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Delivered on 20.12.2012.

Case :- WRIT - A No. - 20740 of 2012

Petitioner :- Arun Kumar Singh & Others

Respondent :- State Of U.P. & Others

Petitioner Counsel :- Siddharth Khare,Ashok Khare,Manoj
Srivastava

Respondent Counsel :- C.S.C.,K.S.Shukla,S.K. Verma

With

Case :- WRIT - A No. - 20741 of 2012

Petitioner :- Chandra Bhanu Dubey

Respondent :- State Of U.P. & Others

Petitioner Counsel :- Siddharth Khare,Ashok Khare

Respondent Counsel :- C.S.C.,Jitendra Kumar,K.S.Shukla,S.K.
Verma

With

Case :- WRIT - A No. - 24618 of 2012

Petitioner :- Anil Kumar Chaubey And Others

Respondent :- State Of U.P. And Others

Petitioner Counsel :- T.N. Tiwari

Respondent Counsel :- C.S.C.,Rajeshwar Singh

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Hon'ble Ashok Bhushan,J.

Hon'ble Prakash Krishna,J.

Hon'ble Sanjay Misra,J.

(Delivered by Hon'ble Ashok Bhushan, J.)

A learned Single Judge, while hearing Writ Petition No.20740 of 2012 (Arun Kumar Singh and others vs. State of U.P. and others) and other similar matters made a reference for constituting a Full Bench to answer following three questions:-

“(a) Whether the power of the parent department

to revoke the deputation even before the expiry of the term for good and valid reason is lost, only due to the fact that the deputationist was getting some additional monetary benefits while working on deputation.

(b) Whether the decision of the employer in revoking the deputation even before expiry of the term on good and valid reasons would be bad merely because the employee during deputation was getting better salary/allowances.

(c) Whether the Single Judge was justified in declaring the judgment of the Single Judge and of the Division Bench dated 17.02.2011 and dated 27.05.2011 respectively as per incuriam or he was obliged to refer the matter to a larger bench if he had doubts about the said judgments.”

The Hon'ble the Chief Justice vide order dated 22nd May, 2012 constituted this Full Bench.

Before we proceed to answer the questions referred, it is necessary to note background facts giving rise to the reference.

It shall be sufficient to note the pleadings in Writ Petition No.20740 of 2012 (Arun Kumar Singh and others vs. State of U.P. and others) for considering the questions referred which may be treated as leading writ petition.

The petitioners were appointed as Assistant Teachers in Junior Basic Schools run by U.P. Board of Basic Education. The petitioners were appointed as Assistant Teachers between 1997 to 1999 and were subsequently given promotion as Assistant Teacher in Senior Basic Schools between the year 2004-2006. The constitutional provisions contained in Part-IV of the Constitution of

India (Articles 39, 41, 45 and 46) enjoin upon the State to frame its laws and policy to implement objectives which have been delineated in the aforesaid constitutional provisions. The aforesaid constitutional provisions enjoin the State to take effective steps for providing education to children. Right to education is now a fundamental right of children between age of 6 to 14 and State is obliged to provide free and compulsory education to all children. The Central Government for attaining the aforesaid objectives, had taken a policy decision to launch a mission namely "Sarva Shiksha Abhiyan". The State Governments were involved in the implementation of the scheme so that compulsory education be provided to children. The State of U.P. has also launched various schemes for achieving the aforesaid goal. The Block Resource Centres and Nyaya Panchayat Resource Centres (BRC and NPRC) were created towards the aforesaid end. A Government order dated 1st September, 2001 was issued providing for a methodology for selecting coordinators/co-coordinators at Block Resource Centres and Coordinator at Nyaya Panchayat Resource Centres. The Government order contemplated selection of coordinator at Block Resource Centre from amongst Headmasters of primary school or Assistant Teachers of junior high schools or a teacher who has worked as coordinator at Nyaya Panchayat Resources Centre for two years. Similarly for Co-coordinator at Block Resource Centres Assistant Teachers of primary schools having four years experience were eligible. For Coordinator at Nyaya Panchayat Resource Centre, Headmaster of primary schools or Assistant Teacher of junior high schools having 8 years service were eligible. Necessary posts for coordinator/co-coordinator at Block Resources Centres and coordinator at Nyaya Panchayat Resource Centres were created by the State Government. Large number of coordinator/co-coordinators at Block Resource Centres and coordinator at Nyaya

Panchayat Resource Centres were appointed in pursuance of the Government order as modified from time to time. The engagements of coordinator/co-coordinator were initially for a period of two years. The State while implementing the scheme realised that Nyaya Panchayat Resource Centres have completely failed to achieve the object and due to large number of teachers being posted at Nyaya Panchayat Resource Centres there is shortage of teachers in the Primary/Junior High Schools. The State Government decided to reconstitute the Block Resource Centre and Nyaya Panchayat Resource Centres. A Government order dated 2nd February, 2011 was issued by the State Government for reconstituting the aforesaid resource centres. The State Government decided that coordinators of Block Resource Centre shall be Assistant Basic Shiksha Adhikari or Nagar Shiksha Adhikari, ex-officio. It was further decided that at Nyaya Panchayat level the Headmasters of Junior High School shall be made Sankul Prabhari who shall be ex-officio coordinator of Nyaya Panchayat Resources Centre. In the new reconstituted scheme the Coordinators were thus made ex-officio. The Government also decided that due to shortage of teachers in the institutions, it is necessary to send teachers who have been working at Block Resource Centres and Nyaya Panchayat Resource Centres to their parent institutions. The reconstituted scheme was implemented and the posts which were created for Block Resource Centre and Nyaya Panchayat Resource Centre were surrendered and the Government order contemplated that out of surrendered posts certain posts be transferred to Nyaya Panchayat Resources Centre for implementation of new scheme. The Government order dated 2nd February, 2011 gives figure of the posts which have been surrendered and the posts which are to be now utilised by transfer on the aforesaid posts for implementation of new scheme. The Government order clearly meant that earlier

scheme is now given up and the new scheme shall be implemented as a consequence of which large number of teachers were to be repatriated to their parent institutions for teaching work which was suffering. In pursuance of the Government order dated 2nd February, 2011, the State Project Director issued a consequential order dated 10th February, 2011 inviting fresh applications from Assistant Teachers of Primary and Junior High Schools for choosing co-coordinators at Block Resource Centres and Nyaya Panchayat Resource Centres. The post of co-coordinators in Block Resource Centre were to be filled from teachers of Science, Maths, English, Hindi and Social Science. After issuance of the Government order dated 2nd February, 2011 and the order dated 10th February, 2011, large number of Assistant Teachers and Headmasters who were working as cCoordinator/co-coordinators were to be repatriated to their parent institutions.

Those Assistant Teachers and Headmasters who were working as Coordinators and Co-coordinators challenged the Government order dated 2nd February, 2011 and the order dated 10th February, 2011 by filing writ petitions. In this context reference is made to Writ Petition No.9393 of 2011 (Har Pal Singh and others vs. State of U.P. and others), Writ Petition No.10232 of 2011 (Virendra Singh and others vs. State of U.P. and others) and Writ Petition No.16615 of 2011 (Subhash Chandra Rathore and another vs. State of U.P. and others). All the aforesaid writ petitions were heard and dismissed by learned Single Judges of this Court upholding the Government order dated 2nd February, 2011 and the order dated 10th February, 2011. The challenge to the Government order on the ground that Government order is arbitrary, was repelled. This Court held that consequent to the Government order, the teachers and Headmasters who were working have to report to

their parent institutions. Special appeals were filed before the Division Bench challenging the order of the learned Single Judges. Reference is made to Special Appeal No.371 of 2011 (Har Pal Singh & others vs. State of U.P. and others) which was filed against the judgment and order of learned Single Judge dated 17th February, 2011 by which the writ petition was dismissed. All the special appeals were heard by the Division Bench of this Court and vide its detail judgment and order dated 27th May, 2011, the Division Bench dismissed all the special appeals and upheld the order of learned Single Judges. The writ petitioners in pursuance of the Government order dated 2nd February, 2011 applied and were selected for appointment as co-coordinators. Reference has been made to the appointment letter dated 19th May, 2011 by which the petitioners were appointed as co-coordinators in Block Resource Centres. The petitioners claimed to have joined in May, 2011 and were entitled to continue at least up to May, 2013.

Several writ petitions being Writ Petition No.1178 (SS) of 2011 (Sunil Dutt & others vs. State of U.P. and others) and other writ petitions have been filed at Lucknow Bench of this Court in which writ petitions also the order dated 10th February, 2011 issued by the State Project Director inviting applications for appointment in pursuance of the Government order dated 2nd February, 2011 was under challenge. The aforesaid writ petitions were filed by those coordinator/co-coordinators who were selected and working since before 2nd February, 2011. The petitioners of that writ petitions challenged the Government order dated 2nd February, 2011 as well as the consequential order dated 10th February, 2011 on several grounds including the ground that by repatriation they will suffer financial loss since as Block Resource Coordinators they shall be entitled to receive higher salary. Before the learned Single Judge at

Lucknow Bench of this Court the respondents pointed out that writ petitions filed by similarly situated persons have already been dismissed by judgment and order of learned Single Judge in **Har Pal Singh's** case (supra) upholding the Government order dated 2nd February, 2011 and the petitioners have no right to continue on the post of coordinator/co-coordinators. Before the judgment could be delivered by the Lucknow Bench of this Court, the respondents also pointed out that special appeals against the judgment of learned Single Judges have also been dismissed by the Division Bench vide its judgment and order dated 27th May, 2011. The learned Single Judge of Lucknow Bench of this Court after noticing the judgment of learned Single Judge of this Court dismissing the writ petition as well as the Division Bench judgment of this Court in **Har Pal Singh's** case (supra), allowed the writ petitions vide its judgment and order dated 9th February, 2012. Learned Single Judge of Lucknow Bench held the judgments of learned Single Judge and Division Bench in **Har Pal Singh's** case (supra) as per-incuriam. After the judgment of learned Single Judge dated 9th February, 2012, the State Project Director has cancelled its earlier order dated 10th February, 2011 passed in consequence of the Government order dated 2nd February, 2011. A letter dated 13th April, 2012 was issued by the State Project Director in purported compliance of the judgment of learned Single Judge of Lucknow Bench dated 9th February, 2012. In Writ Petition No.20740 of 2012 order dated 13th April, 2012 was challenged. The petitioners are apprehending that their working as co-coordinators is likely to be interfered with in view of setting aside the order of State Project Director dated 10th February, 2011.

In pursuance of the order dated 13th April, 2012, the Basic Shiksha Adhikari in certain districts have issued an order dated 20th

April, 2012 directing for restoration of earlier position and new appointments of coordinators and co-coordinators in pursuance of the Government order dated 2nd February, 2011 were cancelled. For example, in Writ Petition No.20741 of 2012 order passed by the Basic Shiksha Adhikari dated 20th April, 2012 has been brought on the record. In all the writ petitions, which are up for consideration in this bunch of writ petitions, the order of the State Project Director dated 13th April, 2012, which has been issued in pursuance of the order of the learned Single Judge of Lucknow Bench, is under challenge.

A learned Single Judge of this Court while entertaining the writ petitions, has framed the aforesaid three questions and made a reference and also passed an interim order staying the order dated 13th April, 2012 of the State Project Director.

All the three issues, which have been referred for consideration being interconnected, are taken together.

As noted above, the coordinator/co-coordinators were appointed earlier in pursuance of the Government order dated 1st September, 2001 at Block Resource Centres and Nyaya Panchayat Resource Centres. Large number of teachers from primary institutions/junior high schools including Headmasters of primary institutions were appointed. For implementation of Sarva Shiksha Abhiyan and various projects undertaken by the State Government for providing compulsory education to the children schemes were framed and implemented by the State Government as a policy decision of the State and the appointments as coordinator/co-coordinators were made by executive orders issued by the State Government. The State Government issued Government order

dated 2nd February, 2011 for reconstituting the Block Resource Centres and Nyaya Panchayat Resource Centres in reference to the Government order dated 1st September, 2001 and other Government orders issued from time to time. The Government order dated 2nd February, 2011 specifically noticed that Nyaya Panchayat Resource Centres created under Sarva Shiksha Abhiyan are not able to provide impetus to education programmes. The State Government decided to reconstitute the resource centres since expected results were not being delivered by the resource centres. The State Government also specifically noted that due to posting of 8249 coordinators at Nyaya Panchayat Resource Centres there was shortage of teachers in the institutions. It was specifically provided in the Government order that as there is shortage of teachers, teachers be sent to their parent institutions. It is useful to note the salient features of the Government order dated 2nd February, 2011 with regard to reconstitution of Block Resource Centres and Nyaya Panchayat Resource Centre, which are as under:-

- (i) The Coordinators of Block Resource Centre shall be henceforth Assistant Basic Shiksha Adhikari/Nagar Shiksha Adhikari who shall be ex-officio coordinators of Block Resource Centre/Urban Resource Centre.
- (ii) The Headmasters of Junior High Schools who have been made Sankul Prabhari shall be ex-officio Coordinators of Nyaya Panchayat Resources Centre.
- (iii) The Co-coordinators who shall be required at Block Resource Centre and Nyaya Panchayat Resources Centre shall be appointed and the posts

shall be earmarked subjectwise, namely, Science, Mathematics, English, Hindi, Social Science and Special Education.

- (iv) The posts of coordinators at Nyaya Panchayat Resources Centre shall be surrendered and shall be transferred to Block Resource Centre.

The methodology for selecting the co-coordinators at resource centres was also changed and qualifications were laid down in the Government order dated 2nd February, 2011 and in pursuance of the said Government order, the State Project Director issued order dated 10th February, 2012 and thereafter steps were taken in all districts and co-coordinators were selected and appointed. The petitioners are thus co-coordinators who have been appointed subsequent to the Government order dated 2nd February, 2011. The petitioners before the Lucknow Bench of this Court in Writ Petition No.1178 (SS) of 2011 (Sunil Dutt and others vs. State of U.P. and others) and other connected matters were the coordinator/co-coordinators who were selected and working prior to reconstitution of the Block Resource Centres by Government order dated 2nd February, 2011. Although the writ petitions filed by similarly situated coordinator/co-coordinators appointed and working prior to 2nd February, 2011 like **Har Pal Singh's** case (supra) and other writ petitions were dismissed and the special appeals have also been dismissed by a Division Bench of this Court, but a decision was taken by a learned Single Judge of Lucknow Bench of this Court in **Sunil Dutt's** case (supra) holding the earlier two judgements as per-incuriam and allowed the writ petition filed by such coordinator/co-coordinators who were appointed prior to Government order dated 2nd February, 2011 and further allowed them to continue and also issued mandamus to pay them higher

salary.

From the salient features of the Government order dated 2nd February, 2011, it is clear that earlier policy for appointment of coordinator/co-coordinators were changed and given up with specific stipulation that teachers who were earlier appointed shall go to their parent institutions since there was shortage of teachers for teaching and new scheme will be implemented in which coordinators at Block Resource Centres as well as Nyaya Panchayat Resource Centres shall be ex-officio Assistant Basic Shiksha Adhikari and Sankul Prabhari. Various posts earlier created were surrendered and transferred. Thus the Government order completely reconstituted the scheme and abolished the scheme of coordinators at Block Resource Centres and Nyaya Panchayat Resource Centres. There cannot be any dispute that policy making is in the domain of the State and policy can be changed from time to time by the State Government. One of the submissions which has been noticed in **Sunil Dutt's** case (supra) is that the policy dated 2nd February, 2011 shall be prospectively implemented and shall not effect appointments already made. It was also noticed that the process of appointment, which was introduced by the Government order dated 2nd February, 2011, is only for future appointment and the said Government order was to be implemented with immediate effect. The submission noted in **Sunil Dutt's** case (supra) is that the new policy cannot affect the working of the coordinator/co-coordinators who are already working. The policy was a integrated policy which affected both i.e. coordinator/co-coordinators who were working at the relevant time and those who were to be newly appointed in accordance with the changed policy. When the policy contemplated that there is shortage of teachers and the teachers working in the Nyaya

Panchayat Resource Centres shall be reverted to their parent institution, the said policy clearly affected the incumbents who were already working as coordinator/co-coordinators. Thus the submission that the said Government order cannot be applicable on the coordinator/co-coordinators who are already working is fallacious and against the clear stipulation in the Government order dated 2nd February, 2011.

Before the learned Single Judge and also before the Division Bench in **Har Pal Singh's** case (supra) all the arguments made by coordinator/co-coordinators who were working at the time of issuance of Government order dated 2nd February, 2011, were raised and considered. The Division Bench noted following 4 points for consideration which are as under:-

"(1) Under what circumstances this Court can interfere in policy decisions taken by the State Government.

(2) Whether the change in policy by issuance of Government Order dated 2nd February, 2011 is arbitrary and unreasonable.

(3) Whether the appellants have any vested right to continue as Coordinator/Co-Coordinator after the Government dated 2nd February, 2011 is given effect to.

(4) Whether the learned Single Judge was bound to follow the interim order passed in a similar matter by another Single Judge of the Lucknow Bench of this Court."

Both the parties made elaborate submissions on the aforesaid points and while answering Point No.1 and 2, the Division Bench made following observations:-

"From the perusal of the Government Order dated 2nd February, 2011, we are of the considered opinion that the change in the policy effected by the State Government is based on relevant considerations and cannot be said to be arbitrary so as to entitle this Court to interfere. It is for the State Government to see that the teaching does not suffer. It is the constitutional obligation to provide free education to the children between the age of 6 years and 14 years. This is specially in aid of achieving the avowed object. Therefore, it cannot be said that the policy framed by the Government is arbitrary. The submission of the learned counsel for the appellants that one set of teachers are being replaced by another set of teachers is wholly misplaced. The existing Coordinators/Assistant Coordinators were not doing any regular teaching work. They were involved in supervision of teaching work and various other activities as a result of which teaching work in the school suffered. In the new scheme Co-Coordinators are also required to do teaching work which will be a welcome step towards fulfilling the constitutional obligation.

The plea that the Government Order dated 2nd February, 2011 would operate prospectively and would not cover the cases of existing Coordinators/Co-Coordinators is not correct. It is to be taken note of that all the appellants have been appointed as Coordinators/Assistant Coordinators, as the case may be, on a fixed term of two years on deputation basis and they are still holding their lien on their original post. They are not being paid any extra remuneration what they were getting as teachers. Their primary duty is to teach students. If for some reason they have been appointed under a policy and on a review of their working the Government comes to the conclusion that it is not achieving the desired result it is fully entitled to change the policy. The appellants have no vested rights to say that their appointment as Coordinators/Co-Coordinators cannot be terminated midway. We find from the letter of appointment that a specific

condition has been mentioned there that their appointment can be cancelled at any time. That being the position we are of the considered opinion that with the change of policy the appellants cannot claim any right to continue to complete their full tenure.

Applying the test laid down by the Apex Court in the aforesaid cases regarding interference in a policy decision, we are of the considered opinion that above policy framed by the State Government cannot be said to be arbitrary, unreasonable and it is the result of conscious decision on a review of the working of the existing system of Coordinators and Co-ordinators and State is well within the jurisdiction to change the same in order to achieve the desired result. We may mention here that there is not allegation of mala fied raised against the State Government or the Authorities in framing the said policy. We further find that the change in the policy is of the State Government is well informed by reasons and it is to ensure that the education of the children does not suffer. Therefore, it cannot be said to be arbitrary and unreasonable so as to violate Article 14 of the Constitution of India or other parameters deduced under Point No.1."

The issue as to whether the coordinator/co-coordinators have vested right to continue, was negatived and following was laid down by the Division Bench:-

"While dealing with Point No.2 hereinbefore we have already held that the appointment of the appellant as Coordinators/Co-ordinators was for a fixed term of 2 years. They were not paid any extra remuneration for that work. We also find that their lien on the original post of teacher has been maintained. Thus their appointment on the post of Coordinator/Co-Coordinator is only by way of deputation even if the appointment has been made by facing a selection process. It can be

terminated at any time either by a special or general order as held by this Court in the case of Ram Kumar(supra) that an officiating employee has no right to post and his appointment can be cancelled at any time.

In the case of Babu Ram Ashok Kumar and another vs. Antarim Zila Parishad, AIR 1964 Alld. 534, the Full Bench of this Court has held as follows:

'(9) A Court of appeal would not interfere with the exercise of discretion by the Court below, if the discretion has been exercised in good faith, after giving due weight to relevant matters and without being swayed by irrelevant matters. If two views are possible on the question, then also the Court of appeal would not interfere, even though it may exercise discretion differently, were the case to come initially before it. The exercise of discretion should manifestly be wrong.'

Respectfully following the law laid down in the aforesaid case to the facts of the present case, we are of the view that the discretion exercised by the learned Single Judge does not call for any interference as it is in accordance with law."

The judgment of learned Single Judge in **Sunil Dutt's** case (supra) has taken a view that the issue that coordinator/co-coordinators shall be getting less salary after repatriation and this question was not considered by the Division Bench in **Hal Pal Singh's** case (supra). It is relevant to note that the Division Bench while dealing with Point No.3 noted following regarding emoluments:-

"It may be mentioned here that all the appellants are being paid the same emoluments which they were getting as teachers and they are not paid any extra amount for the work which they are doing as Coordinator/Co- Coordinator.

However, after being appointed as Coordinator and Co- Coordinator they have stopped doing teaching work in their respective schools."

Learned Single Judge in **Sunil Dutt's** case (supra) although noted that coordinator/co-coordinators are getting the same salary but took the view that they are entitled for payment in higher scale and ultimately issued direction for making payment of the post of Headmaster of Junior High School. Thus it transpires that coordinator/co-coordinators were not being paid any higher pay scale to which they were getting while working as Assistant Teacher/Headmaster that is why the Division Bench noticed that while working as coordinator/co-coordinators they were not being paid any higher emoluments. Thus the fact that petitioners before the learned Single Judge of Lucknow Bench claimed that they are entitled for higher emoluments was not a factor on the basis of which it can be said that the judgments of learned Single Judge and Division Bench of this Court in **Har Pal Singh's** case (supra) can be treated to be a not binding precedent and has virtually held them to be per-incuriam.

When a judgment can be held to be per-incuriam is now to be looked into and we have to answer as to whether the judgments of learned Single Judge and Division Bench in **Har Pal Singh's** case (supra) can be held to be per-incuriam.

The word "per-incuriam" is a Latin word which is defined in P. Paramanatha Aiyar "Law Lexicon" (1997th Edition) in following words:-

"Per incuriam. *Through inadvertence or through want of care. (Latin for Lawyers) Through carelessness, through inadvertence.*

A decision should be treated as given per incuriam when it is given in ignorance in terms of a statute, or of a rule having the force of a statute..."

Per-incuriam is an exception to a binding precedent. A constitution Bench of the Apex Court in the case of **A.R. Antulay vs. R.S. Nayak and another** reported in (1988)2 SCC 602 considered the concept of per-incuriam. In the said case an earlier order dated 16th February, 1984 was passed without taking into consideration Section 7(2) of the Criminal Law Amendment Act, 1952. The question arose as to whether said directions are per-incuriam. The Apex Court laid down following in paragraph 42 of the said judgment:-

"42. 'Per incuriam' are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or some authority binding on the Court concerned so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account to be demonstrably wrong. See Morelle v. Wakeling. Also see State of Orissa v. Titaghur Paper Mills Co. Ltd. We are of the opinion that in view of the clear provisions of Section 7(2) of the Criminal Law Amendment Act, 1952 and Articles 14 and 21 of the Constitution, these directions were legally wrong."

The Apex Court had occasion to consider as to when a judgment is held to be per-incuriam in the case of **State of U.P. vs. Synthetics and Chemicals Ltd.** reported in (1991)4 SCC 139 and laid down following in paragraphs 40 and 41:-

"40. 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium.' English Courts have developed this

principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (1944 IKB 718 Young v. Bristol Aeroplane Ltd. Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In Jaisri Sahu v. Rajdewan Dubey, [1962] 2 SCR 558 this Court while pointing out the procedure to be followed when conflicting decisions are placed before a Bench extracted a passage from Halsbury Laws of England incorporating one of the exceptions when the decision of an Appellate Court is not binding.

41. *Does this principle extend and apply to a conclusion of law, Which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English Courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. A decision passed sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind' (Salmond 12th Edition). In Lancaster Motor Company (London) Ltd. v. Bremith Ltd., [1941] IKB 675 the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in Municipal Corporation of Delhi v. Gumam Kaur, [1989] 1 SCC 101. The Bench held that, 'precedents sub-silentio and without argument are of no moment'. The Courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core*

of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decedendi. In Shama Rao v. State of Pondicherry, AIR 1967 SC 1680 it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

In large number of cases the Apex Court had explained and reiterated the grounds when a judgment can be held to be per-incuriam. It is useful to note certain recent judgments regarding per-incuriam. In the case of ***Siddharam Satlinagappa Mhetre vs. State of Maharashtra*** reported in (2011)1 SCC 694 following was laid down in paragraphs 128, 129 and 130 which are as under:-

"128. Now we deem it imperative to examine the issue of per incuriam raised by the learned counsel for the parties. In *Young v. Bristol Aeroplane Company Limited* (1994) All ER 293 the House of Lords observed that 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratum. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratum of a statute or other binding authority. The same has been accepted, approved and adopted by this court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law.

In Halsbury's Laws of England (4th Edn.) Vol. 26: Judgment and Orders: Judicial Decisions

as Authorities (pp. 297-98, para 578) per incuriam has been elucidated as under:

'A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow (Young v. Bristol Aeroplane Co. Ltd., 1944 KB 718 at 729 : (1944) 2 All ER 293 at 300. In Huddersfield Police Authority v. Watson, 1947 KB 842 : (1947) 2 All ER 193.); or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force.'

129. Lord Godard, C.J. in Huddersfield Police Authority v. Watson (1947) 2 All ER 193 observed that where a case or statute had not been brought to the court's attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered in per incuriam.

130. This court in Government of A.P. and Another v. B. Satyanarayana Rao (dead) by LRs. and Others (2000) 4 SCC 262 observed as under:

'8. The rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue.'

Again in the case of **State of Madhya Pradesh vs. Narmada Bacho Andolan** reported in (2011)7 SCC 639 following was laid down in paragraph 67 which is as under:-

"Thus, 'per incuriam' are those decisions given in ignorance or forgetfulness of some statutory provision or authority binding on the Court concerned, or a statement of law caused by

inadvertence or conclusion that has been arrived at without application of mind or proceeded without any reason so that in such a case some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong."

In the case of ***Rattiram and others vs. State of Madhya Pradesh*** reported in (2012)4 SCC 516 following was laid down in paragraphs 30, 31 and 32:-

"30. *In this context, it is useful to refer to a passage from A. R. Antulay (supra), wherein, Sabyasachi Mukharji, J (as his Lordship then was), while dealing with the concept of per incuriam, had observed thus:-*

'42. 'Per incuriam' are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong.'

Again, in the said decision, at a later stage, the Court observed:-

'It is a settled rule that if a decision has been given per incuriam the court can ignore it.'

31. *In Punjab Land Development & Reclamation Corporation Ltd. v. Presiding Officer, Labour Court, Chandigarh & another Constitution Bench, while dealing with the issue of per incuriam, opined as under:-*

'The Latin expression per incuriam means through inadvertence. A decision can be said generally to be given per incuriam when this Court has acted in ignorance of a previous decision of its own or when a High Court has acted in ignorance of a decision of this Court.'

32. *In State of U. P. And Another v. Synthetics and Chemicals Ltd. And Another, a two-Judge Bench adverted in detail to the aspect of per incuriam and proceeded to highlight as follows:-*

'40. .. 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (Young v. Bristol Aeroplane Co. Ltd.17). Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law."

In one recent judgment the Apex Court had occasion to consider conflicting views expressed by two Division Benches of this Court in the case of ***U.P. Power Corporation Limited vs. Rajesh Kumar and others*** reported in (2012)7 SCC 1. The Apex Court in the said judgment observed that if a Division Bench comes across another Division Bench on the same subject judicial decorum demands that in the event another Division Bench does not agree with coordinate Division Bench, the matter should be referred for constitution of Larger Bench. Following was laid down by the Apex Court in paragraphs 17, 18, 19 and 20 which are as under:-

"17. Similarly, the Division Bench at Lucknow erroneously treated the verdict of Allahabad Bench not to be a binding precedent on the foundation that the principles laid down by the Constitution Bench in M. Nagraj (supra) are not being appositely appreciated and correctly applied by the Bench when there was reference to the said decision and number of passages were quoted and appreciated albeit incorrectly, the same could not have been a ground to treat the decision as per incuriam or

not a binding precedent. Judicial discipline commands in such a situation when there is disagreement to refer the matter to a larger Bench. Instead of doing that, the Division Bench at Lucknow took the burden on themselves to decide the case.

18. *In this context, we may profitably quote a passage from Lala Shri Bhagwan and another v. Ram Chand and another[3]:-*

"18. .. It is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a single Judge, need to be reconsidered, he should not embark upon that enquiry sitting as a single Judge, but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned single Judge departed from this traditional way in the present case and chose to examine the question himself."

19. *In Sundarjas Kanyalal Bhathija and others v. The Collector, Thane, Maharashtra and others[4] while dealing with judicial discipline, the two-Judge Bench has expressed thus:-*

"One must remember that pursuit of the law, however, glamorous it is, has its own limitation on the Bench. In a multi-Judge Court, the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned single Judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction, the matter shall be referred to a

larger Bench. It is a subversion of judicial process not to follow this procedure.”

20. *The aforesaid pronouncements clearly lay down what is expected from the Judges when they are confronted with the decision of a Co-ordinate Bench on the same issue. Any contrary attitude, however adventurous and glorious may be, would lead to uncertainty and inconsistency. It has precisely so happened in the case at hand. There are two decisions by two Division Benches from the same High Court. We express our concern about the deviation from the judicial decorum and discipline by both the Benches and expect that in future, they shall be appositely guided by the conceptual eventuality of such discipline as laid down by this Court from time to time. We have said so with the fond hope that judicial enthusiasm should not obliterate the profound responsibility that is expected from the Judges.”*

From the law laid down by the Apex Court, as noticed above, binding precedent of a judgment can be eroded and the judgment can be termed as per-incuriam only when the judgment has been delivered in ignorance of a statutory provision or in ignorance of some binding authority. The judgment of learned Single Judge in ***Sunil Dutt's*** case (supra) does not refer to any statutory provision which has been ignored by learned Single Judge or the Division Bench in ***Har Pal Singh's*** case (supra). The learned Single Judge in ***Sunil Dutt's*** case (supra) also has not referred to any binding precedent which has escaped notice of learned Single Judge or Division Bench in ***Har Pal Singh's*** case. Hence the learned Single Judge in ***Sunil Dutt's*** case (supra) without there being sufficient ground for declaring the judgment of learned Single Judge and the Division Bench in ***Har Pal Singh's*** case as not a binding precedent, held the same as per-incuriam. Thus the view of the learned Single Judge in ***Sunil Dutt's*** case (supra) holding the aforesaid

judgments of learned Single Judge and Division Bench in **Har Pal Singh's** case (supra) as per-incuriam, is erroneous and cannot be approved.

It is also necessary to notice several judgments of the Apex Court, which have been referred to and relied by the learned Single Judge of Lucknow Bench in **Sunil Dutt's** case (supra). The judgment in the case of **Dr. L.P. Agarwal vs. Union of India and othes** reported in (1992)3 SCC 526 has been relied by the learned Single Judge which was a case of appointment on the post of Director of Indian Institute of Medical Sciences which was a tenure post. The post of Director under the recruitment rules was a tenure post and was required to be filled by direct recruitment. The appointment of the Director was with the condition that he is appointed for a period of 5 years or till he attains the age of 62 years. The Director before completing his tenure of 62 years, was retired prematurely. In the said context, the Apex Court held that appellant could not have been prematurely retired and was entitled to continue for 5 years or 62 years of age the appointment being on tenure post. In the present case the appointment of coordinator/co-coordinators was made under the scheme implemented by executive instructions issued by the State Government. The appointment was not a statutory appointment on any tenure post. The appointments of coordinator/co-coordinators were appointments made for a term of two years. There are two reasons for which the judgment in **Dr. L.P. Agarwal's** case (supra) does not help the coordinator/co-coordinators appointed prior to 2nd February, 2011. Firstly the resource centres were reconstituted by the Government order dated 2nd February, 2011 and secondly the posts of coordinators of Block Resource Centres were now to be held by ex-officio Assistant Basic Shiksha Adhikari and the

coordinators working were to be repatriated to their parent institutions. Due to reconstitution the posts of coordinators of Block Resource Centre actually came to an end and coordinators of Block Resource Centres were made ex-officio Assistant basic Shiksha Adhikari, hence there was no post on which coordinators of Block Resource Centre could claim to continue. The 8249 posts of coordinators working in Nyaya Panchayat Resource Centres were also surrendered as noticed in the Government order dated 2nd February, 2011. When on reconstitution the posts of coordinator were no longer in existence and posts of co-coordinator were stood surrendered, the continuance of earlier incumbents cannot be allowed nor it was contemplated. Any direction for their continuance could be clearly in the teeth of the scheme. There is one more reason due to which the repatriation of coordinator/co-coordinators could not be objected. The Division Bench in **Har Pal Singh's** case (supra) has specifically noted that in the letter of appointment there was specific condition that their appointment can be cancelled at any time. While discussing Point No.2 the Division Bench held following:-

"We find from the letter of appointment that a specific condition has been mentioned there that their appointment can be cancelled at any time."

There being specific condition in the appointment letter itself, it cannot be accepted that the coordinator/co-coordinators have any indefeasible right to continue for a period of two years.

Another judgment relied by learned Single Judge in **Sunil Dutt's** case (supra) is in the case of **P. Venugopal vs. Union of India** reported in (2008)5 SCC 1. The said judgment was again a judgment rendered in a case of Director of Indian Institute of

Medical Sciences where the Apex Court held that the appointment on the post of Director was for a fixed term of 5 years. In the said case the constitutional validity of proviso to Sub-section (1-A) of Section 11 of the All India Institute of Medical Science Act, 2007 was challenged. Section 11(1-A) of the 2007 Act as amended, was as follows:-

"11(1-A) - The Director shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of sixty-five years, whichever is earlier.

Provided that any person holding office as a Director immediately before the commencement of the All India Institute of Medical Sciences and the Post-Graduate Institute of Medical Education and Research (Amendment) Act, 2007, shall in so far as his appointment is inconsistent with the provisions of this sub-section, cease to hold office on such commencement as such Director and shall be entitled to claim compensation not exceeding three months' pay and allowances for the premature termination of his office or of any contract of service....."

The Apex Court in the said case held the said amendment as arbitrary and impermissible classification through a one man legislation. Following was laid down in paragraphs 37 and 40 of the said judgment:-

"37. *Such being our discussion and conclusion, on the constitutionality of the proviso to Section 11A, we must, therefore, come to this conclusion without any hesitation in mind, that the instant case is squarely covered by the principles of law laid down by this Court in the various pronouncements as noted herein above including in the case of D.S.Reddy vs. Chancellor, Osmania University and Ors. [1967 (2) SCR 214].*

40. *In view of our discussion made hereinabove and for the reasons aforesaid, we are of the view that this writ petition is covered by the decisions of this Court in the case of D.S.Reddy and L.P.Agarwal and the impugned proviso to Section 11A of the AIIMS Act is, therefore, hit by Article 14 of the Constitution. Accordingly, we hold that the proviso is ultra vires and unconstitutional and accordingly it is struck down. The writ petition under Article 32 of the Constitution is allowed. In view of our order passed in the writ petition, the writ petitioner shall serve the nation for some more period, i.e., upto 2nd of July, 2008. We direct the AIIMS Authorities to restore the writ petitioner in his office as Director of AIIMS till his period comes to an end on 2nd of July, 2008. The writ petitioner is also entitled to his pay and other emoluments as he was getting before premature termination of his office from the date of his order of termination. Considering the facts and circumstances of the present case, there will be no order as to costs."*

The said judgment thus also does not help the coordinator/co-coordinators working prior to 2nd February, 2011.

The next judgment relied by learned Single Judge in **Sunil Dutt's** case (supra) was in the case of **Union of India and another vs. Shardindu** reported in (2007)6 SCC 276. In the said case the appointment of Shardindu was on the post of Chairperson of National Council of Teachers Education for a period of four years or till he attains the age of 60 years and the appointment was governed by National Council of Teachers Education Act, 1993. The Chairperson was sought to be removed from his office on the ground that in the State of U.P. while he was working on earlier post there was allegation and inquiry conducted against the officer. On the said ground the officer was sought to be removed from the office of Chairperson. The Apex Court in the said case held that term of office of Chairperson or member was governed by Section 4

of the 1993 Act and a member can be removed from his office. Section 5 dealt with disqualification and since none of the disqualifications as mentioned in Section 5 was incurred by Shardindu, he could not have been removed from the office. Following was laid down in paragraph 15 which is as under:-

"15. Section 5 deals with disqualification for office of Members. Section 6 lays down the vacation of office of Member. We are not concerned with rest of the provisions of the Act as it deals with various functions and other connected matters of education. In purported exercise of the powers under Section 31 of the Act the Central Government framed the Rules known as National Council for Teacher Education Rules, 1997 (hereinafter to be referred to as ' the Rules'). Rule 5 of the Rules lays down the conditions of service of the Chairperson, the Vice-Chairperson and the Member-Secretary, like their pay, dearness allowance, house rent allowance and city compensatory allowance and other terminal benefits. Rule 6 deals with traveling and daily allowances to Members. Rule 7 deals with the powers and duties of the Chairperson. Therefore, from the scheme of the Act and the Rules it is apparent that the appointment of the Chairperson of the NCTE is a tenure post for a period of four years or any person attaining the age of sixty years whichever is earlier. Section 5 deals with disqualification and none of the disqualifications mentioned in that section has been incurred by the respondent. Neither he has been convicted nor sentenced to imprisonment for an offence which in the opinion of the Central Government, involves moral turpitude, nor has he been un- discharged insolvent, nor was of unsound mind and has been removed or dismissed from the service of the Government or a body corporate owned or controlled by the Government, and has in the opinion of the Central Government such financial or other interest in the Council as is likely to affect prejudicially the discharge by him of his

functions as a Member nor has committed any financial irregularity while working as Chairperson. Therefore, the respondent has not incurred any of the disqualifications as mentioned above. Section 6 deals with vacation of office of Member. Section 6 lays down that the Central Government can remove if any person has incurred any of the disqualifications as mentioned in Section 5. Proviso to Section 6 (a) further clarifies that the incumbent shall be removed on the ground that he has become subject to the disqualification mentioned in clause (e) of that section, unless he has been given a reasonable opportunity of being heard in the matter or refuses to act or becomes incapable of acting or without obtaining leave of absence from the Council, absent from three consecutive meetings of the Council or in the opinion of the Central Government has abused his position as to render his continuance in office detrimental to the public interest. Therefore, under these contingencies if a member is to be removed, then notice is required to be given to the incumbent. On the basis of the analysis of Sections 5 & 6 it is more than clear that the respondent has not incurred any of these disqualifications."

The said judgment was also on its own facts relating to tenure of statutory appointment and does not help the coordinator/co-coordinators working prior to 2nd of February, 2011.

Learned Single Judge in **Sunil Dutt's** case (supra) has also referred to and relied on judgments of the Apex Court in the cases of **State of Bihar and others vs. Mithilesh Kumar** reported in (2010)4 UPLBEC 2669, **N.T. Devinkatti and others vs. Karnataka Publisher Vice Commission and others** reported in (1990)3 SCC 157, **P. Ganeshwar Rao vs. State of Andhra Pradesh** reported in (1988) Supp. SCC 740 and **A.A. Calton vs. Director of Education & others** reported in (1983)3 SCC 33 for the proposition that change in the norms of recruitment applies

prospectively and cannot effect those who have been selected. There cannot be any dispute to the proposition that change in the norms of recruitment applies prospectively and statutory rules and Government order is prospective in nature unless it is expressly or by necessary implication made to have retrospective effect. Learned Single Judge himself has observed this in following words:-

"The same view was taken in P. Ganeshwar Rao v. State of Andhra Pradesh [1988] Supp. SCC 740 and A.A. Calton v. Director of Education & Ors., [1983] 3 SCC 33 wherein it has been held by the Hon'ble Apex Court that it is a well accepted principle of construction that a statutory rule or Government Order is prospective in nature unless it is expressly or by necessary implication made to have retrospective effect. Where proceedings are initiated for selection by issuing advertisement, the selection should normally be regulated by the then existing rules and Government Orders and any amendment of the rules or the Government Order pending the selection should not affect the validity of the selection made by the selecting authority or the Public Service Commission unless the amended rules or the amended Government orders issued in exercise of its statutory power either by express provision or by necessary intendment indicate that amended Rules shall be applicable to the pending selections. See P. Mahendra & Ors. v. State of Karnataka & Ors."

Present is not a case where any recruitment rules are applied retrospectively on the coordinator/co-coordinators who were working prior to 2nd February, 2011. The Government order dated 2nd February, 2011 specifically applied the Government order on incumbents who were already working which is apparent from plain language of Government order. The Government order dated 2nd February, 2011 reconstituted the Block Resource Centres and Nyaya Panchayat Resource Centres and contemplated repatriation

of teachers who are already working since due to appointment of large number of coordinator/co-coordinators there was shortage of teachers in the institutions run by Basic Shiksha Parishad. The Government order contemplated their repatriation. Thus the Government order also covered the incumbents who were already working as coordinator/co-coordinators since by reconstitution of Block Resource Centres and Nyaya Panchayat Resource Centres they were to be affected which was specifically noticed. Thus the Government order clearly applied on the incumbents who were already working and further the Division Bench in **Har Pal Singh's** case (supra) specifically negatived the argument that the Government order dated 2nd February, 2011 is prospective and shall not effect the incumbents who were already working. Thus the judgments of the Apex Court relied by the learned Single Judge in **Sunil Dutt's** case (supra) in holding that the Government order dated 2nd February, 2011 shall have prospective operation is also not a correct view of law.

The Questions (a) and (b), which have been referred for consideration, are little wide question which need to be reframed to the extent it arise in facts of the present case.

Questions (a) and (b) both are reframed as only one question in following manner:-

- (a) Whether the coordinator/co-coordinators who were working in Block Resource Centres and Nyaya Panchayat Resources Centres on the date of issuance of Government order dated 2nd February, 2011 could not have been repatriated to their parent institutions since they were entitled to receive additional monetary benefits while working on the post of coordinator/co-

coordinators?

Our answer to the above reframed question is that the Government order dated 2nd February, 2011, which has reconstituted the Block Resource Centres and Nyaya Panchayat Resource Centres has rightly provided for sending back the coordinator/co-coordinators to their parent institutions and their entitlement to receive higher pay scale was no impediment in sending back the said teachers, moreso when actually no Headmaster/Teacher/Assistant Teacher of primary schools was getting higher pay scale while working as coordinators of Block Resource Centres or Nyaya Panchayat Resource Centres.

Our answer to Question (c) is that learned Single Judge in ***Sunil Dutt's*** case (supra) was not justified in declaring the judgment of the learned Single Judge and Division Bench in ***Har Pal Singh's*** case as per-incuriam. The learned Single Judge, if was unable to agree with the view taken by the learned Single Judge and the Division Bench in ***Har Pal Singh's*** case (supra) was obliged to refer the matter to Hon'ble the Chief Justice for constituting a Larger Bench. The judgment of learned Single Judge in ***Sunil Dutt's*** case being in direct conflict with the judgments of learned Single Judge and Division Bench in ***Har Pal Singh's*** case (supra) does not lay down the correct law and is overruled.

Let the writ petitions be listed before the learned Single Judge with our answers as given above.

Order Date :- 20.12.2012

Rakesh