further, the Supreme Court in *E.P. Royappa Vs. State of Tamil Nadu and Another*, and in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, held that basic principles which informs both Articles 14 and 16 is equality and inhibition against discrimination. Equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic while the other to the whim and caprice of an absolute monarch.

See *Paradise Printers and Others Vs. Union Territory of Chandigarh and Others*, .

83. The very fact that tenure, remuneration and other terms and conditions of services of officers, teachers and other employees of the schools were to remain the same to which he would have been entitled to hold before taking over of the said school and were entitled to continue to do even after the taking over thereof by the State Government clearly indicates that the officers, teachers and other employees holding any office or post, upon take over of the school ipso facto becomes an employee of the State Government with such designation as the State Government may determine. The State Government is empowered to change the tenure, remuneration or terms and conditions of the services only by framing rule in that regard but evidently the same cannot be done otherwise. Such a construction of section 4(2) of the ad Act as has been suggested by the learned Advocate General, in my opinion shall negate the scheme, object and purpose for which the said provision has been made.

84. In my considered view, the power of the State Government to change the designation must be construed to mean a change of designation of posts but thereby other terms and conditions of service of employees cannot be altered nor thereby is becomes entitled to refuse to take the services of an employee who was validly appointed.

In other words by changing the designation the terms and conditions of service attached to the post remuneration therefor cannot be changed to the prejudice of concerned employees unless the same is duly altered.

85. The power to change the designation of an officer, teacher and other employees has been conferred upon the State Government, in my opinion, only for the purpose of bringing an uniformity in the designation of all such officers

who were holding similar or equivalent posts.

86. In a given case it is possible that earlier designation attached to a post may not be commensurate with the duties and the scale of pay of an officer holding a particular post and the nature and function in respect thereof.

87. I am, therefore, of the view that the State Government is not entitled to alter the remuneration or other terms and conditions of service of an employee of teacher or other officers under the garb of the power of changing the designation of such officers, teachers and employees.

88. It is a cardinal principal of law that a literal meaning has not to be given to the provisions of an Act.

89. In *Sutters v. Briggs* reported in 1922 AC 1 at page 8, Birkenhead I.C. observed as follows:

Where, as here, the legal issues are not in serious doubt, our duty is to express a decision and leave the remedy (if one be resolved upon) to others.

90. It is also a well known principle of law that when the language is clear and unambiguous the court cannot legislate nor it is open to the court to put any other interpretation which may violate the phraseology used therein nor the width of the expression used in the statute can be narrowed down or cut down.

Reference in this connection may be made to *State of Kerala Vs. Mathai Verghese and Others*, .

91. In Craies on statute law 7th Edition at page 65, the law has been stated in the following terms:

If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such case best declare the intention of the law given.

In *R.V. City of London Court Judge* (1892) I.Q.P. 273 and *Vacher and Sons Ltd. v. London Society of compositors* reported in 1913 A.C. 107 it has been held to the following effect.

If the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in their ordinary sense.

In *Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others*, it was held that literal meaning of the statute must be adhered to when there is no absurdity in ascertaining the legislative intendment and for that purpose the broad feature of the Act can be looked into.

In *Halsbury's Law of England* (4th Edition) Vol. 44 at page 940 it has been stated that it is the province of the legislature to enact statutes, and of the courts to construe the statutes which the legislature had enacted.

Recently, the Supreme Court of India in *Raja Satyendra Narayan Singh and Another Vs. State of Bihar and Others*, held that basic principles of constructions of the every statute are to find out what is clearly stated and not to speculate upon latent imponderables.

The Supreme Court of India, in almost similar circumstances upheld a statutory continuation of service of the workmen engaged in a Coking Coal Mines under the Coking Coal Mines (Nationalisation) Act, 1972 in *Workmen v. B.C.C. Ltd.* reported in 1978 L.I.C. 709.

92. In this connection it may also be useful to refer to a recent Supreme Court decision in *Balasinor Nagrik Cooperative Bank Ltd. Vs. Babubhai Shankerlal Pandya and Others*, wherein it has been held that the rule without a statute must be read as a whole equally applied to a section and hence, no part of a section can be omitted for interpretation.

The language used in Section 4(2) of the Act is absolutely clear and unambiguous. It in no uncertain terms seek to protect the interest of all employees-both on the teaching as well as non-teaching side. The words "Every officer, teacher or other employee holding any office or post in the school taken over by the State Government....." used in section 4(2) of the Act are very significant. It embraces within its fold all employees of the school without any exception whatsoever.

93. Assuming that two interpretations are possible while construing section 4(2) of the 1976 Act, in my opinion, even this the provisions of the aforementioned section being beneficent in nature so far as the employees of the taken over schools are concerned, the same has got to be liberally construed in favour of the employees.

Reference in this connection may be made to the decision of the Supreme Court in *Jivabhai Purshottam Vs. Chhagan Karson and Others*, .

94. Further, from the plain and unambiguous wordings used in the aforementioned provision it is clear that the legislature intended to protect the interest of the officers, teachers and other employees whose services have been transferred from a private institution to the State of Bihar.

95. It is also a fundamental principle of interpretation of statute that every statute must be interpreted "ex visceribus actus" (within the four corners of the Act) and in that view of the matter also it is not permissible to construe the words used therein with reference to various circulars and office orders as suggested by the learned Advocate General.

96. I am further of the view that the judgment of the Division Bench in *Tarkeshwar Singh's case* (supra) is not binding upon me as the same has been rendered per in-curium as it did not take into consideration the earlier Division Bench decision of this Court in *Krishna Prasad v. The State of Bihar and others* (1981 B.B.C.J. 387 : 1982 P.L.J.R. 214). In that judgment the earlier decisions of

this Court in Chandra Kumar Chakarvarty v. The Deputy Director of School Education (1979 B.B.C.J. 378), Smt. Maya Raman Vs. State of Bihar and Others, have not been taken note of nor the unreported judgment of the Division Bench in Anandi Kumari v. State of Bihar (L.P.A. No. 64 of 1983 disposed of on 11th January, 1985 has been correctly distinguished.

The aforementioned decisions are binding upon this court. It is now well settled that if there is a conflict between two Division Bench decisions, a single judge is bound by the earlier Division Bench decision. Reference in this connection may also be made to Yogendra Lal v. Bihar State Electricity Board reported in 1987 BLT 340 at page 350.

97. The learned Advocate General further argued that in terms of the provisions of section 3(2) of the 1976 Act only such aided schools were to be taken over which fulfil the criteria laid down by the committee constituted under sub-section (4) of section 3 thereof. According to the learned Advocate General sub-section (2) of section 3 of the 1976 Act contains merely an enabling provision as a result whereof the State may or may not take over the schools in terms of section 3(2) of the Act. As the taking over of the school in such a situation, the learned Advocate General contends, is subject to the contract, it was open to the State to take only such number of teachers which are required for the purpose of running.

On a plain reading of sub-sections (2) and (4) of section 3 of the 1976 Act it is clear that the scope and extent of the enquiry to be conducted by the District Committee is limited i.e. only with regard to submitting recommendations for the purpose as to whether the school may be taken over or not and while considering the feasibility of the taking over of the school, the committee, in my opinion, cannot make any recommendations that some teachers, who although were validly and legally appointed be left out so far as transfer of their services from the school to the State is concerned, although the school itself may be taken over.

98. The right of teaching and non-teaching staff in respect of school which has been taken over is governed by section 4 of the said Act. Such a statutory right of a validly appointed teacher cannot be taken away at the ipse dixit of the District Committee constituted under sub-section (4) of section 3.

99. The learned Advocate General further submitted that it is within the domain of the State of Bihar not to take the services of such teacher who are not recognised teachers. The learned Advocate General, in this connection, has referred to a circular bearing sanklap Sankhya 763 dated 9.2.1973. In this connection my attention has also been drawn to paragraph 7 of the counter affidavit, which reads as follows:--

That with respect to the paragraph No. 5 of the writ petition it is stated that it is also correct to say that 15 teachers including the two petitioners were working in the said school as teachers on the date of take over i.e. 26.1.1975. It is also correct that services of 5 of them and one class IV employee were on the sanctioned posts and the Secretary through his letter dated 26.1.1975 handed

over the management of moveable and immovable properties of the school and 2 list of teachers working in that school. The list No. 1 and the list of above named teachers working on unsanctioned post was given in list No. 2 As the teachers working on unsanctioned posts were untrained, the Government had not to spend any amount for the payment of their salaries. Hence after take over by the Government i.e. 26.1.1975 the services of the petitioners and other untrained teachers on miscellaneous posts were terminated and question of payment of their salaries by the department does not arise for that date.

100. The learned Advocate General has also referred to circular relating to the appointment of a teacher in ratio of the students studying in the said school.

101. However, in the instant case, there is no dispute that the services of the petitioner, if held to be valid the same was commensurate with the ratio of the students and the teachers in the school as per the notification itself.

In this connection reference may also be made to letter no. 166 dated 10th April, 1975 issued by the District Superintendent of Education, Muzaffarpur to Director Elementary Education, Bihar, Patna as contained in Annexure 1 to the writ application. In the said letter it has categorically been stated that apart from the teachers in five purported sanctioned posts ten other teachers had been working. In the said letter it has clearly been mentioned that in view of the fact that the number of students studying in the said school numbered 575, the ratio of the teachers and students was less than the prescribed norm. In the said letter the District Superintendent of Education, therefore, recommended that other ten teachers including the petitioners be adjusted.

Similarly, in a letter dated 23.7.1978 issued by the District Superintendent of Education, it has been stated that the school had been taken over along with 15 teachers i.e. 5 teachers on sanctioned posts and 10 teachers on unsanctioned posts. In the said letter, it has further been mentioned that all the 10 teachers who were serving in the said school should be paid their salaries.

102. From the aforementioned letters it is evident that the school was taken over along with all the 15 teachers including the petitioners and as such the petitioners cannot be deprived of their legal right as contained in sub-section (2) of section 4 of 1976 Act only because they were allegedly found to be working on the unsanctioned posts. In my opinion, the schools which were being privately managed before the same was taken over, the State of Bihar admittedly had no statutory control over the same. The teachers, who were thus validly appointed and were not bogus teachers have derived a right to continue in the said post and receive the salaries in respect thereof. It may further be mentioned that even the managing committee has handed over the school in question with all the 15 teachers including the petitioners and the same having been accepted by the State of Bihar without any demur and as the State of Bihar had been taking services from them, there is absolutely no reason as to why they should be paid their due salaries.

103. In the result, this writ application is allowed and the respondents are hereby directed to treat the petitioners as teachers in Government service with effect from 26.1.1975. So far as the question of arrears of pay is concerned, as claimed by the petitioners, the same shall be paid to the petitioners by the concerned authorities after determination of the quantum thereof in accordance with the law. Let an appropriate writ be issued accordingly. In the circumstances of the case there will, however, be no order as to costs.