
(1989) 08 PAT CK 0018
In the Patna High Court
Case No : C.W.J.C. No. 6070 of 1989

Bhagwat Prasad and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 08-08-1989

Acts Referred:

Constitution of India, 1950 — Article 166

Citation : (1990) 1 BLJR 375 : (1990) 2 PLJR 65

Hon'ble Judges : S.H.S. Abidi, J; S.B. Sanyal, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

S.B. Sanyal and S.H.S. Abidi, JJ.—The petitioners, who are teachers of Middle and Primary Schools in the district of Nalanda, numbering sixty-eight assailed the order of transfer dated 30.6.1989 (Annexure-I). The impugned annexure states that the District Establishment Committee in a meeting dated 23.6.1989 have taken a decision that those Headmasters and Assistant Teachers, who are working in the same school for 20 years or more, except those who have attained the age of 56 years, are being transferred to different schools, as indicated in the enclosed schedule to the said order. The said order has been passed by the District Superintendent of Education (respondent No. 3).

2. Mr. Rajendra Prasad Singh, learned Counsel appearing on behalf of the petitioners assailed the said decision on the grounds:

(a) Prior to the take over of the elementary schools by the State Government under the Bihar Non-Government Elementary Schools (Taking over of Control) Act, 1976 from 1st January, 1971, the terms and conditions of service of the petitioners did not justify transfer from one school to other school. The terms and conditions of service shall continue to be so unless and until they are duly altered by the State Government by framing rules u/s 7 of the said Act and the State Government having framed no rules the impugned order is inoperative.

(b) The transfer is a terms and conditions of service and, therefore, till rules are framed u/s 7 of the Act cannot be altered by resorting to Section 8 of the said Act, which is prefixed by the words "to resolve difficulties" which empowered the State Government to pass orders as appears to it necessary for the purpose of removing difficulty in giving effect to the provisions of the Act.

(c) Even assuming that the order of transfer can be passed u/s 8 of the Act, the said order having not been made by the State Government, but by the District Superintendent of Education, which is per se illegal and without jurisdiction.

(d) The State Government has itself taken a decision on 26.9.1988 that no order should be passed changing the terms and conditions of service on the strength of Section 8 of the said Act.

3. On 25.7.1989 after having minuted the points raised by the learned Counsel for the petitioners we noticed the Advocate General to assist us in this case in order to enable us to dispose of the matter at the stage of admission itself, as it involves an important question of law.

4. Before we proceed to consider the submissions of the learned Counsel for the petitioners we may state that a Bench of this Court dismissed a writ, petition (C.W.J.C. No. 6274/89) on 19.7.1989 challenging the very said decision of the Establishment Committee dated 23.6.1989 at the stage of admission without, however, assigning any reason. We, therefore, thought it expedient to consider the arguments of the learned Counsel for the parties for its disposal one way or the other by a regular judgment, as also for the reason that the petitioners are not bound by the unreasoned order, not being party to it.

5. The State Government for better organisation and development of Elementary education in the State of Bihar decided to take over control of the said schools, firstly by an Ordinance which was followed by Bihar Act 30 of 1976, known as the Bihar Non-Government Elementary Schools (Taking Over of Control) Act 1976 (hereinafter referred to as the "Elementary Schools Act"), which will be deemed to have come into force with effect from 1.1.1971. Under Sub-section (1) of Section 3 of the Elementary Schools Act, Elementary Schools managed by the District Board, Zila Parishad, the Municipal Board, and the Patna Municipal Corporation, and those opened under the Expansion and Improvement Scheme vested in the State Government from the said date. Under Sub-section (2) of the said section aided Elementary Schools. The managing committees of which voluntarily handed over the control of the School to the Government were taken over by the State Government with effect from the date determined by the District Committee constituted under Sub-section (4) of the said section. Under Sub-section (3) of the said section Elementary Schools administered by public or private undertakings will be taken over by the State Government by publication of a Notification in the official gazette from the date specified in the said notification. Under Sub-section (4) of the said section the District Committee in each district consisted of the members noticed in the said subsection was vested

with the powers to examine the feasibility of taking over of such Schools by the State Government. The State Government was empowered to change the personnel of the District Committee so constituted u/s 3(4)(a). Section 4 of the Elementary Schools Act provided for the consequences of taking over. It provided that all the assets and properties whether movable or immovable possessed by the Schools taken over by the State Government u/s 3 including lands, buildings, documents books shall stand transferred to the possession and ownership of the State Government. Sub-section (2) of Section 4 of the Elementary Schools Act is quite important and is therefore, extracted below:

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 remuneration 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.

6. Section 7 related to the power of making rules and it envisages that the State Government may make rules not inconsistent with this Act for carrying out the purposes of this Act, and the same should be laid before the State Legislature while in session, with power to modify or annul the rules without prejudice to the validity of anything previously done under the rule. Section 8 reads as hereunder:

Power to remove difficulties. If any difficulty arises in giving effect to the provisions of this Act, the State Government may take such action or pass such order as appearing to it necessary for the purposes of removing the difficulty.

Under Section 9 various Acts pertaining to the schools were repealed as also the earlier take over Ordinances.

7. The State Government has also taken over the Bihar Non-Government Secondary Schools. Section 4 of the Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act, 1981 (hereinafter referred to as the "Secondary Schools Act") provided for consequences of taking over the management and control. Sub-section (3) of Section 4 of the Secondary Schools Act reads as follows:

The age of superannuation of Headmaster, teachers and other employees of the Schools taken over by the State Government shall be 58 years. The other terms and conditions of their services shall continue to be the same as it was before taking over the management and control of the school until any alteration is made therein by the State Government in the prescribed manner.

The word "prescribed" has been defined u/s 2(k) of the Secondary Schools Act as prescribed by the Act or the rules framed thereunder, and the word "rule" has been defined as rules framed u/s 15 of the Act.

8. Learned Counsel for the petitioners in support of his submission strongly relied on a Full Bench decision of this Court in the case of Krishnadeo Mishra v. The State of Bihar and Ors. 1987 PLJR 854. as also on the decision in Sheo Nath Praiad v. The State of Bihar and Ors. 1984 PLJR 556. He has also placed his reliance on two other cases, namely, Bilat Jha and Anr. v. The State of Bihar and Ors. CWJC No 2901 of 1981, disposed of on 4th October, 1983 and in viadan Kant Mishra v. The State of Bihar and Ors. 1983 PLJR 107.

9. In Bilat Jha's case (supra) Section 4(2) of the Elementary Schools Act was under consideration, where the Government by a decision amalgamated the cadres of the teachers in the urban and rural elementary schools and ordered that appointment, transfer, promotion etc. would be made on that basis. It was argued that this amounted to change in the terms and conditions of service without making any rule u/s 7 of the Elementary Schools Act. This submission was repelled by the Bench on the ground that the terms and conditions of service are not required to be altered only by rules but also by an executive order by referring to the working of Section 4(2) of the Elementary Schools Act. The order of amalgamation, however, was struck down on the ground that the decision was not taken by the State Government but by a subordinate authority. The ratio of this decision is, therefore, against the contention of the petitioners that the terms and conditions of service can only be altered by the State Government by making rules u/s 7 of the Elementary Schools Act.

10. Sheo Nath Prasad's case (supra) relates to Bihar Non-Government Secondary Schools Ordinance, where it was held that mention of a wrong provision of law does not affect the validity of the power or its efficacy. In that case the Government decision bearing No. 510 dated 20.11.1981 which provided for promotion to the posts of Headmaster which were vacant prior to 2.10.1980 in the nationalized schools was challenged, as the said order was passed in exercise of the power u/s 15 of the said Ordinance instead of Section 16. The decision stated that the preparation of rules regarding the service conditions of teachers of nationalised secondary schools may take sometime in fulfilling the formalities and, therefore, in keeping with the direction of the High Court for appointment of Headmasters within a fixed time, the State Government in exercise of the power conferred u/s 15 of the said Ordinance decided to fill up the vacant posts as on 2.10.1980 or thereafter treating each school as an independent unit. It was held in that case that the terms and conditions of the service of the teachers will continue till such time alteration is made in the prescribed manner and it cannot be filled up by general power of transfer as envisaged under Rule 56 of the Bihar Service Code. The judgment in that case was rendered on the wording of Section 4(3) of the Non-Government Secondary Schools Ordinance which required that the terms and conditions of service of taken over schools will continue to prevail till such time they are altered by the Stale Government in the prescribed manner. This case, in our opinion, is of no assistance to the petitioners, firstly because it was considering the relevant section of the Bihar Non-Government Secondary Schools Ordinance which

expressly required alteration in the terms and conditions of service only by making rules therefore or by the Ordinance itself. Similar is the view taken in the decision of Madan Kant Mishra, (supra), which also related to the Bihar Non-Government Secondary Schools Take over and the true interpretation of Rule 21(2) of the Bihar Nationalised Secondary Schools (Service Condition) Rules, 1982.

11. The real thrust of the argument of the learned Counsel for the petitioners is founded upon the case of Krishnadeo Mishra, (supra). The said case was dealing with the Bihar Non-Government Elementary Schools (Taking Over of Control) Act, 1976. The question referred to the Full Bench was--"Whether Section 8 of the Bihar Non-Government Elementary Schools (Taking Over of Control) Act 1976, empowering the State Government to remove difficulties in giving effect to its provisions can be used as a cloak for subordinate legislation and as a substitute for the express rule making power u/s 7 of the Act?". The reference was answered in Paragraph No 12-A of the judgment to the effect that Section 8 of the Act empowering the State Government to remove difficulties in giving effect to its provisions cannot be used as a cloak for subordinate legislation and as a substitute for the express rule making power u/s 7 thereof and having so held it was observed that the directions issued from time to time making Section 8 as a fountain head without any coherence and showing a complete absence of any larger scheme or method or consistency are unsustainable in the eye of law, and Annexures 2, 7, 10 and 11 of that writ petition, namely, Circular dated 15.12.1976 making provision for disciplinary proceedings and removal from service by the District Superintendent of Education by referring to Section 8 of the Act, notification dated 19.11.1981 issued u/s 8 of the Take Over Act by which the District Collectors were removed from the Establishment Committee and Chairman of the Zila Parishad was appointed as the Chairman of the District Establishment Committee, notification dated 29.9.1981 issued Section 8 of the Act clarifying the administrative arrangements regarding; the working of the taken over primary schools and notification dated 11.10.1985 issued by the Government in exercise of the power conferred u/s 8 of the Taken Over Act by which power of suspension was conferred on the District Establishment Committee respectively. In short, the Full Bench struck down all such orders, notifications which were issued u/s 8 after having held that resort to the power to remove difficulties was really a cloak to subordinate legislation and used as a substitute for rule making power u/s 7 thereof. Learned Counsel, therefore, states that in the instant case the District Establishment Committee having passed the order of transfer which is per se bad and is inconsistent with the ratio of the Full Bench.

12. Learned Advocate General appearing on behalf of the State also relied on the case of Krishnadeo Mishra, (supra) particularly Paragraph No. 15 of the said judgment. According to the learned Advocate General, the Full Bench expressly said that Annexure 6 (notification No. 3388 dated 2.12.1980), which was under challenge in that writ petition, did not purport to have been made u/s 8 of the

Act, but in exercise of the executive power of the Government flowing from Article 166 of the Constitution of India, Clause 2 of the said Notification envisaged that till such time rules u/s 7 is not framed a committee constituted under this notification shall have the power to appoint, promote, determine seniority as also to take decision with respect to transfer of teachers This direction has been issued in public interest. The rules, according to the learned Advocate General, have not yet been framed, and, therefore, the provisions made in this notification will continue to operate till rules are framed: This notification was sought to be modified by various directions issued u/s 8 of the Act, namely, Annexures 2, 7, 10 and 11 of the Full Bench case which were struck down.

13. Admittedly, the impugned order contained in Annexure-1 has been passed by the Establishment Committee as required to be constituted by notification No. 3358 dated 2.10.1980 (Annexure 6 of Krishnadeo Mishra's, case). This committee was empowered under the said notification to direct transfer of teachers It is now well-settled that the Government in exercise of its executive power under Article 166 of the Constitution can issue directions when there is no statutory rule and when rules are silent on a particular point the Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed See Sant Ram Sharma Vs. State of Rajasthan and Another, . Section 4(2) of the Elementary Schools. Take Over Act does not require the change of the terms and conditions only by rules, but it could also be changed by executive power of the Government since the language of Section 4(2) is "are duly altered by the State Government", and not as is the language in Section 4(3) of the Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act, i.e., until any alteration is, made therein by the State Government in the prescribed manner". The words "prescribed manner" are absent in the Elementary Schools Act, The view taken by us finds support from the case of Bilat Jha and others, (supra). Further, the notification dated 2nd December, 1980 in purported exercise of which the Establishment Committee has passed the impugned order has been upheld by the Full Bench in the case of Krishnadeo Mishra, (supra). We are also of the opinion that the said notification of 2nd December, 1980, clearly said that this decision has been taken till such time rules u/s 7 is framed without any reference the Section 8 of the Act, by way of cloak for subordinate legislation. The State Government, in our opinion, has an executive power to render such decision in view of the provision of the Constitution of India.

14. We, therefore, find no merit in this writ petition and it is, accordingly, dismissed. There will be no order as to costs.