

SUPREME COURT OF INDIA

Syed Abdul Qadir

Vs.

State of Bihar

C.A.Nos. 3351-3354 of 2003

(B.N. Agrawal, Harjit Singh Bedi and G.S. Singhvi JJ)

16.12.2008

JUDGMENT

B.N. AGRAWAL,J.

1. These appeals by special leave are directed against the common judgment of Patna High Court whereby a Division Bench of that Court dismissed letters patent appeals preferred by the appellants herein against that part of the judgment of the learned Single Judge in which it was decided that Office Order dated 16.11.2000 issued by the Finance Department, Government of Bihar, providing that fixation of pay scale on promotion of Assistant Teachers of the Government taken over Schools [the Nationalised Schools] in the State of Bihar shall be governed by Fundamental Rule 22(1)(a)(2) [FR.22(I)(a)(2)] instead of Fundamental Rule 22-C [FR.22-C], was valid. By the same judgment, the Division Bench allowed letters patent appeals preferred by the State of Bihar and set aside that part of judgment of the learned Single Judge whereby it was decided that Office Order dated 16.11.2000 would apply prospectively and not retrospectively and that recovery of the amount paid in excess in breach of FR.22(I)(a)(2) from the appellants was not to be made. While setting aside the judgment of the learned Single Judge and holding that, since Office Order dated 16.11.2000 only reiterated that the amended provisions of FR.22-C would apply and not FR.22-C, the question of its applicability with retrospective or prospective effect did not arise, the Division

Bench directed that the excess amount paid to the employees be recovered without interest in at least 50 instalments provided such an employee had the tenure of 50 months or more so that such an employee did not suffer unnecessary brunt of a cut in the salary.

2. While Civil Appeal Nos. 3351-54 and 3364 have been preferred by the aggrieved Assistant Teachers of the Nationalised Schools, Civil Appeal No. 3355 has been preferred by the Bihar Secondary Teachers Association.

3. We now proceed to the facts relevant for the disposal of these appeals. The appellants herein are the Assistant Teachers of the Nationalised Schools in the State of Bihar, administrative control of which lies with the Department of Human Resource Development, Government of Bihar. Exercising powers under Section 9 of the Bihar Non-Government Secondary School [Take Over of Management and Control] Act, 1981, the State Government vide Notification No. 12/B 8-760/75-398 dated 9th June, 1983 framed Bihar Nationalised Secondary School [Service Condition] Rules, 1983 [hereinafter referred to as 'the 1983 Rules'] and under rule 3 of the 1983 Rules, the secondary school teachers of the Nationalised Schools were categorised. The hierarchy of promotion of these teachers was from the post of Assistant Teacher [Junior Grade] to the post of Assistant Teacher [Subordinate Grade], then to the post Assistant Teachers [Selection Grade] and finally to the post of Head Master, which was the highest promotional post. Rule 17 of the 1983 Rules provided that the pay scale of the teachers of the Nationalised Secondary Schools would be determined as per Bihar Service Code and Rules issued by the State Government from time to time. At that point of time, the time scale of these teachers was regulated under Rule 78 of the Bihar Service Code. In order to remove anomaly in the pay scales of teachers of the Nationalised Schools in the State of Bihar and in terms of Bipartite Agreement entered into between the State Government on the one hand and Secondary School Teachers Association and other Unions on the other, the Finance Department, Government of Bihar, vide its Resolution dated 18th December, 1989 took a decision with regard to revision of pay scales of teachers of the Nationalised Schools based on the recommendations of the 4th Pay Revision Committee appointed by the State Government, which recommendations were made applicable to all the teachers who were in service on 1st January, 1986 and those who joined or were promoted thereafter. Clause 13 of the said Resolution provided that revised pay scales indicated in Schedule II of the said Resolution would be extended to the teachers of Nationalised Schools and the provisions relating to such teachers in the Central Government regarding training, eligibility for appointment and promotion and other service conditions would be made applicable to them as far as possible. Sub-clause (ii) of Clause 13 provided that 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 1.1.1986 shall have their pay fixed in the revised senior scale as indicated in Schedule II of the Resolution. However, those teachers who got promotion or time bound promotion into the junior selection grade but had not completed 12 years of service in the basic grade on 1.1.1986, shall have their pay fixed in the revised scale in the basic grade only on 1.1.1986 and they were to be extended the benefit of promotion and fixation of pay in the senior scale with effect from the date they completed 12 years of service. Sub-clause (iii) of Clause 13 laid down that those teachers who received promotion into junior selection grade or first time bound promotion after 1.1.1986 but before 1.3.1989 shall be given the benefit of promotion for the purpose of fixation of their pay in the revised scale only w.e.f. the date they have received promotion or from the date on which they complete 12 years of

service, whichever is later. Sub-clause (vii) of Clause 13 provided that the existing procedure of fixation of pay on promotion will cease to be applicable to teachers in the revised pay-scales w.e.f. 1.1.1986 and in their case the pay fixation on promotion would be governed by FR.22-C and instructions issued by the Central Government from time to time and not as per the existing procedure. It may be mentioned here that Department of Personnel and Training, Government of India, vide its Notification dated 30th August, 1989, published in the Gazette of India on 16th September, 1989, i.e., before Resolution dated 18th December, 1989 issued by the Finance Department of Government of Bihar came into force, deleted FR.22-C and in its place inserted FR.22(I)(a)(1) and FR.22(1)(a)(2).

4. On 20.2.1993 the Finance Department, Government of Bihar, issued another Resolution whereby Clause 13(ii) of its earlier Resolution dated 18.12.1989 - which provided that the category of teachers mentioned in the said clause would be extended the revised senior scale on completion of 12 years of service in the basic grade and that their pay in the senior scale shall be fixed as per FR.22-C - was amended to the effect that pay of these teachers, on completion of 12 years of service in the basic grade shall be fixed as per Rule 78(ii) of the Bihar Service Code. It may be mentioned that while under FR.22-C there was provision for grant of an additional increment on promotion to the higher post carrying duties and responsibilities of greater importance, there was no such provision under Rule 78(ii). However, despite the amendment aforesaid, the Human Resources Department of the Government of Bihar, vide Notification dated 24.6.1993, reiterated that pay fixation of teachers shall be made as per FR.22-C. Upon objection by the Audit Team of the Office of the Accountant General, Bihar, in regard to payment of pension, etc. to the concerned teachers on the basis of their last pay scale which was fixed as per FR.22-C and on being asked to provide information about the amendment/deletion of FR.22-C, the Kendriya Vidyalaya Sangathan informed the Office of the Accountant General that pay fixation of teachers in senior/selection scale was to be made under FR.22(1)(a)(2), and that notional increment was not admissible. Some of the elementary school teachers, who were affected by the Resolution dated 20.2.1993, filed a Writ Petition before the High Court of Patna, being CWJC No. 2405 of 1997 challenging Resolution dated 20.2.1993. The learned Single Judge vide its judgment dated 17.9.1997 disposed of the writ petition and while holding that the Resolution dated 20.2.1993 would come into effect only prospectively, directed that the said Resolution was not applicable in the cases of the petitioners of that Writ Petition in the matter of fixation of pay on promotion/conversion granted prior to 20.2.1993, forbidding the respondent-State of Bihar from reviewing the fixation of pay of the petitioners made prior to the said Resolution. Aggrieved, the State of Bihar challenged the judgment of the learned Single Judge by way of letters patent appeal, which having been dismissed for failure on the part of the State Government for taking required steps, a special leave petition was preferred before this Court, which was also dismissed. After the dismissal of the special leave petition by this Court, the State of Bihar filed letters patent appeal challenging that very judgment of the learned Single Judge, against which the special leave petition had been dismissed. A Division Bench of the High Court vide its judgment dated 17th February, 2000 dismissed the letters patent appeal on merits, which judgment of the Division Bench was not challenged by the State of Bihar before this Court.

5. Meanwhile, after the dismissal of the special leave petition by this Court, the Director, Secondary Education, Government of Bihar, vide his letter dated 8.1.1999 requested the Accountant

General to inform him about any decision of the State Government with regard to the applicability of amended provision regarding fixation of pay on promotion to the higher scale. The Accountant General in turn wrote to the Finance Department, Govt. of Bihar, in this regard.

6. On coming to know of the instances of pay on promotion being fixed in terms of FR.22-C, the Finance Department, Government of Bihar, on 16.11.2000 issued an Office Order to the Departments of Primary and Mass Education, Secondary Education and Primary Education, stating that pay fixation in terms of FR.22-C was irregular and illegal because the said rule had been substituted before the said date and no higher responsibility and duties were attached to the promotion post. Accordingly, it directed all the principals/headmasters of Nationalized Schools to re-fix the pay of the teachers in terms of provisions of FR.22(I)(a)(2) and recover the excess payment made from the date of initial fixation of pay under FR.22-C in one instalment, authorizing the Drawing and Disbursing Officer concerned to recover the excess amount in maximum 20 instalments, if requested.

7. Aggrieved by the said Office Order, the appellants herein and others similarly situated, filed Writ Petitions before the High Court of Patna, inter alia, for quashing Office Order dated 16.11.2000 and for issuing directions to the respondents not to reduce their pay scale and to allow them to continue in the scale which was fixed as per FR.22-C. A learned Single Judge of the High Court, while holding that FR.22(1)(a)(1) and FR.22(1)(a)(2) would be applicable in fixation of pay scale of teachers of the Nationalised Schools and that Office Order dated 16.11.2000 would apply prospectively and not retrospectively, quashed that part of the Office Order whereby direction for recovery of amount paid in excess was given. The State of Bihar as well as the appellants herein and others similarly affected laid a challenge against the judgment of the learned Single Judge by way of letters patent appeals before the High Court. While the State of Bihar challenged that part of the judgment of the learned Single Judge whereby it was held that the Resolution dated 16.11.2000 would apply prospectively and not retrospectively and against the direction for no recovery of amount paid in excess, the appellants herein and others challenged that part of the judgment whereby it was held that FR.22(1)(a)(1) and FR.22(1)(a)(2) would apply in fixation of pay of the teachers of the Nationalised Schools. As stated above, a Division Bench of the High Court allowed the letters patent appeals preferred by the State of Bihar and dismissed those preferred by the appellants herein and others similarly situated, holding that the cases of the appellants - teachers would be governed by FR.22(1)(a)(2), their fixation of pay would be made according to the amended rule i.e, FR.22(I)(a)(2) and not according to FR.22-C, directing the State Government to recover the amount paid in excess in reasonable installments.

8. Pursuant to the aforesaid directions of the High Court, the Finance Department, Government of Bihar, issued an Office Order dated 12.9.2002 stating that payment of salary from the month of September, 2002 would be made only if the drawing and disbursing authority certified that the pay scale of all the teachers had been re-fixed and steps for realization of the amount paid in excess in installments had been initiated.

9. Aggrieved by the judgment of the Division Bench, the appellants have filed these appeals by special leave.

10. We now turn to the rival submissions of learned counsel appearing on behalf of the parties. Shri P.S. Mishra, learned senior counsel, appearing on behalf of the appellants, submitted that in terms of Clause 13(vii) of Resolution dated 18.12.1989 of the Finance Department, Government of Bihar, the pay fixation of the appellants on promotion was rightly made in terms of the provision contained in FR.22-C as the said rule provided for grant of additional increment at the time of promotion to higher grade. Mr. Mishra further submitted that FR.22-C having been incorporated by adoption in the Resolution dated 18.12.1989, deletion of the said rule prior to its adoption in the Resolution or any amendment or substitution of that rule would not automatically delete, amend or substitute the same and,

therefore, the benefit of additional increment on promotion was rightly extended to the appellants. The next submission of the learned counsel is that since Office Order dated 16.11.2000 provided for fixation of pay of the appellants - teachers in terms of the amended provision i.e., FR.22(I)(a)(2), the said Order would apply prospectively and not retrospectively. Alternatively, it is submitted that in view of the fact that decision of the learned Single Judge in CWJC No. 2405 of 1997 holding that the amendment of Clause 13(ii) of Resolution dated 18.12.1989 by Resolution dated 20.2.1993 in the case of assistant teachers of primary schools would apply prospectively i.e., w.e.f. from 20.2.1993, had attained finality, the letters patent appeal against which having been dismissed by the Division Bench of the High Court and the State of Bihar having not challenged the said decision before this Court, the question of making the Office Order effective from a date prior to 20.2.1993 does not arise. It has also been submitted that even if it were to be held that the appellants were not entitled to the benefit of additional increment on promotion, the excess amount that has been paid to the appellants cannot and should not be recovered; it having been paid without any misrepresentation or fraud on the part of the appellants herein.

11. Per contra, Shri Rakesh Dwivedi, learned senior counsel appearing on behalf of the respondents, submitted that since FR.22-C, which was not even in existence on the day of issuance of Resolution dated 18.12.1989 wherein reference of it was made, the same having been substituted by FR.22(I)(a)(1) and FR.22(I)(a)(2), was not adopted and was only referred to in the said Resolution, the cases of the appellants would be governed by the amended provision and not FR.22-C. Alternatively, it is submitted that even if it were to be held that cases of the appellants would be governed by FR.22-C and not by the amended provisions, the appellants [assistant teachers], on their promotion to the higher/selection grade, would still not be entitled to the benefit of additional increment provided under FR.22-C as, admittedly, on their promotion to the higher/selection grade, they were not discharging any duties and responsibilities of greater importance. It is further submitted that as the question whether FR.22-C or its amended provision would apply in the case on hand was not the subject matter of the decision rendered in CWJC No. 2405 of 1997, it having decided the cases of the assistant teachers covered by Clause 13(ii) of the Resolution whereas in these appeals the cases of rest of the teachers covered by Clause (vii) are to be decided, the said decision is not at all relevant for deciding the issue at hand.

12. Before advertng to the respective submissions made by the learned counsel appearing on behalf of the parties, it would be useful to refer to Clause 13 of Resolution dated 18.12.1989, Rule 78 of the Bihar Service Code, FR.22-C, as it existed prior to its substitution, and FR.22(I)(a)(1) and FR.22(I)(a)(2), which replaced FR.22-C.

13. Clause 13 of Resolution dated 18.12.1989 deals with revision of pay scale of assistant teachers of the Nationalised Schools and fixation of pay on their promotion, relevant portion of which runs thus:-

"Clause 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 indicated in Schedule II. 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 also have their pay fixed in the revised scale in the basic grade only on the 1st day of 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 also have their pay fixed in the revised senior scale. Promotion into the senior selection grade or second time bound 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 availability of post 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.

.....

(vi)

(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) & (v) shall also be governed by those provisions."

14. While sub-clauses (ii), (iii), (iv) and (v) of Clause 13 lay down the procedure to be adopted for fixation of pay on promotion in respect of different classes of teachers mentioned in these sub-clauses, sub-clause (vii) provides that the pay fixation of teachers referred to in sub-clauses (ii), (iii), (iv) and (v) shall be governed

by FR.22-C and instructions issued by the Central Government from time to time.

15. Rule 78 of the Bihar Service Code, which governed the fixation of pay of the appellants - teachers prior to 1.1.1986, reads as under:-

"Rule 78.- The initial substantive pay of a Government servant who is appointed substantively to a post on a time-scale of pay is regulated as follows:-

(a) If he holds lien on a permanent post other than a tenure post, or would hold a lien on such a post had his lien not been suspended:-

(i) When appointment to the new post involved the assumption of duties or responsibilities of greater importance [as interpreted for the purpose of rule 89] than those attached to such permanent

post, he will draw as initial pay the stage of the time-scale next above his substantive pay in respect of the old post.

(ii) When appointment to the new post does not involve such assumption, he will draw as initial pay the stage of the time-scale which is equal to his substantive pay in respect of the old post, or, if there is no such stage the stage next below that pay, plus personal pay equal to the difference and in either case will continue to draw that pay until such time as he would have received an increment in the time-scale of the old post, or for period after which an increment is earned in the time-scale of new post, whichever is less. But if the minimum pay of the time-scale of the new post is higher than his substantive pay in respect of the old post, he will draw that minimum as initial pay."

16. A plain reading of sub-rule (i) of Rule 78 makes it clear that an incumbent, on being appointed to the new post, involving the assumption of duties or responsibilities of greater importance than those attached to such permanent post, will draw as initial pay the stage of the time-scale next above his substantive pay in respect of the old post, but in the event of appointment to the new post, not involving such assumption, the fixation of pay will be done under sub-rule (ii) of Rule 78 according to which, he will draw as initial pay the stage of the time-scale which is equal to his substantive pay in respect of the old post. or, if there is no such stage the stage next below that pay, plus personal pay equal to the difference and in either case will continue to draw that pay until such time as he would have received an increment in the time-scale of the old post It may be mentioned here that under Rule 78(i) of the Bihar Service Code, there is no provision of granting of additional increment while fixing the basic pay of the higher post, which appear to be the reason for ignoring the said rule by the State Government and deciding to have the central pattern vide FR.22-C and instructions issued by the Central Government from time to time in the case of pay fixation on promotion vide Resolution dated 18.12.1989.

17. FR.22-C, which was substituted even prior to the issuance of Resolution dated 18.12.1989, and was replaced by FR.22(I)(a)(1) and FR.22(I)(a)(2), read thus:-

"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."

18. A reading of FR.22-C makes it clear that benefit of an additional increment would be extended to a government servant in the event of his being promoted or appointed to 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. As aforesaid, FR.22-C was substituted even prior to the issuance of Resolution dated 18.12.1989 and was replaced by FR.22(I)(a)(1) and FR.22(I)(a)(2), relevant portions of which are quoted hereinbelow:- "FR.22(I).- 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 fulfillment 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."

"FR.22(I)(a)(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."

19. Rule 22(I)(a)(1) provides that when a government servant is promoted or appointed to a higher post and the higher post he is promoted carries 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. According to FR.22(I)(a)(2), the benefit of an additional increment, which is available to a government servant under FR.22 (I)(a)(1), would not be available to the government servant if the higher post he is promoted or appointed to does not carry duties and responsibilities of greater importance than those attaching to the post held by him. Even, according to FR.22- C, the additional increment was to be granted only in cases where the incumbent on promotion or appointment to a higher post has to discharge the duties and responsibilities of greater importance. Therefore, in cases where on promotion or appointment to the higher post no duties and responsibilities of greater importance - than those being discharged in the post held by the incumbent regularly prior to the promotion - were to be discharged by the government servant, the pay fixation formula is provided for under FR.22(I)(a)(2) according to which benefit of additional increment is not to be extended at the time of fixation of pay on the promotional post.

20. The primal question for consideration in these appeals is as to whether provisions of FR.22-C or

FR.22(I)(a)(1) and FR.22(I)(a)(2) would apply to the appellants-teachers.

21. The admitted position in the case on hand is that the post of Assistant Teachers, on promotion to the higher/selection grade, does not carry any duties and responsibilities of greater importance than those attached to the post held by them regularly prior thereto. It is also admitted position that on the day the Resolution was issued by the State Government, i.e., 18th December, 1989, which laid down the criteria for fixation of pay, etc., FR.22-C was not even in existence. The submission of the learned counsel appearing on behalf of the appellants is that it is FR. 22-C which is applicable to the case of the appellants herein and not FR.22(I)(a)(1) or FR.22(I)(a)(2) as, according to him, FR.22-C was incorporated by adoption in the Resolution and deletion of the said rule prior to its adoption in the Resolution dated 18.12.1989 and any amendment or substitution of that rule would not automatically delete, amend or substitute the same. This submission of Shri Mishra, even if it were to be accepted, would be of no help to the appellants herein as even under FR.22-C an incumbent would get benefit of additional increment at the time of fixation of pay only in the event of the higher post, he is promoted or appointed, carries duties and responsibilities of greater importance, which admittedly is not so in the case on hand. It appears that on the day the Resolution was issued by the State Government, i.e., on 18.12.1989, the officials of the State of Bihar, who were responsible for issuing the Resolution, were unaware of the fact that FR.22-C had already been substituted and in place thereof FR.22(I)(a)(1) and FR.22(I)(a)(2) had been inserted as otherwise there was no reason to apply the rule - which had already been substituted - to the appellants-teachers- and not the rule which was there on the statute book on the day of issuance of the Resolution i.e., the substituted provisions of FR.22-C. As quoted above, Clause 13 of Resolution dated 18.12.1989 begins with, "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" and sub- clause [vii] thereof, provides that "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".

22. Clause 13, therefore, makes it clear that vide Resolution dated 18.12.1989 the State Government decided that the provisions under the Central Government regarding training, eligibility for appointment and promotion and other service conditions would be made applicable as far as possible to the teachers of the Nationalised School in the State of Bihar and that their pay fixation on promotion shall be governed by FR.22-C and instructions issued by the Central Government

for their teachers from time to time. Therefore, in the light of what is provided under Clause 13 of the said Resolution, as aforesaid, the submission that even after substitution of FR.22-C, the pay fixation on promotion would still be governed by the said rule and not by the amended rule is bound to be rejected. Having regard to the provisions of Clause 13 of Resolution dated 18.12.1989, we hold that pay fixation on promotion of the assistant teachers of Nationalised Schools in the State of Bihar would be governed by FR.22(I)(a)(1) and FR.22(I)(a)(2), as the case may be, and not by FR.22-C, which was not even in existence on the day Resolution dated 18.12.1989 was issued by the Finance Department of the Government of Bihar. Insofar as the appellants-teachers are concerned, since they were not discharging any duties and responsibilities of greater importance on their

promotion to the higher post/grade, which is sine qua non for being eligible for an additional increment, they would be governed by FR.22(I)(a)(2) and not by FR.22(I)(a)(1).

23. Since, having regard to the provisions of Clause 13 of the Resolution, we have held that appellants - teachers on their promotion to the higher post/grade would be governed by the amended provisions of FR.22-C, i.e., FR.22(I)(a)(1) and FR.22(I)(a)(2) we need not go into the submission made by the learned counsel appearing on behalf of the appellants that FR.22-C having been incorporated by adoption in the Resolution, deletion of the said rule prior to its adoption in the Resolution or any amendment or substitution of that rule would not automatically delete, amend or substitute the same.

24. The question that now arises is as to whether the amended provisions would have prospective or retrospective application. It is the submission of learned counsel appearing on behalf of the appellants - teachers that Office Order dated 16.11.2000, whereby instructions have been issued to fix the pay of the appellants- teachers as per the amended provisions of FR.22-C, i.e., FR.22(I)(a)(2), should be applied prospectively and not retrospectively. Alternative submission in this regard is that since decision of the learned Single Judge in CWJC No. 2405 of 1997 holding that the amendment of sub-clause (ii) of Clause 13 of Resolution dated 18.12.1989 by Resolution dated 20.2.1993 in the case of teachers referred to in the said sub-clause would apply prospectively i.e., w.e.f. from 20.2.1993, had attained finality, the letters patent appeal against which having been dismissed by the Division Bench of the High Court and the State Government having not challenged the said decision before this Court, the question of making the Office Order dated 16.11.2000 effective from a date prior to 20.2.1993 does not arise. On the other hand, learned counsel appearing on behalf of the respondents - State of Bihar submitted that insofar as decision in CWJC No. 2405 of 1997 is concerned, it is not at all relevant in the case on hand as the challenge in that writ petition was to the amendment made in sub-clause (ii) of Clause 13 whereas in the case on hand, the cases of teachers covered by sub-clauses (iii), (iv) and (v) of Clause 13 are to be decided. Ordinarily, we would have held that the amended provisions of FR.22-C would apply to the appellants - teachers w.e.f. 16.9.1989, i.e., the date from which the amended provisions of FR.22-C were notified. But, in the peculiar facts and circumstances of this case and having regard to the fact that the State Government did not move this Court against the decision of the Division Bench whereby letters patent appeal preferred by the State Government challenging judgment of the learned Single Judge holding that Resolution dated 20.2.1993 amending sub-clause (ii) of Clause 13 of the Resolution would apply to the class of teachers referred to in the said sub-clause prospectively i.e., w.e.f. the date of issuance of the Resolution dated 20.2.1993, was dismissed, we hold that FR.22(I)(a) (2) shall apply to the teachers of Secondary Schools also w.e.f. 20.2.1993.

25. We now come to the question as to whether the amount that has been paid in excess to the appellants-teachers should be recovered or not. It is the submission of the learned counsel appearing on behalf of the appellants - teachers that even if it were to be held that the appellants were not entitled to the benefit of additional increment on promotion, the excess amount that has been paid to the appellants cannot and should not be recovered; it having been paid without any misrepresentation or fraud on their part.

26. From the record that has been produced before us, there is not an iota of doubt that officials of the State Government, responsible for issuing Resolution dated 18.12.1989, were ignorant of the amended provisions of the FR.22-C and it is their inaction, negligence and carelessness which has created all the chaos in the case on hand. Further, until January 1999, the officials of the Education Department of the Government of Bihar were unaware of the amendment in the said rule until the Accountant General, Government of Bihar, on a query being made to him by the Director of Secondary Education, who is the head of the Department of the Secondary Education in the State of Bihar, vide his letter dated 8.1.1999, responded to the said query that the officials of the Education Department came to know of the amendment in FR. 22-C. That apart, it also appears from the record produced before us that while the Finance Department of the Government of Bihar was in favour of making the amended provisions of FR. 22-C applicable to the appellants- teachers after having come to know that the said rule did not exist and had been substituted, the Department of Human Resource Development, Government of Bihar, wanted to apply the unamended provision to the appellants-teachers so as to make available the benefit of additional increment provided for under FR.22-C to its teachers, unaware of the fact that even under FR.22-C they were not entitled to the additional increment as they were not discharging duties and responsibilities of greater importance on the promoted post. This further goes on to show that the authorities in the State of Bihar were not even aware of the basic requirement for grant of additional increment and the decision appears to have been taken without proper application of mind. Otherwise, there was no reason for the Finance Department to state in the counter affidavit filed before the High Court that any affidavit filed on behalf of the Education Department may be ignored as Finance Department was the competent authority. In this very affidavit, the Finance Department while admitting that the pay fixation by the Education Department was wrong, stated as under:-

"...the fixation of pay under Fundamental Rule 22-C has wrongly been made as it was not in existence. Pay fixation on the basis of a non-existent rule is a bona fide mistake."

27. This Court, in a catena of decisions, has granted relief against recovery of excess payment of emoluments/allowances if (a) the excess amount was not paid on

account of any misrepresentation or fraud on the part of the employee and (b) if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous. The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess. See *Sahib Ram vs. State of Haryana*, 1995 Supp. (1) SCC 18, *Shyam Babu Verma vs. Union of India*, [1994] 2 SCC 521; *Union of India vs. M. Bhaskar*, [1996] 4 SCC 416; *V. Ganga Ram vs. Regional Jt., Director*, [1997] 6 SCC 139; *Col. B.J. Akkara [Retd.] vs. Government of India & Ors.* (2006) 11 SCC 709; *Purshottam Lal Das &*

Ors., vs. State of Bihar, [2006] 11 SCC 492; Punjab National Bank & Ors. Vs. Manjeet Singh & Anr., [2006] 8 SCC 647; and Bihar State Electricity Board & Anr. Vs. Bijay Bahadur & Anr., [2000] 10 SCC 99.

28. Undoubtedly, the excess amount that has been paid to the appellants - teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. Learned counsel appearing on behalf of the appellants-teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellants-teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellants-teachers should be made.

29. Learned counsel also submitted that prior to the interim order passed by this Court on 7.4.2003 in the special leave petitions, whereby the order of recovery passed by the Division Bench of the High Court was stayed, some instalments/amount had already been recovered from some of the teachers. Since we have directed that no recovery of the excess amount be made from the appellant-teachers and in order to maintain parity, it would be in the fitness of things that the amount that has been recovered from the teachers should be refunded to them.

30. In the result, the appeals are allowed in part, the impugned judgment so far as it relates to the direction given for recovery of the amount that has been paid in excess to the appellants - teachers is set aside and that part of the impugned judgment whereby it has been held by the Division Bench that the amended provisions of FR.22-C would apply to the appellants-teachers is upheld. We direct that no recovery of the excess amount, that has been paid to the teachers of Secondary Schools, be made, irrespective of the fact whether they have moved this Court or not. We also direct that the amount that has been recovered from some of the teachers, after the impugned judgment was passed by the High Court, irrespective of the fact whether they have moved this Court or not, be refunded to them within three months from the date of receipt of copy of this judgment.