

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.87 of 2014

In

Civil Writ Jurisdiction Case No.4386 of 2012

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Ram Ekwil Paswan Son of Late Janaki Paswan Resident of Village -
Nagwan, P.S. Naubatpur Distt. Patna

... .. Appellant/s

Versus

1. The State of Bihar and Ors
2. The Director, Primary Education, Govt. of Bihar, Patna
3. The District Magistrate, Patna
4. The District Superintendent of Education, Patna
5. The Block Education Officer, Naubatpur, P.S. - Naubatpur, District - Patna
6. The Mukhiya Gram Panchayat Raj Ibrahimpur, P.S. - Naubatpur, District - Patna
7. The Panchayat Secretary Gram Panchayat Raj Ibrahimpur In The Naubatpur Block, P.S. Naubatpur, Dist

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr.Dhananjay Kumar Mr. Srikant Pandey
For the Respondent/s	:	Mr.Pushkar Narain Shahi, AAG 6 Mrs. Shilpa Singh, GA 12 Mr. Ranjan Kumar, AC to G A 12

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CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH

and

HONOURABLE MR. JUSTICE PRABHAT KUMAR JHA

and

HONOURABLE JUSTICE SMT. NILU AGRAWAL

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH)

Date : 20-06-2019

Heard learned counsel for the parties.

The genesis of the constitution of the instant

Full Bench lies in the order dated 22.4.2016 passed by a

Division Bench of this Court in the present appeal, which arises



out of C.W.J.C. No. 4386 of 2012, noticing two conflicting views in Division Bench judgments on the point of prospective or retrospective application of the circular, dated 4.7.2008, issued by the Human Resources Department, Government of Bihar, prescribing the acquisition of intermediate qualification for being engaged as Shiksha Mitra within 33 months of the date of engagement. The order of reference dated 22.4.2016 reads as follows:

“Learned counsel for the appellant relies upon Division Bench Judgment in L.P.A. No. 1247 of 2009 (The State of Bihar & Ors. Vs. Indu Devi) and in L.P.A. No. 1470 of 2010 (Shashi Kant Vs. The State of Bihar & Ors.).

In the aforesaid judgments, a view has been taken that qualification of Intermediate is necessary within 33 months from the date of issuance of the Circular dated 04.07.2008 and not from the date of initial appointment.

On the other hand, learned counsel for the respondents refers to two Division Bench judgments in C.W.J.C. No. 7719 of 2010 (Bhagwan Mahato Vs. The State of Bihar & Ors.) and in C.W.J.C. No. 11620 of 2010 (Sakita Kumari Vs. The State of Bihar & Ors.), wherein, it has been held that the qualifications must be obtained within 33 months of joining.

In C.W.J.C. No. 7719 of 2010,



view taken by the learned Single Bench in Indu Devi's case was not found to be a correct view. Such Division Bench judgment, passed on 19th of January, 2011, was not brought to the notice of the L.P.A. Bench hearing appeal against the order in Indu Devi's case, referred to by the counsel for the appellant.

Another Division Bench in CWJC No. 11620 of 2010 has taken the same view as in Letter Patent Appeal in Indu Devi's case. But the judgment of the Division Bench dated 19th of January, 2011 was also not brought to the notice of the Division Bench.

We find that two contradictory sets of judgments have been brought to our notice, one taking a view that 33 months is the period of acquiring Intermediate qualification from the date of the circular; whereas, other judgment says that 33 months are required from the date of appointment, therefore, to resolve the conflict between the two sets of judgment, we deem it appropriate to refer the matter to the larger Bench.

We request the Acting Chief Justice to constitute a larger Bench to decide the controversy involved in this case.

Learned counsel for the appellant is directed to file an extra copy of the paper-book to facilitate the hearing of the matter by the larger Bench.”



Consequently, under the administrative minutes of Hon'ble the Chief Justice dated 7.2.2019, the present Full Bench has been constituted to deliberate on the reference.

In order to appreciate the issue involved, it is relevant to catalogue the factual matrix in chronological order. The State of Bihar, in order to fulfill its constitutional obligation of 'Education to All', particularly, to the students of Primary schools in the Panchayats, envisaged the engagement of teachers known as 'Shiksha Mitra' on contract basis for 11 months. The said concept was initially introduced vide Resolution No.336 dated 21.6.2002 issued by the Primary and Adult Education Department, Government of Bihar.

Subsequently, the said Resolution was modified by Circular No. 1458 dated 11.8.2004 issued by the Primary and Adult Education Department, Government of Bihar.

Further, vide Clause (8) of Resolution No.8/3-122/03-845 dated 7.4.2005, certain modifications were made with regard to the criteria of selection, wherein it was prescribed that preference for selection as Panchayat Shiksha Mitra would firstly be given to such candidates with minimum educational qualification of Intermediate or equivalent and



Diploma in Education/B.Ed Trained and that the merit list would be prepared on the basis of candidates with maximum marks, as per Schedule- 'ka'. Thereafter, in case of non-availability of candidates with Diploma in Education/B.Ed Trained, or in case of vacancies remaining unfilled, then merit list would be prepared on the basis of candidates with minimum qualification of Intermediate, in accordance with Schedule 'kha'. Subsequently, vide Letter No. 8/93-122/03-672, dated 21.4.2005, some clarification were made on the issue of selection of Panchayat Shiksha Mitra.

Ultimately, the Human Resources Development Department, in exercise of the provisions of Article 243-G of the Constitution of India read with Section 146 of the Bihar Panchayat Raj Act, 2006, framed Bihar Panchayat Elementary Teachers (Employment and Service Conditions) Rules 2006 (hereinafter referred to as 'Rules, 2006'), which envisages, *inter alia*, permanent employment of elementary teachers in the Panchayats known as Panchayat Teachers instead of engagement of Shiksha Mitra on contractual basis for 11 months.

The said Rules, 2006 was amended by the Bihar Panchayat Primary Teacher (Employment and Service



Condition)(Amendment) Rules, 2008 (hereinafter referred to as Rules, 2008) vide Notification dated 25.8.2008. Before the amendments were introduced in 2008, the Resolution in question dated 4.7.2008 was issued by the Human Resources Development Department, Government of Bihar, in pursuance to the judgment dated 12.2.2008 passed in LPA No. 940 of 2007 (Kishori Prasad Vs. State of Bihar and Ors.) reported in 2008(2) PLJR 458, whereby the Government decided that the persons who were engaged on the basis of matric qualification and who had, within 33 months of their engagement, acquired the qualification of intermediate or those who were having intermediate qualification from before, even though they had not secured 45% marks, would be deemed to be engaged as Shiksha Mitra as on 1.7.2006 and they would acquire the status of Block/ Panchayat Teacher under 2006, Rules. The prospective or retrospective operation of the said Circular dated 04.07.2008 is the point of reference before this Full Bench.

It is to be noted that *as per* Clause 4 (Ka) of Circular dated 21.06.2002, the basic requisite for being engaged as Shiksha Mitra was that applicant should be a resident of the Panchayat. Clause 4(Kha) prescribed qualification for being engaged as Shiksha Mitra as



matriculation or passing of the equivalent examination with minimum 45% marks and for the Urdu subject, passing of *Fokania* from any institution recognized by the Madarsa Education Board or the Government of Bihar. On first January of the year of engagement, the maximum age of applicant should have been 30 years, with relaxation of two years for backward and extremely backward candidates, three years for women candidates and five years relaxation for SC/ST candidates. Clause 8 (Ka) prescribed the engagement to be on contractual basis, while Clause 8(Kha) mandated that engagement would be for eleven months excluding the period of summer vacation. Clause 8 (Ga) prescribed that Shiksha Mitra would be entitled to honourarium of Rs. 1,500/- per month, Clause 8 (Cha) prescribed that engagement of 11 months could be made for maximum of three terms, i.e., $11 \times 3 = 33$ months.

The Resolution dated 21.06.2002 was modified vide Resolution no. 1458, dated 11.08.2004 Clause 5(Kha) altering the minimum educational qualification for engagement as Shiksha Mitra from matric to intermediate or equivalent with minimum 45% marks and for Urdu subject, intermediate with Urdu or passing of Maulvi examination from institution



recognized by Madarsa Education Board and State Government, was made compulsory. Clause 3 of the Resolution dated 11.08.2004 prescribed that a Panchayat would, as far as possible, try to fill up 50% of the vacancies of Shiksha Mitra by female candidates. Clause 5(Ga) allowed relaxation for the female candidates and provided that if female candidates having minimum intermediate qualification were not available, then the female candidates having matriculation and equivalent qualification would be engaged with a condition that they would acquire qualification of intermediate within three years. While allowing relaxation to such candidates, the District Magistrate was to send a proposal to the State Government and the State Government to the NCTE, for necessary relaxation. Clause (Kha) and (Ga) of Clause 5 of resolution dated 11.08.2004 read as follows:-

“(5) पंचायत शिक्षा मित्र के अनुबंध पर नियोजन हेतु निम्न अहर्ता निर्धारित की जाती है—

(क).....

(ख) न्यूनतम इन्टरमीडिएट अथवा इसके समकक्ष परीक्षा में उत्तीर्णता तथा उक्त परीक्षा में न्यूनतम 45 प्रतिशत अंक रखी जाएगी। उर्दू विषयक पदों के लिए इन्टरमिडियट उर्दू सहित या मदरसा शिक्षा बोर्ड एवं राज्य सरकार द्वारा मान्यता प्राप्त संस्थाओं से “मौलवी” परीक्षोत्तीर्ण की योग्यता अनिवार्य होगी।

(ग) पंचायत के अन्तर्गत इन्टरमीडियट



योग्यताधारी महिलाओं के उपलब्ध नहीं होने की स्थिति में मैट्रिक अथवा समकक्ष योग्यताधारी महिलाओं का नियोजन जिला पदाधिकारी की अनुमति लेकर इस शर्त के साथ की जा सकेगी कि अभ्यर्थी तीन वर्ष के अंदर इन्टरमीडियट अथवा समकक्ष शैक्षिक योग्यता प्राप्त कर लेंगे। ऐसे सभी उम्मीदवारों की अनुमति देने के साथ जिला पदाधिकारी राज्य सरकार को प्रस्ताव भेजेंगे और राज्य सरकार राष्ट्रीय अध्यापक शिक्षा परिषद विनियमन, 2001 के नियम 5 के अन्तर्गत राष्ट्रीय अध्यापक शिक्षा परिषद से शिथिलता प्राप्त करेगी।”

The implementation of aforesaid resolution dated 11.08.2004 resulted in some confusion with regard to eligibility criteria and other ancillary issues. The Department was being confronted with various queries on the point of the meaning of 'recognized institution', 'requirement of submission of fresh application under the new resolution', 'requirement of candidate being the resident of the Panchayat for which he is being sought to be engaged', meaning of 'trained teachers' and the 'impermissibility of extension/renewal of those Panchayat Shiksha Mitras who were having only matriculation qualification'.

The Human Resources Department vide letter no. 8/93-122/03-672, dated 21.04.2005 issued guidelines to the jurisdictional officers which is being extracted for ready reference. Question Nos. 7 and 8 and the clarification thereto



by the department is relevant for the present reference to be answered which are being reproduced hereinbelow:-

“ बिहार सरकार मानव संसाधन विकास विभाग, प्रेषक विजय प्रकाश, सचिव, प्राथमिक एवं व्यस्क शिक्षा, बिहार, पटना। सेवा में, सभी जिला पदाधिकारी, सभी जिला शिक्षा अधीक्षक एवं सभी जिला कार्यक्रम समन्वयक, पत्रांक 8/93-122/03-672, दिनांक : 21.04.2005

विषय :- पंचायत शिक्षा मित्र (अनुबंध पर नियोजन) मार्गदर्शिका के अनुसार पंचायत शिक्षा मित्रों के नियोजन से संबंधित कुछ विन्दुओं का स्पष्टीकरण।

निदेशानुसार उपर्युक्त विषयक दिनांक 16.04.2005 को जिला शिक्षा अधीक्षकों की राज्य स्तरीय मासिक बैठक में उठाए गये विन्दुओं का सम्यक विचारोपरान्त निम्न प्रकार स्पष्टीकरण किया जाता है:-

- 1....
- 2....
- 3....
- 4....
- 5....
- 6....

7. पूर्व से नियोजित पंचायत शिक्षा मित्रों में से मैट्रिक उत्तीर्ण पंचायत शिक्षा मित्रों के अनुबंध का विस्तार किया जायेगा या नहीं?	पूर्व से नियोजित पंचायत शिक्षा मित्रों में से जिनकी शैक्षिक योग्यता मैट्रिक या समकक्ष है उनके अनुबंध का विस्तार नहीं किया जाए, क्योंकि अब पंचायत शिक्षा मित्रों की नियुक्ति के लिए न्यूनतम शैक्षिक आवश्यकता इंटरमीडिएट है। संतोषप्रद सेवा होने पर केवल इंटरमीडिएट (या समकक्ष) अथवा इससे
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	अधिक योग्यताधारी पंचायत शिक्षा मित्रों के अनुबंध का ही विस्तार किया जाए।
8. न्यूनतम 50 प्रतिशत महिलाओं का नियोजन किया जाना है। इसकी गणना किस प्रकार की जाएगी?	सरकार के संकल्प संख्या 1458 दिनांक 11.8.2004 की कंडिका 3 एवं 5 (ग) के अनुसार पंचायत शिक्षा मित्रों के अनुबंध पर नियोजन में यथा संभव न्यूनतम 50 प्रतिशत स्थानों पर महिलाओं का नियोजन किया जाना है। पंचायत अन्तर्गत इन्टरमीडिएट योग्यताधारी महिला उम्मीदवार नहीं मिलने की स्थिति में मैट्रिक अथवा समकक्ष योग्यताधारी महिलाओं का नियोजन, जिला पदाधिकारी की अनुमति ले कर इस शर्त के साथ किया जा सकेगा कि अभ्यर्थी तीन वर्ष के अन्दर इन्टरमीडिएट अथवा समकक्ष योग्यता प्राप्त कर लेंगे। महिलाओं के नियोजन हेतु रिक्तियों की गणना के लिए निम्नलिखित प्रक्रिया अपनायी जाए: (i) सर्व प्रथम संबंधित ग्राम पंचायतों द्वारा ग्राम पंचायत में नियुक्ति किये जानेवाली पंचायत शिक्षा मित्रों की रिक्तियों में 50% रिक्तियाँ पंचायत शिक्षा मित्र (महिला) एवं शेष 50% रिक्तियाँ पंचायत शिक्षा मित्र (पुरुष) के नाम से वितरित की जाएगी। विषम संख्या रहने पर अतिरिक्त पद पंचायत शिक्षा मित्र (महिला) के लिए चिन्हित किया जाएगा। उदाहरण के लिए यदि किसी पंचायत में 6 पंचायत शिक्षा मित्र के रिक्तियाँ हैं तो 3 पंचायत शिक्षा मित्र (महिला) एवं 3 पंचायत शिक्षा मित्र (पुरुष) के लिए रखा जाएगा। पर यदि किसी पंचायत में 7 रिक्तियाँ होती हैं तो 4 पंचायत शिक्षा मित्र (महिला) तथा 3 पंचायत शिक्षा मित्र (पुरुष) के लिए रिक्तियाँ निर्धारित की जाएँ। (ii) महिला पंचायत शिक्षामित्र एवं पुरुष पंचायत शिक्षामित्रों के लिए अलग-अलग आरक्षण रोस्टर निर्धारित किया जाएगा जिसके प्रपत्र का नमूना निम्नलिखित है:—

(क) पंचायत शिक्षा मित्र (महिला) का रोस्टर



क्रम संख्या	पंचायत शिक्षामित्र (महिला) का लगातार	आरक्षण कोटि	नियुक्त व्यक्ति का नाम
1.	1	अनारक्षित	
2.	2	अत्यंत पिछड़ा वर्ग	
3.	3	अनारक्षित	
4.	4	अनुसचित जाति	
5.	5	अनारक्षित	
6.	6	पिछड़ा वर्ग	
7.	7	अनारक्षित	

(क) पंचायत शिक्षा मित्र (पुरुष) का रोस्टर

क्रम संख्या	पंचायत शिक्षामित्र (पुरुष) का लगातार	आरक्षण कोटि	नियुक्त व्यक्ति का नाम
1.	1	अनारक्षित	
2.	2	अत्यंत पिछड़ा वर्ग	
3.	3	अनारक्षित	
4.	4	अनुसचित जाति	
5.	5	अनारक्षित	
6.	6	पिछड़ा वर्ग	
7.	7	अनारक्षित	

The above question nos. 7 and 8 reflect that one of the categorical questions was as to whether the contract of those Panchayat Shiksha Mitras who were engaged from before and were having only Matriculation qualification could be given the extension/renewal for the next term or not. To this, the Department categorically answered in negative and it was directed that under no circumstance, the contract should be



extended or renewed in connection with those Panchayat Shiksha Mitras who were having the qualification of matriculation only, in as much as the requisite qualification for engagement as Panchayat Shiksha Mitras had been raised from matric to that of Intermediate. It was further clarified that the contract of those Panchayat Shiksha Mitras who were having Intermediate qualification and were working from before could be extended only upon being satisfied with regard to satisfactory discharge of their duties.

The question no.8 as quoted above, dealt with the manner in which the representation of 50% of women candidates as Panchayat Shiksha Mitras in any Panchayat could be ensured. Taking note of the Resolution No. 1458 dated 11.08.2004 with special Reference to Clause 3 and 5(ga), it was clarified that as far as possible there should be at least 50% representation of the women candidates and in the event of non-availability of qualified women candidates (i.e. intermediate pass), it was open for the authorities to engage those women candidates who had matriculation qualification or equivalent, as noted above. The said relaxation was, however, subject to the approval of the District Magistrate and this engagement was further subject to a condition that the



Candidate would be acquiring the requisite qualification of Intermediate within 3 years of her engagement.

It is this relaxation in favour of women candidates, which has been misconstrued to have been made applicable to all applicants, male or female due to wrong submission of learned counsel for the parties and concession to that effect made by learned counsels for the State led to passing of the conflicting judgements referred in the reference.

It is evident on conjoint reading of question nos. 7 and 8 and clarification/guidelines issued by the department in response thereto, with regard to engagement of Panchayat Shiksha Mitra, that the eligibility criteria for engagement as Panchayat Shiksha Mitra was raised from Matric to Intermediate, though the nature of engagement remained contractual. Neither extension nor renewal was accorded to those Panchayat Shiksha Mitras who were engaged and were working in terms of Resolution dated 21.06.2002, but were having only Matriculation qualification. The re-engagement/extension of those candidates who were already working and were having Intermediate qualification were also subject to the satisfactory discharge of duty by them during their earlier tenure.



An exception in favour of women candidates was, however, carved out in the endeavour to ensure the representation of 50% Women Shiksha Mitra. It was provided by way of an exception that in the event of non-availability of adequate number of women candidates having Intermediate qualification, the candidates who were having Matric qualification could be engaged as Panchayat Shiksha Mitras but subject to approval by the District Magistrate and upon a condition that the candidates so engaged would be acquiring the qualification of Intermediate within three years, as Intermediate was the requisite qualification. Meaning thereby, that for male candidates there was no relaxation, hence no opportunity to acquire the requisite qualification in the course of engagement and only those candidates could have been directly engaged/allowed to be re-engaged on the basis of their earlier engagements, who had the qualification of Intermediate. Apparently the exception and relaxation was provided in favour of women candidates only and that too conditionally.

Therefore, it can be safely concluded that for the absorption/renewal of contract of already working Panchayat Shiksha Mitra and for fresh engagement of Panchayat Shiksha



Mitras in the male candidates category, the qualification of having Intermediate qualification was made indispensable. The relaxation was only in favour of the women candidates.

Clause 8 of the Resolution dated 11.04.2004 was further modified vide Resolution dated 07.04.2005 which suggested that for engagement of Shiksha Mitra, first of all minimum Intermediate or equivalent qualification with Diploma in Education/ B. Ed. trained would be given preference and a comparative merit list would be prepared in accordance with the Schedule (Ka). In case of the vacancies being not filled up by trained candidates, a separate merit list was to be prepared on the basis of weightage prescribed under Schedule (Kha). Clause 8 of the resolution reads as follows:-

“बिहार सरकार, मानव संसाधन विकास विभाग, सचिव, प्राथमिक एवं वयस्क शिक्षा विभाग। संकल्प ज्ञापांक—/8व3-122/03-845, दिनांक: 7.4.2005

पंचायत शिक्षा मित्र (अनुबंध पर नियोजन) मार्गदर्शिका (संशोधित) की कण्डिका (8) में संशोधन।

(8) चयन का आधार

(i) पंचायत शिक्षा मित्र के नियोजन हेतु सर्वप्रथम न्यूनतम इन्टरमीडियट (या समकक्ष) एवं डिप्लोमा इन एडुकेशन/बी0एड0 प्रशिक्षित को प्राथमिकता दी जाएगी। विभिन्न शैक्षणिक योग्यताओं के अभ्यर्थियों के लिए अनुसूची “क” के अनुसार मेधा सूची तैयार कर अधिकतम अंक के अभ्यर्थी का चयन किया जाएगा।

(ii) डिप्लोमा इन एडुकेशन/बी0एड0



प्रशिक्षित अभ्यर्थी नहीं होने या रिक्तियाँ अवशेष रहने पर न्यूनतम इन्टरमीडियट शिक्षित अभ्यर्थियों की अनुसूची "ख" के अनुसार मेधा सूची तैयार कर अधिकतम अंक के अभ्यर्थी का चयन किया जाएगा।

संकल्प संख्या 1458 दिनांक 11.8.2004 की अन्य सभी कंडिकाएँ (कंडिका-8) को छोड़कर पूर्ववत रहेंगी।

Circular dated 11.08.2004 was further modified and another clause 14 was added vide Resolution no.8(ब) 3-122/03 1748, dated 02.09.2005 which stipulated that in case of non-availability of candidates having requisite qualification under reserved category or women category in the Panchayat, an advertisement would be made at the Block level and thereafter selection would be made from any of the Panchayats of the concerned block. Clause 14 was added to the resolution dated 11.08.2004 giving jurisdiction to the District Magistrate to make enquiry with regard to engagements of the Shiksha Mitras and in case of any irregularity being confirmed, the District Magistrate was authorized to pass appropriate order in writing to the Gram Panchayat for cancellation of the engagement and in case the engagement was not cancelled by the Gram Panchayat, such Shiksha Mitra would be identified and their honorarium would not be paid.

The engagement of Shiksha Mitra on



contractual basis in pursuance to Resolution no. 1458 dated 11.08.2004 continued till 2006. In the year 2006, the State of Bihar in discharge of its obligation under Articles 47 and 48 of the Constitution of India deriving powers conferred by Article 243-G of the Constitution of India, read with Section 146 of the Bihar Panchayat Raj Act, 2006, framed the Rules for employment of teachers in the elementary schools of rural areas of the State. These Rules were notified vide Notification No. 3-02/06-974, dated 01.07.2006 by the Human Resources Development Department known as Bihar Panchayat Elementary Teachers (Employment and Service Conditions) Rules, 2006. As the statement, object, reasons and the nomenclature suggest, the Rules lay down the procedure for employment and provide for service conditions of panchayat teachers. The Rules of 2006, as would be apparent, for the first time, introduced the word 'employment' as against the word 'engagement' which was in vogue by virtue of the earlier resolutions holding the field, noted above.

There can be no dispute that the Rules of 2006 having been framed in exercise of power under Section 146 of the Bihar Panchayat Raj Act, 2006, are statutory in nature.

Rule 2 of the Rules, 2006 defines 'Primary



School' to mean Government and Nationalized Schools imparting education up to Vth standard, 'Middle School' is defined to mean Government and Nationalized schools imparting education for VIIth and VIIIth standard. 'Elementary school' is defined to mean Government and Nationalized primary and middle schools. Rule 3 of the Rules, 2006 envisages two grades of Panchayat Elementary Teachers-

(i) Block Teacher employed at Block level

(ii) Panchayat Teachers employed at panchayat level.

Rule 8(A) prescribes the minimum qualification of Intermediate or equivalent examination passed from educational institution recognized by the Government for block teachers. Similar is the qualification for the Panchayat teachers.

Rule 8 of the Rules, 2006 reads as follows:-

“8. For employment-

(A) Eligibility- For Block

Teacher:

1. Should be citizen of India and habitant of Bihar.

2. Should be higher secondary or Intermediate or equivalent examination passed from educational institution recognised by Government.

3. Should be two years training



diploma or certificate from training institution recognised by NCTE or B.EL-Ed in Elementary education or B.Ed with Bachelor degree or equivalent qualification.

Minimum two years certificate (CPed) or equivalent qualification for physical teacher.

But in the first transaction under this rule those candidates who acquired matric or equivalent certificate from school recognised by the government and acquired two years of teacher training certificate from training schools/colleges recognised before commencement of NCTE Act.

For Panchayat Teachers:-

1. Should be citizen of India and habitant of Bihar.

2. Should be higher secondary or Intermediate or equivalent examination passed from educational institution recognised by Government.

3. Should be two years training diploma or certificate from training institution recognised by NCTE or B. EL-Ed in Elementary education or B. Ed with Bachelor degree or equivalent qualification.

But in the first transaction under this rule those candidates who acquired matric or equivalent certificate from school, recognised by the government and acquired two years of teacher training certificate from training schools/colleges



recognised before commencement of NCTE Act.

(B) Age -

The minimum age of the candidates must be 18 years and the maximum age be 37 years on the 1st January of the year in which the candidate is being employed. For SC/ST and disabled candidates, there will be relaxation of 5 years in the maximum age limit. For BC and OBC three years and for women candidate in each category relaxation of 3 years in the maximum age limit.

But in the first transaction of employment trained category of Block teacher and panchayat teachers the maximum age limit will be relaxed completely.”

Rule 4 (3) gives relaxation in minimum qualification of Intermediate with regard to ‘reserved category’ candidates. It provides that if Higher Secondary/Intermediate passed candidates are not available then candidates having Matriculation qualification may be employed, but they will have to acquire minimum prescribed qualification within six years. Rule 4(3) of the Rules, 2006 reads as follows:-

“4. Employment of Panchayat
Elementary Teachers-(1).....
(2).....



(3) In reserved category if higher secondary/Intermediate passed candidates would not be available, secondary examination (Matriculation) passed candidates may be employed. But it will be necessary for them to acquire prescribed qualification within maximum six years.”

A conjoint reading of Rule 4 and Rule 8 of the Rules 2006 suggests that minimum qualification for Block Teachers or Panchayat Teachers is Intermediate and relaxation has been given only to reserved category candidates for acquiring prescribed qualification within maximum six years. Hence, either under the Circular of 2002 or 2004 for engagement of Shiksha Mitra, no such relaxation in academic qualification was given to male candidates nor under the Rules 2006, to open category candidates. Rule 9 of Rules, 2006 prescribes the process of direct recruitment of Block and Panchayat Teachers. Rule 9 is being reproduced here for better appreciation.

“9 Process of Employment.- (I) The State Government will provide number of posts from time to time to panchayat samiti and Gram Panchayat for employment of Block teachers and panchayat teachers



respectively.

(ii) Information regarding categorywise vacant posts will be advertised within the block/Panchayat for minimum 15 days by the respective panchayat samiti/gram panchayat.

(iii) Application form in prescribed proforma (Annexure-I) will be received by Block Education Extension Officer for Block teacher and by the Secretary of Gram Panchayat for panchayat teachers. Receiving certificate will be issued immediately.

(iv) Panel for employment of Block teacher:

(A) Panel for employment of Block teacher will be prepared by the committee constituted under chairmanship of Pramukh of Panchayat samiti at block level on the basis of merit points

Merit points will be calculated as follows:

(i) Matric/Higher secondary/Intermediate percentage of marks obtained.

(ii) Two years training/BEL-Ed/B-Ed/C.P.Ed certificate-percentage of marks obtained

But if a candidate has acquired two years of training certificate as well as B.EL-Ed/B-Ed certificate then the percentage of marks obtained in one of the training examination, claimed by him will be added to merit point calculation.

(B) The percentage obtained after adding 1 and 2 and the dividing by two, will be the merit point of the candidate

(C) in the case of employment of physical



teacher, separate and different panel will be prepared.

(V) Panel for employment of panchayat teacher:

(A) Panel for employment of panchayat teacher will be prepared by the committee constituted under Chairmanship of Mukhiya of Gram Panchayat

Merit points will be calculated as follows:

- (i) Matric/Higher secondary/Intermediate percentage of marks obtained.
- (ii) Two years training/BEL-Ed percentage of marks obtained

But if a candidate has acquired both two years training certificate and B.EL-Ed certificate then the percentage of marks obtained in one of the training examination, claimed by him will be added to merit point calculation.

(B) The percentage obtained after adding 1 and 2 and the dividing by two, will be the merit point of the candidate

(VI) In the preparation of panel for employment of teachers of both level (Block and Panchayat) if equal merit points obtained by two candidates, then the older in age will be placed upper in the panel. In the case of same merit points and same date of birth the place will be decided through draw.

(VII) Constitution and Approval of Committee for preparation of panel:

Panel will be prepared on the basis of application forms obtained by the following Committee:

(A) For Block teacher and physical



teachers:

- (i) Pramukh of panchayat samiti-
Chairman
- (ii) Executive Officer Panchayat Samit –
Member
- (iii) One member elected by education
committee of Panchayat Samiti. (If Pramukh is male
member, the elected member shall be a female)
- (iv) Block Education Extension Officer, -
Member Secretary.

(B) For Panchayat teacher:

- (i) Mukhiya of Gram Panchayat-
Chairman
- (ii) One member elected by Education
Committee of Gram Panchayat (In case Mukhiya is a
male, the elected member will be female) – Member
- (iii) The member of Panchayat samiti
whose area covers most of the area of Panchayat –
Member
- (iv) One teacher from the secondary
school either from to the panchayat or nearer to the
panchayat nominated by the D.E.O. - Member
- (v) Secretary Gram Panchayat – Member
Secretary.

But the term of the elected members of
both the above committees will be one year.

Note.- In case of (non-existence) non-
constituent of the Education Committee of panchayat
samiti and Gram panchayat, one member of panchayat
samiti/ Gram Panchayat nominated by the Block



Education Extension officer, will be a member of the Committee.

(viii) After preparation, the panel will be published or made available to the public one week time will be given for their objection/grievances. Resolving the grievances obtained, panel will be finalised.

(ix) Panel prepared for employment of Block teachers and panchayat teachers will be approved by the panchayat samiti and Gram panchayat respectively.

(x) Selected members will be employed in their willing schools through counseling by the above committees in descending order of the preference mentioned in Anusuchi-II from the panel prepared on the basis of merit.

(xi) Employment letter will be given to the selected candidate (Anusuchi-III).

Their joining will be accepted on the basis of their consent letter.”

The next mode of entry into block and panchayat teachers is stipulated in section 20(iii) of the Rules, 2006 by way of absorption of the panchayat Shiksha Mitras working on 1.7.2006, the day the Rules, 2006 came into force.

Rule 20 (iii) of Rules, 2006 reads as follows:

“20. Repeal and savings-(i).....

(ii).....

(iii) But panchayat Shiksha Mitra



employed under previous circular, orders, instruction shall be deemed to have been employed as panchayat Shikshak under these rules.”

A conjoint reading of Rule 9 and Rule 20(iii), of the Rules of 2006 suggests that there are two modes of entry of Panchayat teachers - one by direct recruitment under Rule 9 with an exception of compassionate appointment under Rule 10 and another by operation of Rule 20 (iii) which envisages unconditional absorption of Shiksha Mitras, who were working on the date of coming into force of Rules, 2006 i.e., 01.07.2006.

Rule 20 (i) of Rules 2006 stipulates repealing of all the circulars, orders or instructions issued earlier regarding employment of elementary teachers in rural areas/ physical teachers/panchayat Shiksha Mitras from the date of commencement of Rules, 2006, i.e., with effect from 01.07.2006. Rule 20(ii) is the saving clause and provides, while repealing all earlier circulars, instructions, resolutions, that it will not affect the payments and service conditions of the teachers appointed under the provisions of previous circulars. Rule 20(iii) stipulates that all Shiksha Mitra employed under previous Circular, orders, instructions working as on the date of



commencement of the Rules i.e., (1.7.2006) shall be deemed to have been employed as Panchayat Teachers under the Rule, 2006.

The Rules, 2006 was modified by the Rules, 2008 vide Notification no. 7/ 3-02/06 dated 25.08.2008. Through this amendment, provisions have been made for preparation of certain panels of trained and untrained teachers under Rule 4(2) and for weightage to be given to different categories of teachers. However, after coming into force of the Rules, 2006, there remained dispute with regard to direct recruitment of Panchayat/Block teachers. However some of the Shiksha Mitras who were working on 01.07.2006, the date the Rules, 2006 came into force got absorbed by operation of Rule 20(iii), whereas employment of some of them was terminated on the ground that the candidates had not acquired the Intermediate qualification within 33 months of their engagement or they had failed to acquire minimum 45% marks at Intermediate level. Rule 20(iii) did not envisage these two conditions for absorption of Shiksha Mitra as Panchayat Teachers, which led to filing of writ applications and conflicting opinions being formed by different Benches of this Court, leading to conflicting decisions.



Initially one such Shiksha Mitra, Kishori Prasad, being engaged as Shiksha Mitra on 12.5.2003 in the Primary School, Makarpur, on the basis of having higher secondary qualification only, was disengaged by order dated 21.7.2005 since he could not acquire the higher qualification of Intermediate which was mandated under Government Circular dated 21.4.2005. The said Kishori Prasad challenged the same in CWJC No. 15589 of 2006 but the same got dismissed by the learned Single judge vide order dated 3.10.2007 which came to be challenged in intra-court appeal being LPA no. 940/2007. A Division Bench of this court relying upon the submission of the learned counsel for the appellant that the Government Circular dated 21.4.2005 raised the qualification of Shiksha Mitra from Matriculation to Intermediate with a rider that if they acquired the Intermediate qualification within 33 months of the engagement, they could continue to work as Shiksha Mitra failing which the services were liable to be terminated. Since Kishori Prasad's disengagement was made only within 27 months of his engagement, his disengagement was quashed and he was directed to be reinstated with consequential benefits vide judgment dated 12.2.2008 [Kishori Prasad v. State of Bihar and



ors.- 2008 2 PLJR 458]. Paragraph nos. 5 and 6 of the judgment read as follows:

“5. The petitioner has been appointed on 12.5.2003 as a Panchayat Shiksha Mitra in the Primary School, Makarpur. He was holding a certificate of higher secondary which was the eligibility qualification required then. Thereafter, vide Government Circular dated 21.5.2005 the qualification for Shiksha Mitra was raised to Intermediate. Thus while the future appointment of candidates below Matric was prohibited and the persons already appointed on the basis of their qualification of Matriculation were provided 33 months’ time to acquire the higher qualification prescribed for their further continuance in service. It was envisaged that existing Shiksha Mitras, who are not Intermediate shall obtain such qualification within 33 months, failing which services of such Shiksha Mitras were liable to be terminated. Those who acquired such qualifications were to continue in service.

6. Undisputedly, on the date when the petitioner’s services were terminated vide Annexure 8 dated 21.7.2005, 33 months’ time had not expired since his date of appointment but only 27 months had expired. Before expiry of 33 months from the date of his appointment, the petitioner had already acquired the qualification of Intermediate as per the certificate issued on



22.9.2005. Apparently on this undisputed fact, the petitioner's services could not be terminated by Annexure 8 and said order cannot be sustained."

The Rules 2006, whereby, the post of Shiksha Mitra was abolished was not brought to the notice of the Division Bench nor this fact was brought to notice, that the relaxation of acquiring the higher qualification of Intermediate, within 3 years of engagement, was made only in favour of women candidates vide Resolution no.1458 dated 11.8.2004 vide clause 5(Ga).

However, consequently the Human Resources Department, Government of Bihar, by Resolution dated 04.07.2008 came out with a resolution in the light of the judgment dated 12.02.2008, passed in the case of Kishori Prasad (supra). The Government decided that all such candidates who have been engaged on the basis of Matric qualification and have acquired Intermediate qualification within 33 months of their engagement or who had acquired Intermediate from before, even though they had not secured 45% marks, they would be deemed engaged as Shiksha Mitra from 01.07.2006. The Circular dated 04.07.2008 reads as follows:



“बिहार सरकार, मानव संसाधन विकास विभाग, प्रेषक, प्रकाश चन्द्र सिंह, संयुक्त सचिव, मानव संसाधन विकास विभाग। संकल्प, ज्ञापांक.7वि1-89/2000 मा0.-2517, दिनांक: 4.7.2008.

विषय:- मैट्रिक योग्यता के आधार पर पंचायत शिक्षामित्र के पद पर नियोजित अभ्यर्थी, जिन्होंने नियोजन की तिथि से 33 माह के अन्दर इन्टरमीडिएट की योग्यता प्राप्त कर ली हो, उन्हें शिक्षा मित्र एवं पंचायत /प्रखण्ड पद पर नियोजित पर रखे जाने के संबंध में।

बिहार राज्य में संकल्प संख्या 1079 दिनांक 20.6.2012 के द्वारा प्रथम बार पंचायतों द्वारा राज्य के प्राथमिक एवं मध्य विद्यालयों का परिचालन किया गया था। तदनुसार ग्राम पंचायतों द्वारा राज्य के प्राथमिक एवं मध्य विद्यालयों में पंचायत शिक्षामित्रों का नियोजन किया गया। पुनः वर्ष 2004 में शिक्षा मित्र के नियोजन से संबंधित मार्गदर्शिका में संशोधन किया गया एवं संकल्प संख्या 1458 दिनांक 11.8.2004 के द्वारा संशोधित मार्गदर्शिका निर्गत की गयी। संशोधित मार्गदर्शिका के अनुसार पंचायत शिक्षा मित्र के पद पर नियोजन हेतु अभ्यर्थी की न्यूनतम योग्यता इन्टरमीडिएट अथवा इसके समकक्ष परीक्षा में उत्तीर्णता तथा उक्त परीक्षा में न्यूनतम 45 प्रतिशत अंक निर्धारित किया गया। संशोधित मार्गदर्शिका के अनुसार पुनः ग्राम पंचायतों के द्वारा आवंटित पदों पर पंचायत शिक्षामित्रों का नियोजन किया।

2. संशोधित मार्गदर्शिका, 2004 में इस बात का उल्लेख नहीं किया गया कि पूर्व की मार्गदर्शिका के द्वारा नियोजित अभ्यर्थी, जिनका नियोजन मैट्रिक के आधार पर किया गया था, उनकी अवधि विस्तार के क्रम में नयी मार्गदर्शिका के प्रावधान लागू होंगे अथवा नहीं। जिलों के द्वारा इस बिन्दु पर पृच्छा किये जाने के उपरान्त विभागीय पत्रांक 672 दिनांक 21.4.2005 के द्वारा स्पष्ट किया गया कि “पूर्व से नियोजित पंचायत शिक्षामित्रों में से जिनकी शैक्षिक योग्यता मैट्रिक या समकक्ष है, उनके अनुबंध का विस्तार नहीं किया जाए। क्योंकि अब पंचायत शिक्षा मित्रों का



नियुक्ति के लिए शैक्षणिक आवश्यकता इन्टरमीडिएट है। संतोषप्रद सेवा होने पर केवल इन्टरमीडिएट (या समकक्ष) अथवा इससे अधिक योग्यताधारी पंचायत शिक्षा मित्रों के अनुबंध का ही बिस्तार किया जाए”।

3. उपर्युक्त विभागीय पत्र संख्या 672 दिनांक 21.4.2005 में यह अंकित नहीं किया गया कि इन्टरमीडिएट योग्यताधारी जिन्हें 45 प्रतिशत अंक प्राप्त हुए उन्हीं का अवधि विस्तार किया जाए। साथ ही कई जिलों के जिला शिक्षा अधीक्षकों ने ग्राम पंचायतों को यह निर्देश दिया कि जिन शिक्षामित्रों ने इन्टरमीडिएट की डिग्री प्राप्त कर ली है, उन्हें अवधि विस्तार दिया जाए। जिलों के द्वारा यह भी अपने पत्र में 45 प्रतिशत न्यूनतम अंक का उल्लेख नहीं किया गया।

4. प्रारंभिक शिक्षक नियोजन नियमावली 2006 लागू होने की तिथि दिनांक 1.7.2006 से विधिवत् रूप से नियोजित एवं कार्यरत पंचायत शिक्षा मित्रों को पंचायत शिक्षक मित्रों को पंचायत /प्रखण्ड शिक्षक मान लिया गया। तत्पश्चात पूर्व के शिक्षामित्रों के नियोजन एवं अवधि विस्तार के संबंध में अनियमितता की बात सामने आयी तथा निर्देश दिया गया कि जिन इन्टरमीडिएट योग्यता अभ्यर्थियों ने 45 प्रतिशत अंक प्राप्त नहीं की थी, उनका अवधि विस्तार नहीं किया जाना था। अतएव जिलों में जिन शिक्षा मित्रों को इन्टरमीडिएट में 45 प्रतिशत अंक प्राप्त नहीं था, उन्हें सेवा से हटाने की कार्रवाई की गयी। सेवा से हटाने के आदेश के विरुद्ध माननीय उच्च न्यायालय में कई मुकदमा भी दायर किये गये। माननीय उच्च न्यायालय के एल. पी. ए. बेंच के द्वारा 12.2.2008 को एल. पी. ए. संख्या [940/2007](#) में पारित ओदश तथा इस मामले पर सम्यक विचारोपरान्त सरकार द्वारा निर्णय लिया गया कि मैट्रिक के आधार पर नियोजित अभ्यर्थी जिन्होंने नियोजन की तिथि के 33 माह के अन्दर इन्टरमीडिएट की योग्यता प्राप्त कर लिये हों अथवा जो पूर्व से ही इन्टरमीडिएट योग्यताधारी जो (भले ही इन्टरमीडिएट) में 45 प्रतिशत से कम अंक प्राप्त किया है) वे सभी शिक्षामित्र के रूप में नियोजित माने जाएंगे तथा दिनांक 1.7.2006 (wrongly printed as



1.6.2007) से पंचायत /प्रखण्ड शिक्षक हो जाएंगे ।

अतएव सरकार के निर्णय के आलोक में पूर्व विधिवत रूप से नियोजित जिन शिक्षामित्रों को उक्त कारणों से सेवा से हटाया गया है, वे सेवा से हटाने जाने की तिथि से पुनर्नियोजित माने जाएंगे ।

पूर्व में निर्गत संकल्प/आदेश/निदेश इस हद तक संशोधन माना जायेगा ।”

It is manifest that the Circular in question dated 4.7.2008 was issued in light of the Division Bench judgment of this court in Kishori Prasad (supra). While issuing the Circular dated 4.7.2008 apparently it could not be appreciated that by operation of the provisions under Rule 20 (i) of the 2006 Rules, the earlier circular which was being amended, already stood repealed.

It appears that through the aforesaid Circular, amendment has been sought not only in the repealed Circular/Instruction and orders issued for engagement of Shiksha Mitra which had been repealed by Rule 20(i) of Rules, 2006 but through this circular a new mode of absorption of Shiksha Mitra into the category of Panchayat Teachers has been envisaged by assuming the engagement and continuation of Shiksha Mitra till 1.7.2006 by way of deeming fiction, and thereby allowing such deemed Shiksha Mitra to be absorbed as



panchayat teacher by operation of Rule 20(iii) of the Rules 2006, which was neither permissible under any repealed circular providing for engagement of Shiksha Mitra for 11 months, nor the provisions under the Rules, 2006 stipulate as such.

Hence by an executive circular dated 4.7.2008 not only has an attempt been made to give life to a repealed Circular having provisions for engagement of Shiksha Mitra but an attempt has also been made to override the statutory Rules 2006 by executive instruction and thereby another mode of entry as panchayat teacher has been opened, contrary to the provisions under the Rules, 2006 particularly Rule 20(iii).

It is well settled law that executive instruction cannot override the Rules or the Statute. Executive instructions can supplement/explain but cannot supplant the statutory rules, which has been sought to be done through this Circular dated 4.7.2008. Once the statutory rules have been framed, the appointment can be made only in accordance with the Rules. Executive powers can be exercised in appropriate cases to fill up the gap but such instructions cannot and should not supplant the legal provisions. The decision in the case of J & K Public Service Commission Vs. Dr. Narindra Mohan, (1994) 2



Supreme Court Cases 630 may be usefully referred to.

Paragraph 7 reads as follows:

“7. Existence of statutory rules is not a condition precedent to appoint an eligible and fit person to a post. The executive power is a co-executive with legislative power of the State and under Article 162, the State can create civil posts and fill them according to executive instructions consistent with Article 14 and 16 of the Constitution. It is settled law that once the statutory rules have been made, the appointment shall be only in accordance with the rules. The executive power could be exercised only to fill in the gaps but the instruction cannot and should not supplant the law, but only supplement the law. The Governor exercising the power under proviso to Section 125 (Article 309 of the Constitution of India) made the rules which do not expressly give the power to the State Government to make ad hoc appointments. No such rule has been brought to out notice. No express power was conferred and in fact cannot be conferred to relax the rules of recruitment. Having made the rules the executive cannot fall back upon its general power under Article 162 to regularise the ad hoc appointments under the Rules. Rule 9(3) empowers only to relax the qualification of age in particular exigencies which cannot be call in aid to relax the rules of recruitment. To tide over unforeseen exigencies,



power to make ad hoc appointments, may be visualised as envisaged by Explanation (b) to Rule 4 but it expressly states that by virtue of such appointment, the ad hoc appointee does not become member of the service. The Rules prescribe direct recruitment/promotion by selection as the mode of recruitment which would be done only by PSC or promotion committee duly constituted and by no other body. Therefore, ad hoc employee should be replaced as expeditiously as possible by direct recruits. A little leeway to make ad hoc appointment due to emergent exigencies, does not clothe the executive Government with power to relax the recruitment or to regularise such appointment nor to claim such appointments to be regular or in accordance with rules. Back door ad hoc appointment at the behest of the power source or otherwise and recruitment according to rules are mutually antagonistic and strange bed partners. They cannot co-exist in the same sheath. The former is in negation of fair play. The later are the product of order and regularity. Every eligible person need not necessarily be fit to be appointed to a post or office under the State, selection according to rules by a properly constituted commission and fitment for appointment assures fairness in selection and inhibits arbitrariness in appointments. In view of the Explanation (b) to Rule 4, the ad hoc appointments to any post in any of the three wings of the services under the Rules



are therefore de hors the Rules. Appointments of Respondents 1 to 6 cannot be held to be in accordance with the Rules.”

In the present case, the petitioner-appellant being aggrieved and dissatisfied with the non-extension/renewal of his engagement as Panchayat Shiksha Mitra on contractual basis, preferred a writ application being CWJC No. 4386 of 2012. The petitioner-appellant was engaged as Shiksha Mitra in 2003 for 11 months and thereafter he was re-engaged in 2004, but in 2004 after the qualification of engagement being enhanced from matric to intermediate with 45% marks vide resolution dated 11.8.2004, he was debarred from working and marking attendance. However, in support of such claim, the petitioner-appellant did not bring on record any document. His second term of engagement expired on 11.2.2005. The petitioner-appellant acquired Intermediate qualification in 2006, well within 33 months, four months after his disengagement and hence he claimed his engagement as Panchayat Shiksha Mitra from 2005 by a deeming fiction, by virtue of Resolution dated 4.7.2008 and his consequent absorption by virtue of the said Resolution as Panchayat Teacher.



Learned Single Judge of this Court, taking judicial notice of the fact that the circular dated 4.7.2008 could not come in aid of the petitioner to claim a deemed re-engagement with effect from 2005, has been pleased to dismiss the writ application vide order dated 12.3.2012.

Seeking exception to the aforesaid order by which the writ application was dismissed, the petitioner-appellant preferred intra-Court appeal being LPA No. 87 of 2014. The Division Bench, in course of hearing of the appeal, was confronted with two different and contradictory lines of judicial pronouncements by two different Division Benches – one suggesting the acquiring of intermediate qualification within 33 months of engagement as Shiksha Mitra and the other suggesting the prospective application of circular dated 4.7.2008, i.e., within 33 months of the date of circular.

It is submitted by learned counsel for the appellant that the appellant was initially engaged for 11 months as Shiksha Mitra and thereafter his engagement was renewed. In the meantime, by circular dated 11.08.2004, the qualification for Shiksha Mitra was upgraded to Intermediate with minimum 45% marks, but before expiry of 33 months, the appellant was disengaged prior to expiry of the term of the engagement on



11.02.2005. The appellant acquired Intermediate qualification in 2006, within 33 months, hence, on the basis of the said resolution dated 04.07.2008, he should be treated as deemed Shiksha Mitra. The petitioner-appellant has relied upon a judgment passed in P. Mahendran and ors. v. State of Karnataka AIR 1990 SC 405 and A.A. Calton v. The Director of Education and another AIR 1983 SC 1143, in support of his submissions.

Mr. Pushkar Narayan Shahi, learned AAG-6 appearing for the respondent submitted that the petitioner-appellant was disengaged in 2005, whereas the petitioner-appellant preferred a writ application after seven years in 2012 whereas the post of Shiksha Mitra was abolished in 2006 itself. Hence, being a fence sitter, the appellant does not deserve any consideration. Mr. Shahi has relied upon the judgment of State of U.P. and Others Vs. Arbind Kumar Srivastava and Others, (2015) 1 SCC 347, wherein it has been held that the normal rule is that when a particular set of employees is given relief by a Court, all other identically situated persons should be treated alike by extending the same benefit, however, subject to the well recognized exception in forms of laches and delay and acquiescence and the case of the appellant comes within such



exception.

It is further contended that admittedly the appellant was not working as Shiksha Mitra on 1.7.2006 hence he could not have been absorbed as panchayat teacher by operation of Rule 20(iii) of the 2006 Rules.

It is also contended that the validity of the circular dated 4.7.2008 particularly the retrospective application with regard to higher qualification of Intermediate within 33 months of engagement as Shiksha Mitra has been upheld initially in Kishori Prasad (supra) and subsequently in CWJC 7719/2010 (Bhagwan Mahato v. State of Bihar and ors.) treating the relaxation of acquiring the higher qualification within 33 months to be retroactive and not retrospective and this view was again reaffirmed by a division bench in CWJC no. 11620 of 2010 (Sakita Kumari v. State of Bihar and Ors.) decided on 24.2.2012.

Subsequent to the case of Kishori Prasad, one Indu Devi after being absorbed as panchayat teacher by operation of Rule 20(iii) challenged termination of her engagement/employment dated 11.2.2009 issued by BDO, Jandaha on the ground of not acquiring the Intermediate qualification within 33 months of her engagement as panchayat



Shiksha Mitra in compliance of Circular no. 4517 dated 4.7.2008 and thereby challenged the retrospective application of the said circular. The said writ application was allowed on 4.7.2009 quashing the termination on the ground that the circular being an executive order cannot be made applicable with retrospective effect and therefore even if the petitioner had acquired higher qualification in 40 months instead of 33 months, her engagement could not have been terminated. The petitioner was directed to be reinstated with all consequential benefits. Though in spite of the fact that the judgment of Division Bench was considered by the Learned Single Judge, a contrary view was taken, as the Division Bench had upheld the view of acquiring the higher qualification within 33 months. The said decision was challenged by the State of Bihar in LPA no. 1247/2009 (State of Bihar and Ors. v. Indu Devi) which was dismissed, affirming the order of the learned Single Judge on the ground that Rule 20(iii) of the 2006, Rules, by virtue of which the respondent Indu Devi was absorbed does not stipulate acquiring of Intermediate qualification within 33 months.

Subsequent to the case of Indu Devi, one Bhagwan Mahato preferred a writ application bearing CWJC



No.7719/2010 for a declaration that he be treated as Shiksha Mitra on and after 25.7.2005 and consequently be absorbed as a panchayat teacher by operation of Rule 20(iii) of 2006, Circular dated 4.7.2008 and the judgment of learned Single judge dated 14.7.2009, passed in CWJC No. 3700 of 2009 (Indu Devi v. State of Bihar and Ors.). The learned Single Judge vide order dated 24.9.2010 referred the writ application to division bench noticing the conflicting view taken by the learned Single judge in the case of Indu Devi to the effect that the Circular dated 4.7.2008 has prospective application, to that of the view taken in LPA no. 940/2007 (Kishori Prasad Vs. State of Bihar and Ors), wherein, the requirement of acquiring qualification of Intermediate within 33 months was upheld.

Consequently, the Division Bench decided the writ application by dismissing the same by holding that the concession given by the circular dated 4.7.2008 is not retrospective but retroactive in effect and it does not deprive anyone of any vested right. Moreover, the retrospective application of executive orders is permissible only when it adversely affects the vested right. The Division Bench did not approve of the view taken by the learned Single Judge in the case of Indu Devi for the same being against the rule of



precedence and contrary to the law laid down in Kishori Prasad (supra). The Division Bench dismissed the writ application since the petitioner had failed to acquire the higher qualification within 33 months of initial engagement as Shiksha Mitra. The judgment dated 19.1.2011 passed by Division Bench in CWJC No. 7719 / 2010 (Bhagwan Mahto vs State of Bihar) however was not brought to the notice of the Division Bench hearing the LPA no. 1247 / 2009 (State of Bihar and Ors. vs Indu Devi), which was disposed of on 9.3.2011, which resulted into a conflicting view being taken by the Division Bench and as such the order of the learned Single Judge in the case of Indu Devi was affirmed.

Subsequently, one Sakita Kumari preferred a writ application, bearing CWJC No. 11620 / 2010 whose services as panchayat teacher was terminated as she had failed to acquire the higher qualification within 33 months of engagement as Shiksha Mitra. She challenged the termination in view of the relaxation given by the State Government in the circular dated 4.7.2008 issued pursuant to the Division Bench judgment in Kishori Prasad, 2008 (2) PLJR 458. Since, the petitioner relied upon the ratio of Indu Devi (supra), which is contrary to the view in case of Kishori Prasad (supra), the



learned Single Judge referred the matter to the Division Bench. Thereafter, the Division Bench vide judgment 22.6.2010 disposed of the writ petition by dismissing the claim of the petitioner since she did not have the minimum qualification of intermediate within the extended period, in light of Circular dated 4.7.2008 and followed the view expressed in case of Bhagwan Mahto v. State of Bihar, CWJC 7719 of 2010, whereby, the Division Bench had overruled the view taken by the learned Single Judge in case of Indu Devi (Supra), though in the reference order, there is an apparent error of record that the Division Bench in CWJC no. 11620 / 2010 (Sakita Kumari v. State of Bihar) has taken the same view as in LPA No. 1247 of 2009, State of Bihar and Ors. V. Indu Devi. It appears, on the other hand, that the said LPA which was disposed of on 9.3.2011 was not brought to the notice of the Division Bench which disposed of the CWJC No. 11620 / 2010 Sakita Kumari vs. State of Bihar on 24.2.2012.

On examination of the two different views expressed by the two different Division Bench noted above, coupled with the stipulation in the Circular dated 4.7.2008, it is manifest that it was not brought to the notice of the Division Benches that no relaxation of acquiring intermediate



qualification was ever given to male candidates. Moreover, the Circular dated 4.7.2008 was issued by the State Government on the basis of the judgment passed in case of Kishori Prasad (Supra) which has been held per incurium by Full Bench of this Court in Kalpana Rani v. State of Bihar 2014(2) PLJR 665, wherein it has been held that no writ of mandamus can be issued by appointing a person on an abolished post of Shiksha Mitra. Paragraph 28 of the judgment reads as follows:

“28. While allowing the said benefit of improvement of qualification to one Kishori Prasad (2008(2) PLJR 458] the Bench failed to appreciate that the benefit of relaxation in qualification was not extended to the male candidates. The Bench also did not notice the factum of abolition of cadre of Panchayat Shiksha Mitra and the replacement of the Scheme by the Statutory Rules of 2006. The judgment in the matter of Kishori Prasad Vs. The State of Bihar & Ors. (2008(2) PLJR 458] is, therefore, *per incurium* and is expressly overruled. The decision in the matter of Rima Kumari Vs. The State of Bihar & Ors. [2012(1) PLJR 107] is affirmed.

The Full Bench has further held that any judgment which has taken a view contrary to the view



expressed by the Full Bench stands impliedly overruled.

Paragraph 29 reads as follows:-

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

The Full Bench in the case of Kalpana Rani (supra) while endorsing the view taken in the judgment dated 23.08.2011 in the case of Renu Kumari Pandey Vs. The State of Bihar and Others, 2011(4) PLJR 297 held that under Clause (i) of Rule 20 of Rules, 2006, all earlier resolutions / circulars issued with regard to engagement of Shiksha Mitra were repealed. Consequently, the post of Shiksha Mitra was abolished. Thereafter no person can be employed as Shiksha Mitra nor can there be a deemed employment of Shiksha Mitra or the deemed absorption of their services. The above finding has been recorded in paragraph 17 and 21 of the judgment in the case of Renu Kumari Pandey (supra) which has been quoted and adopted by the Full Bench in paragraph no. 22 and 23 of the judgment in Kalpana Rani (supra), which read as follows:-

“22. The aforesaid Scheme came to an end with enactment of the 2006 Rules which came into operation on 1st July, 2006. The scope



and ambit of the Rules of 2006, particularly Rule 20 thereof have been discussed in the above referred matter of Smt. Renu Kumari Pandey. The relevant paragraphs are reproduced for convenience:-

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

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



Panchayat Teachers. Rule 18 thereof provides for appeals arising out of selection made under the Rules.

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

16. Clause (iii) of the Rule 20 of the Rules reflects the policy decision of the State Government. We are of the considered opinion that no legal provision can be held to be arbitrary or discriminatory or ultra vires Articles 14 and 16 of the Constitution on hypothetical set of facts.



We, therefore, hold that Clause (iii) of Rule 20 of the said Rules is neither arbitrary nor discriminatory nor it is violative of Articles 14 and 16 of the Constitution.

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

23. Having considered the scope and ambit of the Scheme for appointment of



Panchayat Shiksha Mitra and the Rules of 2006,
the Bench Held:-

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

It is relevant to state here that the writ application preferred by Renu Kumari Pandey (2011) 4 PLJR 297, was referred by the learned Single Judge to the Division Bench vide order dated 19.09.2007, wherein the validity of the Rule 20(iii) of Rules, 2006 was under challenge on the ground that there were several persons who did not prefer to be engaged as Shiksha Mitra since they were not aware that ultimately Shiksha Mitra would be absorbed as Panchayat Teachers, though, in the case of Renu Kumari Pandey (supra)



the learned counsel representing the State had pointed out with regard to the issuance of the Circular dated 04.07.2008, which has wrongly been printed as 01.07.2008, whereupon the Division Bench observed that though the said resolution was passed in pursuance to the judgment of the Division Bench in the case of Kishori Prasad (supra), but was contrary to Rule 20(iii) of Rules, 2006. However, since none claimed on the basis of the circular dated 4.7.2008, the Court declined to express any opinion on the said circular. Paragraph 19 and 20 of Renu Kumari Pandey (supra) read as follows:

“19. In course of hearing, learned advocate Mr. S.D. Sanjay has produced copy of the Government Resolution dated 1st July 2008. He has submitted that under the said Resolution the State Government has relaxed Rule 20(iii) of the Rules to the extent that the Panchayat Shiksha Mitra employed under the then prevalent Government Resolution dated 20th June 2002 but discontinued pursuant to the Government Resolution dated 11th August 2004 on the ground of eligibility are deemed to be continued as Panchayat Shiksha Mitra and are absorbed as Panchayat Shikshak under the Rules. To us it, prima facie, appears that the aforesaid Resolution though has been passed pursuant to the Division Bench Judgment of this Court in the matter of Kishori Prasad v. The State



of Bihar & Ors.[2008(2) PLJR 458] is contrary to Rule 20(iii) of the Rules.

20. Be that as it may, as none of the claims before us is based on the said Resolution, we do not express any opinion on the said Resolution.”

However, this is not in dispute that Circular dated 04.07.2008 was not under consideration before the Full Bench, but the findings recorded in Renu Kumari Pandey (supra) with regard to non-engagement of Shiksha Mitra by deeming fiction has been approved by the Full Bench. The Division Bench judgment in Renu Kumari Pandey (supra) was challenged before the Supreme Court in S.L.P.(C) No. 33303 / 2014, which was dismissed by the Supreme Court vide order dated 9.1.2012 with a liberty to the petitioner to file a review application before the High Court. Consequently, Civil Review No. 123 / 2012 was preferred by the petitioner which was also dismissed by the Division Bench vide order dated 17.12.2012. It is relevant to state here that an SLP No.34639/2014 was also preferred against the judgment of the Full Bench in Kalpana Rani (Supra) which was also dismissed by the Supreme Court while expunging certain remarks against the learned Senior counsel for the petitioner. In the above background, the



Circular dated 04.07.2008 cannot be held to be valid being in teeth of the law laid down by the Full Bench in case of Kalpana Rani (supra) and the fact that through the said circular the repealed circulars and resolutions have been sought to be modified and overriding effect has been sought to be given to Rules, 2006.

So far as L.P.A. No. 1470 of 2010 (Shashi Kant Vs. the State of Bihar and Others) which was disposed of on 19.05.2015 is concerned, the Full Bench judgment in Kalpana Rani (supra) was considered and the Division Bench distinguished it on the ground that in Kalpana Rani case the circular dated 4.7.2008 was not under challenge whereby the State Government had taken into account the abolition of the post of Shiksha Mitra with coming into force of the Rules, 2006, whereby and whereunder by a deeming fiction the candidates who acquired the qualification of Intermediate were treated as Shiksha Mitra and consequently absorbed as panchayat teacher by the operation of Rule 20(iii) of 2006 Rules. Apart from the above distinction, the candidates before the Full Bench came much after the abolition of the post of Shiksha Mitra and the Full Bench also dealt with a situation where persons were wrongly not engaged as Shiksha Mitra.



The Division Bench in LPA no. 1470/2010 (Shashi Kant v. State of Bihar and Ors.) decided the issue on the presumption that the relaxation was for both male and female candidates, but missed to appreciate that no deemed appointment of Shiksha Mitra could be made since the post had already been abolished. Hence, in the said case, the petitioner Shashi Kant was reinstated on the post of panchayat teacher by virtue of stipulation in Circular dated 4.7.2008 which in my opinion amounts to making an entry on the strength of an executive instruction, overriding the statutory rule which envisages only two modes of entry by Rule 9 and Rule 20(iii) of Rules, 2006, as noted above.

In view of the Full Bench judgment in Kalpana Rani's case which held the judgment of Kishori Prasad (supra) and other similar judgments, as, per incurium on the basis of which basis the said Circular dated 4.7.2008 was issued, in no circumstance the said circular can be given effect to.

The distinction between the fiction and presumption is that fiction assumes something, which is known to be false, whereas presumption assumes something, which may possibly be true. In the present case, the deeming fiction has been created for the applicants on abolished posts which is



beyond the circumference of deeming fiction. A useful reference may be made to the case of Bhuwalka Steel Industries Limited and Another Vs. Union of India and Others, (2017) 5 SCC 598. Para 38 reads as follows:

“38. There is a clear distinction in law between a legal fiction and presumption. “A distinction commonly taken between the fiction and the legal presumption runs something as follows: a fiction assumes something which is known to be false; a presumption (whether conclusive or rebuttable) assumes something which may possibly be true. This distinction is regarded as being reinforced, as it were, in the case of the rebuttable presumption because such a presumption assumes a fact which probably is true.” “Presumptions are closely related to legal fictions ... but they operate differently”. “Fictions always conflict with reality, whereas presumptions may prove to be true”. Legal fictions create an artificial state of affairs by a mandate of the legislature:

“... an assumption of fact deliberately,



lawfully and irrebuttably made contrary to the facts proven or probable with the object of bringing a particular legal rule into operation ... the assumption being permitted by law ...”

They compel everybody concerned including the courts to believe the existence of an artificial state of facts contrary to the real state of facts. When a fiction is created by law, it is not open to anybody to plead or argue that the artificial state of facts created by law is not true, barring the only possible course if at all available is to question the constitutionality of the fiction. It is settled law that only sovereign legislative bodies can create legal fictions but not a subordinate law making body.”

Coming to the facts of the present case, admittedly the appellant was not working as Shiksha Mitra on 1.7.2006 and he challenged his disengagement made in 2005 by filing writ application in 2012. Hence, he cannot claim parity with Vimla Devi and Arvind Kumar who were re-engaged in 2005 itself. Moreover, the judgment cited by the learned counsel for the appellant, as reported in AIR 1983 SC 1143 A. A. Calton Vs. The Director of Education and Anr. and AIR



1990 SC 405, P. Mahendran and Ors. Vs. State of Karnataka, have no application in the facts and circumstances of the present case.

It is evident that the petitioner appellant had preferred the writ application claiming relief by virtue of Resolution dated 04.07.2008 for a direction to treat him as a Shiksha Mitra since 2005 and as Panchayat Teacher from 01.07.2006.

However, during the course of hearing before this Full Bench, an I.A. No. 01 of 2019 has been preferred seeking amendment of prayer, for setting aside the Memo No. 2517, dated 04.07.2008. Such inconsistent stand of the appellant is beyond the terms of reference and moreover, for answering the terms of reference, there is no need to deliberate upon the said I.A. It appears that the ratio of Full Bench in Kalpana Rani (supra) was not brought to the notice of Division Bench and in my opinion had the same been brought to the notice of the Division Bench, the question of referring the matter to the Full Bench would possibly not have arisen.

In view of the above discussion, it is quite apparent that the resolution dated 4.7.2008 is based on judgment of this Court in case of Kishori Prasad (supra) which



has been held to be *per incurium*, the same cannot be given effect to. Additionally, since the purport of the said resolution is contrary to the provision of the Rules, 2006, prospective or retrospective application of the said circular becomes meaningless.

The reference is answered accordingly.

(Dinesh Kumar Singh, J)

Prabhat Kumar Jha, J. - I agree.

(Prabhat Kumar Jha, J)

Nilu Agrawal, J. - I agree.

(Nilu Agrawal, J)

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