

(1994) 03 PAT CK 0018

In the Patna High Court

Case No : Civil Writ Jurisdiction cases No. 4352 of 1992

Bali Ram Choudhary and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 16-03-1994

Acts Referred:

Citation : (1994) 03 PAT CK 0018

Judgement

G.C. Bharuka, J.—These writ applications are being disposed of by a common judgment because, keeping in view the nature of relief claimed and the directions which need to be issued, dealing with the facts of individual cases will not be necessary.

2. These writ applications have been filed by the Petitioners, claiming to be duly appointed assistant teachers in Elementary Schools governed by the provisions of the Bihar Non-Government Elementary Schools (Taking Over of Control) Act, 1976 (hereinafter in short the "Act" only), for issuance of an appropriate writ or direction commanding upon the Respondents to accord promotions to them in scales of pay/grades higher than in which they are presently serving and grant them the salaries admissible on such promoted posts from the date they are eligible and/or are promoted to the said posts.

3. In these writ applications the relief by way of seeking promotion to higher grades had been sought primarily on two grounds, namely, (1) the Petitioners have the requisite qualifications like that of I.A. trained or B.A./B.Sc. trained for being promoted to those grades and (II) Assistant Teachers ranking junior to them have been granted promotion to higher grades.

4. According to the Petitioners, keeping in view the various circulars, instructions, orders and judgments of this Court passed in individual cases they have acquired a right of having promoted to higher grades and non-(sic) thereof will lead to violation of their fundamental rights guaranteed under Articles 14, 16 and 21 of the Constitution of India. On the other hand, learned Counsel appearing for the State of Bihar, its Officers and authorities have disputed various foundational

facts in some of the individual cases and further by referring to Government instructions have submitted that the claims of the Petitioners have to be examined by the respective District Establishment Committees keeping in view the Rules of promotions which were operative at the material time.

5. We had also called upon the Director, Primary Education, to appear in person and apprise us in respect of the stand of the Government in the present context. Apart from making oral submissions in person, he has placed on record certain letters and circulars to which we will be referring hereinafter. Considering the complexity of the questions involved which will have a bearing on the promotional prospect, of near about two lacs assistant teachers said to be serving in the taken over elementary schools of the state, I feel it desirable to first refer to certain provisions of the Act. The provisions of the Act which were preceded by series of ordinances on the subject, have been made effective from 1st of January, 1971.

6. Section 2(a) of the Act defines "elementary School" to mean a school of different grades up to class VII and Clauses (b), (c) and (d) of the Section further defines "minority elementary School", "aided elementary School" and "unaided elementary School", respectively. For being an "aided elementary School" it must fulfil two conditions, namely,

- (i) It is a private school which has been in receipt of Government grant, and
- (ii) It is administered by a Managing Committee.

7. Section 4(2) of the Act provides for consequences of taking over. Sub-section (2) thereof provides that (i) every teacher holding post in the school taken over by the State Government shall be deemed to have been transferred and (ii) every Officer, teacher or other employee holding any office or post in the school taken over by the State Government shall be deemed to have been transferred to and become an officer, teacher or employee of State Government with such designation as the State Government may determine and shall hold office by the same tenure, at the same remunerations and on the terms and conditions of service as he would have held before the taking over of the said school and shall continue to do unless and until such tenure, remuneration, terms and conditions of service are duly altered by the State Government.

8. Section 7 of the Act authorises the State Government to make rules not inconsistent with the Act for carrying out the purposes thereof.

9. Section 8 of the Act provides for power to remove difficulties and empowers the State Government to take such actions or pass such order as appears to it necessary for the purposes of removing the difficulties arising in giving effect to the provisions of the Act.

10. It may look somewhat strange but is true that despite the passage of 22 years no statutory rules were framed laying down the principles of promotion of assistant teachers of taken over elementary schools to higher grades till framing

and publication of Bihar Taken Over Elementary School Teacher's Promotion Rules, 1993 (hereinafter in short the "Rules" only), the provisions whereof have been made effective from 1st January, 1986. These rules also were framed only because peremptory directions were issued by this Court requiring the State Government to discharge its duties under the Act in the larger interests to avoid arbitrary and mala fide acts of the departmental authorities and to avoid long drawn multiple litigations resulting from puzzling and self-contradictory instructions issued by various officers in the Education Department claiming authority to act in these matters.

11. The Rules provide for publication of district wise seniority list of assistant teachers to be prepared after draft publication inviting objections, keeping in with the rules of seniority provided therein. It also provides that the seniority list has to be approved by the Establishment Committee and the Regional Deputy Director of Education. Under Rule 3(2) the decision regarding promotion has to be taken by the Establishment Committee. Rule 14 provides for an appeal against such orders before the Divisional Commissioner.

12. Rule 4 of the Rules contemplates conditions for promotion and reads as under:

4. Conditions of promotion.-The promotion of a teacher may only be considered on fulfilling the following:

- (1) He fulfills the minimum prescribed period of service for promotion;
- (2) He possesses minimum prescribed educational qualification and training for promotion;
- (3) There must be a vacancy meant for the category to which he belongs S.C., S.T. or general according to latest rules regarding reservation;
- (4) He must be eligible for consideration for promotion on the basis of the seniority list against the available vacancies;
- (5) His service is satisfactory.

13. A reading of the aforesaid Rule shows that before the Establishment Committee can take up the matters of promotion, there has to be a duly published seniority list from amongst which the eligible assistant teachers need to be considered for promotion. But on being questioned the Director, Elementary Schools, frankly conceded before us that no final seniority list made in accordance with the instructions and rules issued/framed by the Government in respect of the assistant teachers of taken over elementary schools is available in any of the district of the State. He has further to admit that as a matter of fact, the State Government in the Department of Education, is not possessed of even the list of the schools which have been taken over by the State Government under the provisions of the Act or the details of the teachers whose services have been transferred pursuant to such taking over as provided u/s 4(2) of the Act.

According to him, in quite a large number of cases, private schools are being treated as taken over schools and expenses and salaries are disbursed out of public funds through treasuries even without there being any Government order in this regard. Anyhow, he has filed before us a letter written by him under Memo No. 2303 dated 25.8.1993 addressed to all the District Magistrates, Deputy Development Commissioners and the District Superintendents of Educations wherein a scheme has been devised to complete the publications of seniority list by 31st of March, 1994.

14. Mr. D.K. Sinha, learned Standing Counsel No. IV, on the basis of written instructions received by him from the Director, Primary Education, has stated that the steps will be taken for filling up the vacancies in higher grades in the following manner.

(i) The vacancies accruing during the period 1.12.1975 to 31.3.1981 will be filled up by way of promotion keeping in view the principles laid down in the Government Order No. 4557 dated 15.12.1976, which has been held to be the law in this regard by a Bench of this Court in the case of Kameshwar Prasad Sharma v. State of Bihar C.W.J.C. No. 2205 of 1977 disposed of on 12.9.1979.

(ii) The vacancies following in higher grades between the period 1.4.1981 to 31.12.1985 will be filled up in accordance with the Government Notification No. 2440 dated 18.12.1984 and

(iii) The vacancies accruing on or after 1.1.1986 will be filled up in accordance with 1993 Promotion Rules.

15. Mr. Sinha has also brought to our notice that after issuance of Government Order No. 4557 dated 15.2.1976, four notifications being Nos. (1) 1038 dated 21.8.1981, (b) 2060 dated 15.9.1981, (c) 168 dated 7.3.1984 and (d) 1054 dated 28.5.1984 also relating to promotions were also issued, but the later four notifications, namely, (1) to (d) were superseded by Notification No. 2440 dated 18.12.1984 referred to above. Thus, according to him, for the period 15.12.1976 to 31.12.1985 only two Government circulars/notifications remained operative, namely, (i) Government Order No. 4557 dated 15.12.1976 and (ii) Notification No. 2440 dated 18.12.1984.

16. It may be noticed here that even in absence of statutory rules it is permissible for the State to issue instructions keeping in view the ratio laid down by the Supreme Court in the case of Sant Ram Sharma Vs. State of Rajasthan and Another, which is to the following effect:

It is true that there is no specific provision in the Rules laying down the principles of promotion of junior or senior grade Officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principles to be followed in promotions of the Officers concerned to selection grade posts. It is true that the Government cannot amend or supersede statutory rules by administrative

instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.

17. Keeping in view the facts and the law discussed above and the specific statements made on behalf of the Respondents regarding finalisation of seniority list and consideration of claims of the respective assistant teachers for their promotion to their higher grades in accordance with law, we dispose of all these writ applications with the directions that the respective District Establishment Committees must pass final orders regarding grant of promotion by 30th June, 1994. It will be the responsibility of the respective District Magistrates being Chairman of the District Establishment Committees to ensure compliance of this order. The Director, Primary Education, is directed to immediately communicate the judgment to all the District Magistrates for compliance.

18. Before parting, one more fact needs to be stated. It has been brought to our notice at the Bar that in quite a large number of cases, even such persons whose services have neither been recognized pursuant to any taking over of the schools in which they claimed to have been appointed by the Managing Committee nor they have been appointed by the District Establishment Committees in accordance with the Rules of appointment, still they are drawing salaries claiming to be Government servants either on strength of forged documents or by entering into the collusion with some or other officers, staff or clerk appointed at the district levels. This fact has been admitted even by the Director as is apparent from his communication referred to above addressed to district authorities. Therefore, at the time of finalisation of the seniority list it will be incumbent upon the statutory authorities to verify and ascertain that (i) the respective schools have been taken over under the Act under written Government orders, (ii) the services of respective assistant teachers have been duly taken over pursuant to taking over of the schools and (iii) in case of subsequent appointments, the persons claiming to be in the cadre of assistant teachers have, been duly appointed by the Establishment Committees in accordance with the Rules. While examining the said facts it has to be borne in mind that an order takes the colour of the Government order only when it is passed by the competent authority after following the procedure laid down in law. Further such order has to be necessarily in writing as held by a Bench of this Court in the case of *Shibshankar Dokania Oil, Rice and Flour Mills, Barharwa Vs. State of Bihar and Others*, .

19. The writ applications are, thus, disposed of but without any costs.

Gurusharan Sharma, J.

20. I agree.