
(2002) 07 PAT CK 0010

In the Patna High Court

Case No : LPA Nos. 729, 734, 736, 739, 742, 746-749, 750, 754-758, 760, 768, 769, 775-782, 787, 788, 790-794, 796-799, 803, 807-810, 812, 814, 822, 824-833, 838, 842-844, 848, 853, 861-863, 870, 871, 878, 881, 886, 888-891, 893-895, 897, 904, 943, 905, 906, 909, 91

Vijay Kumar Singh and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 17-07-2002

Acts Referred:

Citation : (2002) 07 PAT CK 0010

Judgement

Nagendra Rai, J.—These appeals by the writ Petitioners as well as by the State of Bihar have been filed against the order dated 4.7.2001 passed by the learned Single Judge holding that the decision of the Finance Department, Government of Bihar, dated 16.11.2000, Annexure-1 to the CWJC No. 3964 of 2001, providing that fixation of the pay scale on promotion of the Assistant Teachers of the Government taken over schools (hereinafter referred to as the Nationalised Schools) not carrying duties and responsibilities of greater importance than those attaching to the post held by him, shall be governed by Rules 22(1)(a)(2) instead of Rule 22-C of the Fundamental Rules (for short, Rules), is valid, but its operation will be prospective and not retrospective and accordingly quashed the direction given in the aforesaid order for recovery of any amount paid in excess in breach of the Rule 22(1)(a)(2) of the Rules.

2. The Appellants-writ Petitioners are aggrieved by the part of the order by which the learned Single Judge has held that the Appellants/writ Petitioners are not entitled to fixation of pay scale in terms of the Rule 22-C of the Rules, whereas the State of Bihar is aggrieved by the part of the order whereby the learned Single Judge has held that the decision of the Finance Department, Govt. of Bihar dated 16.11.2000 will apply prospectively and not retrospectively.

3. As the question of law involved in all the appeals are one and the same, they have been heard together and are being disposed of by a common order. Some of the appeals are barred by limitation. After taking into consideration the

averments made in the limitation petitions the delay in filing the concerned appeals is condoned.

4. Admittedly, the writ Petitioner/Appellants are the Assistant Teachers of the Nationalised Secondary Schools which are under the Administrative Control of the Department of Human Resources Development, Govt. of Bihar. The Vth Pay Revision Committee appointed by the State Government recommended for grant of revised pay scales to Government employees. The Finance Department, Govt. of Bihar, vide its resolution dated 18th December, 1989, took a decision with regard to revision of pay scales of the teachers of the Nationalised schools. The revised pay scales were made applicable to all the teachers who were in service on the 1st January, 1986 and to all new appointments or promotions made effective on or after the said date. By the said decision, the State Government also decided that the provision under the Central Government regarding training, eligibility for appointment and promotion and other service conditions will be made applicable to them as far as possible. Clause 13 of the aforesaid resolution laid down the principles of fixation of pay in the revised pay scales in case of promotion etc. The fixation of pay scale with regard to promotion has been dealt with under Clause 13(vii) of the said resolution. According to the said provision, the existing procedure of fixation of pay on promotion will cease to be applicable to the teachers in the Revised pay scales with effect from 1st January, 1986. In their case the pay fixation on promotion shall be governed by Rule 22-C of the Fundamental Rules and instructions issued by the Central Government for their teachers from time to time. The fixation of pay on promotion referred to in subparagraphs (ii), (iii), (iv) and (v) under the aforesaid Clause shall also be governed by those provisions.

5. Before the aforesaid resolution of the Finance Department, Government of Bihar, Rule 22 of the Rules was substituted by G.I., Dept. of Per. and Trg. Notification No. 1/10/89-Estt. (Pay-I), dated the 30th August, 1989, published in the Gazette of India as GSR 679, dated the 16th September, 1989, as amended by Notification of even number, dated the 28th November, 1990 and Rule 22-C was omitted. The question of fixation of pay on promotion was provided under Rule 22(1)(a)(1) and Rule 22(1)(a)(2). Rule 22-C of the Rules, as it was provided inter alia that in case of appointment on promotion to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, pay in higher scale shall be fixed after giving one additional increment. According to the amended provision, the fixation of pay in the higher scale after grant of one additional increment was provided in a case of post carrying duties and responsibilities of greater importance than those attaching to the post held by him was incorporated under Rule 22(1)(a)(1) whereas it provided that no such benefit to the promotion to the post not carrying duties and responsibilities of greater importance than those attaching to the post held by him be given and the provision with regard to the same was contained under Rule 22(1)(a)(2) which provided that in such a case, the employee will draw his initial pay, the stage of the time-scale which is equal to his pay in respect of the

old post held by him on regular basis. It was also provided therein that if there is no such stage, the stage next above his pay in respect of the old post held by him on regular basis.

6. It appears that after the aforesaid Resolution of the Finance Department, Govt. of Bihar, the Education Department, Govt. of Bihar, fixed the pay scale of the Assistant Teachers on promotion to the higher scale/selection grade scale in a case even not carrying duties and responsibilities of greater importance by giving one additional increment in terms of Rule 22-C of the Rules. The office of the Accountant General raised objection regarding grant of additional increment at the time of grant of promotion to the teachers on higher scale/selection grade scale and opined that the amended, provision of Rule 22(1)(a)(2) will apply and not Rule 22-C which had already been amended/substituted. Thereafter, the Director, Secondary Education, Government of Bihar, requested the Accountant General to make aware about any such decision of the State Government with regard to applicability of the amended provision regarding fixation of pay scale on promotion to the higher scale/selection grade scale. It appears that the office of the Accountant General wrote a letter to the Assistant Commissioner, Kendriya Vidyalaya Sangathan and sought information about the mode of pay fixation at the time of grant of promotion to the teachers of the Kendriya Vidyalaya Sangathan whose pay scale was also fixed in terms of the provision of the Fundamental Rules. The Assistant Commissioner, Kendriya Vidyalaya Sangathan informed the office of the Accountant General that the fixation of pay on promotion to the senior selection grade not carrying duties and responsibilities of a greater importance has to be made in terms of the provisions of Rules 22(1)(a)(2), a copy of the said letter has been annexed as Annexure-A to the counter affidavit filed in GWJC No. 3964 of 2001.

7. After receipt of the aforesaid letter, the Accountant General, Bihar sought information from the Finance Department, Govt. of Bihar, as to whether the fixation of pay scale on promotion to the teachers to the higher grade/selection grade scale will be done in terms of the Rule 22-C of the Rules or in terms of the amended provision of Rule 22(1)(a)(2). The Finance Department, Govt. of Bihar, examined the matter and came to the conclusion that as per resolution of the State Government dated 18.12.1989, pay fixation on promotion of the assistant teachers to higher grade was to be made in terms of the provisions contained under Rule 22-C of the Rules and the instructions issued by the Central Government from time to time but as Rule 22-C has been amended prior to that and according to the amended provision, on promotion to the selection grade scale, the pay fixation of the teachers is to be made in terms of the Rule 22(1)(a)(2) for the reason that the promotional post does not carry any duties and responsibilities of greater importance, than those attaching to the post held by him. The Finance Department also came to the conclusion that there was no need for issuance of separate direction regarding applicability of Rule 22(1)(a)(2) of the Rules, on the other hand, the aforesaid provision automatically applies in a case of promotion of the Assistant Teachers of the Nationalised schools to higher/

selection grade. The said decision was communicated to the Accountant General vide its letter dated 1st February, 2000, which has been annexed as Annexure-B to the counter affidavit filed in CWJC No. 3964 of 2001. Thereafter, the impugned order dated 16.11.2000 was issued clarifying the position to the field officials of the Education and the Finance Departments. It was clarified therein that the fixation of pay scale in case of promotion to the Assistant Teacher in the higher scale/selection grade shall be made in terms of the Rule 22(1)(a)(2) as the said post does not carry duties and responsibilities of greater importance than those attaching to the post held by them, and their pay fixation, if made wrongly after giving additional increment in terms of the provision contained under Rule 22-C of the Rules, then steps should be taken to recover the amount and necessary correction be made in the official records.

8. The case of the writ Petitioners/Appellants in brief is that in terms of the provisions contained under Clause 13(vii) of the resolution dated 18.12.1989 of the Finance Department, Govt. of Bihar, the pay fixation on promotion to the assistant teachers has to be made in terms of the provision contained in Rule 22-C of the Rules and the instructions issued by the Central Government from time to time. Rule 22-C of the Rules provided for grant of additional increment at the time of promotion on higher grade. The Appellants have been given promotion in terms of the afore-said Rules. The State Government cannot now take away the aforesaid benefit on the ground that the said Rule was already amended. The said Rule 22-C was incorporated by adoption in the resolution and as such the benefit of the same has to be given and the amended provision of the aforesaid rule though incorporated prior to the issuance of the resolution of the State Government cannot be given effect to. Their further stand is that the benefit has been given to them without any misrepresentation or fraud on their part and accordingly, the State Government cannot now direct for recovery of the aforesaid amount. Their further case is that according to Clause 13(ii) of the aforesaid resolution, the teachers who were in receipt of promotion or time bound promotion into the Junior Selection grade and had completed 12 years of service in the basic grade prior to 1st January, 1986 shall have their pay fixed in the Revised senior scale as indicated in the Schedule II of the resolution, but those teachers who were in receipt of promotion-time bound promotion into the junior selection grade prior to 1st January, 1986, but had not completed 12 years of service in the basic grade on that date shall have their pay fixed in the Revised scale in the basic grade only on 1st January, 1986. Benefit of promotion and fixation of pay in senior scale shall be given to them with effect from the date they complete 12 years of service. Their cases on promotion were also to be governed by Sub-clause (vii) of Clause 13 of the resolution. Clause 13(ii) was amended by resolution No. 1000 dated 20.2.1993 and it was provided that those teachers who have not completed 12 years of service in the basic grade prior to 1st January, 1986, shall have their pay fixed in the Revised scale in the basic grade only on 1.1.1986, but on completion of 12 years of service in the basic grade, their promotion will be made in senior scale and fixation will be made in

terms of the provision contained under Rule 78(II) of the Bihar Service Code and not under Rule 22-C of the Fundamental Rules. The said decision was challenged by the Assistant Teachers of the Primary Nationalised school in CWJC No. 2407 of 1997 which was disposed of on 17th September, 1997, and it was held that the aforesaid resolution will be prospective, i.e., will be effective from the date of issuance of the notification. Any promotion, if already granted or converted or not made prior to 20.2.1993 in terms of resolution dated 18.12.1989. and if a person is entitled for such promotion and/or conversion from a date prior to 20.2.1993, the aforesaid resolution shall have no effect. The said judgment was upheld by this Court in LPA on 7.2.2000. In view of the aforesaid decision, now the impugned decision of the State Government cannot be given retrospective operation and all the promotions on higher grade given earlier and due in the case of the assistant teachers prior to the aforesaid date shall be governed by Rule 22-C of the Rules and not by the impugned decision taken by the State Government.

9. The stand of the State on the other hand is that the State Government by the aforesaid resolution dated 18.12.1989 took a decision to revise the pay scale and made applicable the provision of the Central Government regarding training, eligibility and appointment on promotion and other service conditions. In regard to promotion, it provided that pay fixation on promotion shall be governed by Rule 22-C of the Rules and instructions issued by the Central Government for their teachers from time to time. Thus, the provision as applicable to the Central Government Teachers at the relevant time was made applicable to the teachers of the Nationalised schools. As Rule 22 including Rule 22-C of the Rules was amended and substituted prior to the date of resolution the amended provision of Rule 22 will apply and not Rule 22-C. Rule 22-C was not adopted by the aforesaid resolution, on the other hand, that was only referred to and as on the date of reference the said provision was already amended, the amended provision will govern their cases. Alternatively, it was also argued that if Rule 22-C is held to be applicable even in that case, the Appellants-Assistant Teachers on their promotion to the higher/selection grade scale are not entitled to the benefit of the said Rule as that Rule clearly provides for payment of additional increment only in a case of pro-motion to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him. Admittedly, on promotion to the higher/se-lection grade scale, the Assistant Teachers of the nationalised schools were not carrying any duties and responsibilities of greater importance, therefore, they are not entitled to additional increment in terms of Rule 22-C of the Rules. The further case of the State is that the question as to whether Rule 22-C of the Rules or the amended provision of the Rules will apply in the case of promotion as provided under Clause 13(vii) was not the subject matter of the decision in the earlier writ application and as such the said decision is not relevant at all for deciding the controversy as in that case the question was only with regard to one class of teachers covered by Clause 13(II) of the resolution.

10. Before advertizing to the respective stands taken at the bar, it is relevant to refer to the resolution of the State Government and the relevant provisions of the Rules having bearing on the question in controversy. Clause 13 of the aforesaid resolution deals with revision of pay scale of the Assistant Teachers of the nationalised schools including the fixation of pay on promotion and the same runs as follows:

13. The State Government have decided that Revised pay scale indicated in Schedule II be extended to teachers in these schools and the provisions under the Central Government regarding training, eligibility for appointment and promotion and other service conditions be made applicable to them as far as possible. Thus the efficiency bars in their pay scales shall also continue.

The following principles have been laid down for fixation of pay in the Revised Scale. These provisions shall be applicable to all teachers except those having matric (Untrained) or lower qualification.

(i) All those teachers who were in the basic grade on 1st January, 1986, shall have their revised pay fixed in the basic grade indicated in Schedule II.

(ii) All those teachers who were in receipt of promotion or time bound promotion into the Junior Selection grade and had completed 12 years of service in the basic grade prior to 1st January, 1986 shall have their pay fixed in the Revised senior scale where indicated in Schedule II. Those teachers who were in receipt of promotion-time bound pro-motion into the junior selection grade prior to 1st January," 1986 but had not completed 12 years of service in the basic grade on that date shall also have their pay fixed in the Revised Scale in the basic grade only on 1st January, 1986. Benefit of promotion and fixation of pay in senior scale shall be given to them with effect from the date they complete 12 years of service.

(iii) Those teachers who have received promotion into junior selection grade or first time bound promotion after 1st January, 1986 but before 1st March, 1989 shall be given the benefit of promotion for the purpose of fixation of their pay in the Revised scale only with effect from the date they have received promotion, or date on which they complete 12 years of service whichever is later.

(iv) Those teachers who have been promoted into senior selection grade and have also completed 12 years of service or have received second time bound promotion on completion of 25 years of service prior to 1st January, 1986, shall have their pay fixed in the Revised Senior scale. Promotion into the senior Selection grade or second promotion after 1st January, 1986 shall be ignored for the purpose of fixation of pay in the Revised Scale.

(v) Benefit of Selection scale in the Revised scale of pay shall be extended to teachers in accordance with the availability of posts and the procedure and conditions prescribed by the Central Government for their teachers which would be deemed to have been in force with effect from 1st January, 1986.

The number of posts in the selection scale where admissible in Schedule II will be restricted to 20 per cent of the number of posts in the senior scale of the respective cadre. Regarding conversion of posts into selection scale on 1st January, 1986, the Department of Human Resources Development shall issue separate orders in consultation with Finance Department and promotion shall be given according to the conditions prescribed by the Central Government for their teachers. The number of posts in the selection scales shall be subject to review on 1st April of each year, the first such review being due on 1st April, 1987.

(vi) The existing facility of time-bound promotion and selection grade discussed in paragraphs 10 and 11 of the F.D. Resolution No. 10770, dated 30th December, 1981 shall cease to be applicable from 1st March, 1989 onwards in the existing pay-scales and shall not be applicable at all for the purpose of pay fixation in Revised Scales with effect from 1st January, 1986. The supertime selection grade now being introduced for other Government employees shall not be applicable to these teachers. Such promotions, however, if due before 1st March, 1989 shall be given and payment in the existing scales made only upto 28th February, 1989, after which the promotion would be deemed to have been terminated.

(vii) The existing procedure of fixation of pay on promotion will cease to be applicable to teachers in the Revised pay-scales with effect from 1st January, 1986. In their case the pay fixation on promotion shall be governed by Rule 22-C of the Fundamental Rules and instructions issued by the Central Government for their teachers from time to time. The fixation of pay on promotion referred to in sub-paragraphs (ii). (iii). (iv) and (v) shall also be governed by those provisions.

Rule 22-C of the Fundamental Rules runs as follows:

F.R. 22-C. Notwithstanding anything contained in these Rules, where a Government Servant holding a post in a substantive, temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, his initial pay in the time-scale of the higher post shall be fixed at the stage next above the pay notionally arrived at by increasing his pay in respect of the lower post by one increment at the stage at which such pay has accrued:

Provided that the provisions of this rule shall not apply where a Government servant holding a Class I post in a substantive, temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity to a higher post which is also a Class I post.

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As stated above, Rule 22 was amended and Rule 22-C was omitted. After amendment, the relevant provisions of Rule 22(1)(a)(1) and Rule 22(1)(a)(2) are as follows.

F.R. 22(1). The initial pay of a Government servant who is appointed to a post on

a time-scale of pay is regulated as follows:

(a) (1) Where a Government servant holding a post, other than a tenure post, in a substantive or temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity, as the case may be, subject to the fulfilment of the eligibility conditions as prescribed in the relevant Recruitment Rules, to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, his initial pay in the time-scale of the higher post shall be fixed at the stage next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment at the stage at which such pay has accrued or (rupees one hundred only) whichever is more.

(Save in cases of appointment on deputation to an ex cadre post, or to a post on ad hoc basis or on direct recruitment basis), the Government servant shall have the option, to be exercised within one month from the date of promotion or appointment, as the case may be, to have the pay fixed under this rule from the date of such promotion or appointment or to have the pay fixed initially at the stage of the time-scale of the new post above the pay in the lower grade or post from which he is promoted on regular basis, which may be refixed in accordance with this rule on the date of accrual of next increment in the scale of the pay of the lower grade or post. In cases where an ad hoc promotion is followed by regular appointment without break, the option, is admissible as from the date of initial appointment/promotion, to be exercised within one month from the date of such regular appointment:

Provided that where a Government servant is, immediately before his promotion or appointment on regular basis to a higher post, drawing pay at the maximum of the time-scale of the lower post, his initial pay in the time-scale of the higher post shall be fixed at the stage next above the pay notionally arrived at by increasing his pay in respect of the lower post held by him on regular basis by an amount equal to the last increment in the time-scale of the lower post or (rupees one hundred), which-ever is more.

(2) When the appointment to the new post does not involve such assumption of duties and responsibilities of greater importance, he shall draw as initial pay, the stage of the time-scale which is equal to his pay in respect of the old post held by him on regular basis, or, if there is no such stage, the stage next above his pay in respect of the old post held by him on regular basis:

Provided that where the minimum pay of the time-scale of the new post is higher than his pay in respect of the post held by him regularly, he shall draw the minimum as the initial pay:

Provided further that in a case where pay is fixed at the same stage, he shall continue to draw that pay until such time as he would have received an increment in the time-scale of the old post, in cases where pay is fixed at the higher stage, he shall get his next increment on completion of the period when

an increment is earned in the time-scale of the new post.

On appointment on regular basis to such a new post, other than to an ex cadre post on deputation, the Government servant shall have the option, to be exercised within one month from the date of such appointment, for fixation of his pay in the new post with effect from the date of appointment to the new post or with effect from the date of increment in the old post.

11. Thus, it is clear that Rule 22 of the Rules was amended prior to the resolution of the State Government dated 18.12.1989 and Rule 22-C was omitted before its reference in the said resolution of the State Government. According to Rule 22-C, additional increment was to be granted to the teachers at the time of fixation of their pay on the higher post only when the post is carrying duties and responsibilities of a greater importance than those attaching to the post held by them. After amendment, the provision contained in Rule 22-C was incorporated in Rule 22 (I)(a) (1) of the Rules and the provision for the promotion on the higher post in a case the said post is not carrying duties and responsibilities of greater importance than those attaching to the post held by employee, has been incorporated under Rule 22(1)(a)(2) where the pay fixation has to be made in different manner and no additional increment is to be provided at the time of fixation of pay on the promotional post.

12. The Primal question for consideration in this case is as to whether the Rule 22-C of the Rules will apply in a case of promotion to the higher grade/selection grade of the Assistant Teachers of the nationalised schools or the Rule in force at the relevant time will apply.

13. It is admitted position that the promotion of the Assistant Teachers to the higher grade/selection grade does not carry any duties and responsibilities of a greater importance than those attached to the post held by them earlier. It is also admitted position that when the resolution of the State Government providing criteria for fixation of pay etc. on promotion was issued on 18th December, 1989, Rule 22-C was not the part of the Rules and was amended/substituted as stated above. Even Rule 22C provided for grant of additional increment at the time of fixation of pay on promotion only in a case where on promotion the incumbent has to discharge the duties and responsibilities of a greater importance. In other words, in a case where on promotion to the higher grade, no additional duties and responsibilities were to be discharged by the employee, he is not entitled to the benefit of fixation of pay in terms of Rule 22-C of the Rules. So even according to Rule 22C, the Appellants/writ Petitioners and other similarly situated teachers on promotion to the higher grade/selection grade, not carrying duties and responsibilities of a greater importance than those attached to the post held by them were not entitled to the benefit of additional increment at the time of fixation of pay.

14. Incorporation of the earlier Acts, Rules or its part into the later Act are made by the law makers for the sake of convenience to avoid verbatim reproduction of

the earlier provisions into the later provisions. It is a legislative device to shorten the later statutory provisions. In a case of incorporation of the earlier Act into the later Act, there is a transposition of the provisions of the earlier Act into the later Act, the result is that the later Act which incorporates the provisions of the earlier Act becomes an independent legislation which is not repealed or modified by the repeal or modification of the earlier provisions. In other words, once a provision of law is incorporated into the later Act, then it becomes part and parcel of the law and any amendment of the previous provisions of the Act etc. will not be incorporated into the later Act unless there is a clear indication by the law makers to that effect. However, there are certain exceptions to the said Rules. Where the subsequent legislative provision and previous provision are supplemental to each other or where they are in *pari materia* or where the amendment to the previous Act, if not treated to have been part of the subsequent Act would render the subsequent provision wholly unworkable and ineffectual or where the amendment of the previous Act is either expressly or by necessary intendment, applies the amended provisions to the subsequent Act.

15. In some cases the earlier provisions are not incorporated into the subsequent Act, on the other hand, a bare reference is made of the previous provisions into the later Act. In such a case, the provisions of the previous Act with all its amendment up to the date of reference are treated as a part of the subsequent Act or provision. This apart, the provision of the Act in force for the time being is also treated to be the part of the subsequent Act even if there being no express or by necessary implication any indication in the amended provision of the previous Act regarding its applicability to the provisions of the subsequent Act.

16. In *Clarke v. Bradlaugh*, Brett, L.J. (1881) 8 Q.B.D. 63 at 69, observed

...but there is a rule of construction that, where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third does not affect the second.

17. The Lord Esher, M.R., in *re Wood's Estate*, Ex parte Her Majesty's Commissioners of Works and Buildings [1886] 31 Ch. D. 607, held as follows:

If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and, the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all.

18. The Apex Court considered the question of doctrine of incorporation in the case of *The State of Madhya Pradesh Vs. M.V. Narasimhan*, and approved the aforesaid law and further held that there are four exceptions to the aforesaid principles. It was held by the Apex Court as follows:

Where a subsequent Act incorporates provisions of a previous Act then the borrowed provisions become an integral and independent part of the sub-sequent

Act and are totally unaffected by any repeal or amendment in the previous Act. This principle, however, will not apply in the following cases:

- (a) where the subsequent Act and the previous Act are supplemental to each other;
- (b) where the two Acts are in *pari materia*;
- (c) where the amendment in the previous Act, if not imported into the subsequent Act also, would render the subsequent Act wholly unworkable and ineffectual; and
- (d) where the amendment of the previous Act, either expressly or by necessary intendment, applies the said provisions to the subsequent Act.

19. The distinction with regard to incorporation of the earlier provision or its provisions into the subsequent Act and mere reference was considered by the Supreme Court in the case of *Mahindra and Mahindra v. Union of India* reported in AIR 1979 SC 798, and it was held that when there is a case of mere reference to a provision of statute in another without incorporation, then unless a different intention clearly appears, Section 8(1) of the General Clauses Act will apply and the reference will be construed as a reference to the provision as may be in force from time to time in the former statute. But once there is a case of incorporation, any subsequent amendment in the former statute or even its total repeal would not affect the provisions as has been brought into the later statute.

20. Again this question was considered by the Apex Court in the case of *Rajasthan State Road Transport Corporation, Jaipur Vs. Smt. Poonam Pahwa and others*, . In that case, Punjab Motor Accidents Claims Tribunal Rules (1964) was adopted by the State of Haryana with some modification, the word "Haryana" was substituted in place of Punjab in some of the Rules. The adoption was made on 28th January, 1972. The aforesaid rule was amended on 21st June, 1968. The unamended Rule 20 provided for applicability of some of the provisions of the CPC in the proceeding before the Claims Tribunal. By amendment in Rule 20, Order 21 of the CPC was also inserted. The question for consideration was as to whether Punjab Motor Accident Claims Tribunal Rules will also include adoption of the Rules as it existed on the date of adoption or it will include only the rule as it existed prior to the amendment. The Apex Court in paragraph 27 held that when Punjab Motor Accident Claims Tribunal Rules were adopted by only referring the Rules and not by expressly indicating that the said Punjab Rules of 1964 as it stood prior to the amendment were only adopted, it must be held that the Punjab rules as stood amended on the date of adoption by Haryana were applicable in the State of Haryana.

21. The question as to whether a particular provision of the earlier Statute has been wholly or partially incorporated or has been merely referred to depends upon the construction of the relevant provisions. Clause 13 (vii) of the resolution of the State Government as indicated above clearly shows that the State

Government adopted the Central Government Rules, Rule 22-C of the Rules with regard to pay fixation on promotion and further provided that the instructions issued by the Central Government for their teachers from time to time will also apply. The clear intention of the law makers was that the provisions governing the promotion to the teachers of the Central Schools in force from time to time will apply in case of Assistant Teachers of the nationalised school of the State Government on promotion. This is not a case of incorporation of the provision, of law as in that case there would not have been a mentioning of the fact that the instructions issued by the Central Government from time to time will apply. This is a case of mere reference to the provisions of the law and as such the provision with regard to promotion applicable to the teachers of the Central School in force at the time of issuance of the resolution of the State Government will apply and not the Rule 22 C of the Rules as admittedly it had been omitted prior to the issuance of the notification. Even assuming that it was a case of incorporation even then the amendment as brought up to the date of the issuance of the resolution will apply. The case is fully covered by the law laid down by the Supreme Court in the case of Rajasthan State Road Transport Corporation (*supra*).

22. Thus, it is held that the amended provision of Rule 22 of the Rules as on the date of adoption by the State Government will apply. This apart, the instructions or any amendment brought even subsequently and the instructions issued by the Central Government from time to time will also apply as it was a case of mere reference of provision and not incorporation into the resolution of the State Government. Where Rule 22(1)(a)(1) or Rule 22(1)(a)(2) of the Rules will apply depends upon the nature of the duties and responsibilities to be discharged by the Assistant Teachers on their promotion. In a case where on promotion to the higher grade/selection grade, no duties and responsibilities of a greater importance than those attached to the post already held by them have to be discharged, then their cases will govern by Rule 22(1)(a)(2) of the Rules. The case of the Appellants and other similarly situated teachers will be governed by Rule 22(1)(a)(2) and their fixation of pay has to be made according to the said provision and not according to the provision of Rule 22-C of the Rules or the amended provision of Rule 22(1)(a)(1) which has retained the unamended provision of Rule 22-C of the Rules.

23. The submission advanced by the learned Counsel for the writ Petitioners/Appellants that as the State Government has not taken a decision to incorporate the amended provisions of Rule 22 into the resolution, therefore, the amended provision will not apply, has no legal force for the simple reason that in a case of mere reference of the provision, it is not necessary to amend the subsequent Act or provision and make the reference to the amendments made from time to time. In such a case the amended provision up to the date of reference will apply and any amendment in the subsequent statute is not required for the said purpose.

24. The learned Counsel for the Appellants/writ Petitioners have heavily relied upon a judgment of a learned Single Judge of this Court in the case of Mahashankar Sinha and Ors. v. The State of Bihar and Ors. (CWJC No. 2405 of 1997) disposed of on 17th September, 1997, which has been annexed as Annexure-11 to CWJC No. 3964 of 2001, and the same has been upheld by a Division Bench of this Court in LPA No. 251 of 1998 (Annexure-12 to CWJC No. 3964 of 2001) and submitted that in that case while dealing with a case of pay fixation on promotion to the assistant teachers of the primary school with regard to cases covered by Clause 13(ii) of the resolution of the State Government dated 18.12.1989, the learned Single Judge held that Rule 22-C will apply in case of promotion till the issuance of notification by the State Government dated 20th February, 1993 substituting Rule 22-C by Rule 78(II) of the Bihar Service Code.

25. The State Government came out with a notification dated 20th February, 1993 wherein while referring the resolution of the State Government dated 18.12.1989 with regard to categories of the Assistant Teachers covered by Clause 13(ii) of the resolution, it made certain modification or amendment with regard to fixation of pay on promotion of the assistant teachers covered by Clause 13(ii) of the resolution. The said resolution provided that those teachers in the basic grade who have not completed 12 years of service on 1.1.1986 will be granted promotion and their pay fixation will be made after completion of 12 years of service in the basic grade in terms of Rule 78(II) of the Bihar Service Code in place of Rule 22-C of the Rules. Clause 13 (vii) of the resolution of the State Government as stated above governs the cases of pay fixation on promotion of the Assistant Teachers and it further provides that it will also apply to the cases of promotion of the assistant teachers covered by Clause 13(ii) and other clauses of the resolution as mentioned therein. In that case the question as to whether Rule 22C of the Rules will apply or its amended provision of the Rules will apply was not gone into at all. None of the parties before the Court was aware of the amendment of the Rule 22 of the Rules including 22-C of the Rules. As the question involved in the writ applications was not gone into at all, the said decision will not help the writ Petitioners/Appellants. This apart, by the aforesaid amendment dated 20th February, 1993, the provision of Rule 78(II) of the Bihar Service Code was made applicable which is in pari materia with Rule 22(I)(a)(1) of the Rules. It is unfortunate that the officials of the State Government were ignorant of the amended provisions of the Rules and their inaction, negligence and carelessness have created all the confusion in the matter. Be that as it may the said notification of the State Government dated 20th February, 1993 applies only with regard to fixation of pay on promotion of certain small number of teachers covered by Clause 13(ii) of the resolution who had not completed 12 years of service on 1.1.1986 and the judgment rendered in the earlier case will only cover their cases and no other case.

26. The learned Counsel for the Appellants/writ Petitioners submitted that the benefit of Rule 22-C has been given to them by the officials of the Respondent-

Education Department of the State of Bihar due to wrong construction of the statutory provision or due to mistake and there was no fraud or misrepresentation on behalf of the writ Petitioners/Appellants and other similarly situated teachers. In that view of the matter, direction for recovery of the amount in case of grant of increment on promotion to the assistant teachers should not be given. In support of their submissions, they have relied upon two decisions of the Supreme Court, one in the case of Sahib Ram v. State of Haryana and Ors. [1995 Supp (I) SCC 18] and other in the case of Bihar State Electricity Board and Anr. v. Bijay Bahadur and Anr. 27. The Apex Court in the aforesaid two cases has held that when an excess payment has been made without any representation or misrepresentation on the part of the employee, the equity demands that no recovery should be made. These observations were made by the Apex Court in those cases while dealing with the case of individual employee.

28. In cases where the excess payment has been made to the employees on account of wrong fixation of pay, direction has been issued by the Apex Court with a condition that the authorities may fix installments for recovery of the same. In this connection, reference may be made to the cases of State of Punjab and Others Vs. Devinder Singh and Others, and Union of India and Others Vs. Smt. Sujatha Vedachalam and Another,

29. The question in the present case is as to whether the direction for recovery of excess payment made to the employees is valid or not. No doubt, there is no fraud or misrepresentation on the part of the Appellants, but the fact remains that this is not a case of only few teachers having been given the benefit. This is a case of interpretation of policy involving several crores of rupees. Large number of assistant teachers of the nationalised schools have been wrongly given benefit of additional increment though they are not entitled as admittedly they were not carrying the duties and responsibilities of greater importance than those attached to the post held by them. The huge amount of public money of a poor State has been paid to them by wrong understanding of the provision of law by the Education Department as well as by the Drawing and Disbursing Officer of the School. When there is a question of involvement of public interest in a case like this, balance has to be struck off between the private interest and public interest. The balance lies in favour of public interest. The sympathy and benevolence has no doubt some role to play while exercising the powers under Article 226 of the Constitution of India, but discretion cannot be exercised at the cost of public interest.

30. The question is as to whether the excess payment already paid to the employees is to be recovered from them or not, can also be examined on the touch-stone of principles of equity, fair play and good conscience. According to the employees, once the amount has been paid, now the State is estopped from recovery of the same on the principle of promissory estoppel or equitable estoppel. The principle of promissory estoppel is evolved by equity to avoid

injustice. It is neither in the realm of contract nor in the realm of estoppel. The principle of promissory estoppel is that if one party by words or conduct made to the other party a clear and unequivocal promise intending to create a legal relations or effect to arise in future with full knowledge or intention that it would be acted upon by the other parties to whom the promise was made and the other party has acted on the said promise, then the same is binding on the other party making the promise and he would not be entitled to run away from the same. In other words, the doctrine of promissory estoppel works negative and gives protection to the party who rely on the promise and acts upon but does not give a new cause of action. As stated above the doctrine of promissory estoppel is evolved by equity. It is well settled that equity neither creates a law nor extinguishes the law but it assists the law. In the present case, the law is against the employee as they were not entitled to the amount which has been paid to them wrongly. They cannot take shelter of equity as equity cannot be used to violate law. The principle behind the maxim "equity will not suffer a wrong to be without a remedy", is that equity will intervene to protect a right which, perhaps, because of some technical defect, is not enforceable at law. Such is not the situation here. On the other hand, because of the wrong application of the rules and misinterpretation of the circular, they were paid what they were not entitled. Thus, the equity does not help them for the simple reason that there was no obligation on the part of the State Government to apply Rule 22-C of the Rules in view of the fact that the said rule was not in existence. When the rule itself was not in existence, it cannot be applied, cannot be enforced, cannot be followed, cannot be used for seeking any protection. This apart when the authorities were labouring under the mistake of law there was no question of estoppel.

31. The principle of fair play would simply say that rules of the game cannot be allowed to be made after the game is over or during the game. A fair play is that the parties before entering the arena should know that what would be the rule and the parties would be governed by a particular rule. In the present case the parties knew that, they would be governed by particular rules of the Central Govt. as made applicable by the State Govt. to the State employees. In the present matter the person, who issued the order, did not know that the rules of the game stood amended before the start of the game and applying the non est rule, he asked one of the parties to start the game. The fair play would not allow such a rule to remain operative nor would allow retention of the benefit in favour of the party who otherwise is not entitled.

32. The principles of good conscience would simply say that if you are not entitled to a particular thing then, you would not get it and if under some mistake, you obtained it then on detection of the wrong or fault, you must return it. Why in case of detection of the wrong, the conscience should not prick? Why the employee should fight that he is entitled to retain the wrong benefit? Why he should not say that if he fights for his rights tooth and nail then he would be honest enough to return the benefits which were wrongly given to them.

33. Taking into consideration the totality of the circumstances even on the strength of the above discussions, we are unable to hold that no order should be made for the recovery of the excess amount. We would, however, require the State Government to recover the amount in easy and proper installments. The total amount paid to the employees may be recovered without interest in at least 50 installments provided such an employee has the tenure of 50 months or more. If an employee does not have a tenure of 50 months or more then the installments may be reduced to a reasonable period so that such an employee does not suffer unnecessary brunt of a cut in the payment/salary etc.

34. The impugned notification dated 16.11.2000 does not lay down new criteria for fixation of pay on promotion, on the other hand it only reiterates that the amended provision of Rule 22 will be applicable and not the Rule 22-C of the Rules in terms of the resolution dated 18.12.1939. In such a situation, the question of its applicability with retrospective effect or with prospective effect has no relevance.

35. In the result, the impugned order passed by the learned Single Judge is set aside. The appeals filed by the writ Petitioners/Appellants are dismissed and the appeals filed by the State of Bihar-Appellant are allowed. In the facts and circumstances of the case, there shall be no order as to costs.

R.S. Garg, J.

36. I agree.