

(1990) 01 PAT CK 0018
In the Patna High Court
Case No : C.W.J.C. No. 6581 of 1989

Bimla Nand Prasad and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 10-01-1990

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 245, 246

Citation : (1990) 38 BLJR 793 : (1990) 1 PLJR 421

Hon'ble Judges : N.P. Singh, J; N. Pandey, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

N.P. Singh, J.

J 1. The validity of The Assistants of the Secretariat and Attached Offices, Joint Cadre Ordinance, 1989 (Bihar Ordinance No. 9 of 1989)" creating a joint cadre and combined gradation list of the Assistants, Selection Grade Assistants. Section Officers, Registrars and Under-Secretaries of the Secretariat and its attached offices has been challenged in this writ application as being violative of Articles 14 and 15 of the Constitution.

2. It is necessary to examine the background in which the said Ordinance has been promulgated. It appears that the Finance Department of the State of Bihar used to hold competitive examination every year for the purpose of appointment to the posts of Lower Division Assistants in various departments of the Secretariat and its attached offices. Out of the successful candidates at such competitive examination Assistants used to be posted in different departments of the Secretariat and its attached offices, therefore the department concerned used to give promotion to such Lower Division Assistants to the posts of Upper Division Assistants, Section Officers, Registrars, Under Secretaries.

3. On the basis of the representation made from different sections that there should be a joint cadre of Assistants out of which promotion should be given to

the higher posts, a decision was taken by the State Government on 27th May, 1967 to prepare a joint cadre of Assistants in order of seniority of different departments in the Secretariat and offices attached thereto. That decision was circulated by communications dated 3rd July, 1967 and 24th July, 1967 saying that the State Government had taken a decision to prepare a joint cadre of Assistants in different departments of the Secretariat and its attached offices and any promotion given after 29th May, 1967 to any Assistant in the department in which such Assistant was posted shall not be binding while preparing a joint cadre of Assistants. Although a decision was taken to prepare a joint cadre of Assistant. no positive step in that direction treating such Assistants was taken and the different departments went on promoting such Assistants as belonging exclusively to that department in question. Thereafter some applications were filed before this Court for writ of mandamus directing the State Government to implement the aforesaid decision regarding formation of a joint cadre of Assistants of the different Departments of the Secretariat and offices attached thereto. One such writ application was C.W.J.C. No. 2205 of 1974 which was allowed on 7-2-1977 and a direction was given to prepare a gradation list of the joint cadre of all the Assistants in the Secretariat on the basis of the aforesaid decision of the State Government dated 27th May, 1967 which was circulated by communications dated 3rd July, 1967 and 24th July, 1967.

4. In spite of the aforesaid judgment, when such gradation list was not prepared, another batch of writ applications (C.W.J.C. Nos. 4139 of 1981, 1210 of 1982, 1211 of 1982 and 2145 of 1982) were filed which were heard and disposed of by a learned Judge of this Court on 5th January, 1987. The operative part of the judgment is as follows:

In the circumstances of the case, the State of Bihar, is, therefore, directed to prepare the joint gradation list in terms of the judgments of this Court as contained in Annexures "4" and "5" to the writ application as early as possible and positively by 31st of March, 1988.

From bare reference to the aforesaid judgment it shall appear that the direction to prepare a joint gradation list was given in view of the aforesaid decision of the State Government itself dated 27th May, 1967 which was circulated by communications dated 3rd July, 1967 and 24th July, 1967.

5. The grievance of the petitioners is that instead of creating joint cadre of Assistants in terms of the direction given by this Court, the aforesaid Ordinance has been promulgated constituting a cadre of Assistants of the Secretariat and its attached offices with effect from 30th August, 1988. It was pointed out that by fixing 30th August, 1988 as the date for constitution of one cadre of Assistants of Secretariat and its attached offices, illegal promotions given by the different departments after 29-7-1967 have been validated and the judgments of this Court have been ignored.

6. The Preamble of the Ordinance says that every Department of the State

Government in the Secretariat and its attached offices had separate cadre of Assistants and p notion of the Assistants to higher posts within the Department attaches offices used to be made from amongst the Assistants, section officers etc., in the department/attached office concerned. It has also been stated in that preamble that the Assistants have been placing their demand for a joint cadre of Assistants with a combined gradation list of all the Assistants working in the different Departments of the Secretariat and its attached offices so that equal opportunity it available to all such Assistants for promotion to higher posts and for achieving that object a decision had been taken on 27th May, 1967 constituting a joint cadre of Assistants and all promotions after 29th May, 1967 were to be given on the basis of a combined gradation list of a joint cadre. Thereafter it has been stated that a combined list could not be made because of various objections raised by the Assistants or the Secretariat Department and its attached offices with regard to the principle to be adopted for preparation of the gradation list in the joint cadre and in respect of promotion to the higher posts. With the result, promotions continued to be made to the higher posts on the basis of separate gradation lists department wise/attached office-wise. Therefore the Government considered it necessary in order to give equal opportunity of promotion to Assistants of different departments to prepare a combined gradation list separately for Assistants, Selection Grade Assistants, section officers, Registrars and under Secretaries in the Secretariat and its attached offices. Thereafter it has been said as follows:

And, whereas, the Government found that it is not possible to make aforesaid combined gradation list effective from 29th May, 1967 and to treat all promotions made thereafter non-existent;

And whereas, it was found that the aforesaid combined gradation lists cannot operate with retrospective effect as it will upset all promotions made on the basis of the gradation list maintained department wise/attached office-wise after 29th May, 1967 and it shall cause various hardship to the person appointed/promoted to higher posts on the basis of extent procedures and will lead to avoidable litigations besides causing widespread dissatisfaction among the employees;

And, whereas, some employees a have moved the court for implementation of the Government decision dated 27th May, 1967 and the court had granted relief to some:

And, whereas, in the circumstances stated hereinbefore the Government took a decision on 30th August, 1988 vide Government resolution No. 11012, dated the 30th August, 1988 to have a joint cadre with a combined gradation list each for Assistants, Selection Grade Assistants, Section Officers, Registrars and under Secretaries in the Secretariat Departments and its attached offices with effect from the laid date.

7. Section 3 is as follows:

(3) Constitution of Joint Cadre.... Notwithstanding anything contained to the

contrary in any judgment, decree or order of any court or any rule or circular the posts of the Assistants of the Secretariat and its attached offices are constituted in one joint cadre with effect from 30th August, 1988. All the Assistants of the Secretariat and its attached offices shall become members of the joint cadre of the Assistant and promotion of the Assistants to the higher posts shall hereinafter be made on the basis of their place in the joint cadre and the gradation list so prepared irrespective of the department/attached office where such posts exist.

8. Section 4 speaks of a combined gradation lists of the Assistants, Selection Grade Assistants, Section, Officers, Registrars and Under-Secretaries of the Secretariat departments and attached offices as on 30th August, 1988 shall be prepared separately for each of the aforesaid categories of employees and their seniority shall be determined in the manner prescribed in Section 5. Section 5 prescribes the procedure for determination of seniority. Section 7 provides the procedure for promotion, Section 9 which is relevant and subject-matter of controversy, in the present writ application, is follows:

9. Validity of appointment promotion and confirmation--Notwithstanding anything contained to the contrary in any judgment, decree or order of any court or any rule or circular, all appointments and promotions of Assistants to higher posts and their confirmation in various Secretariat departments and attached offices made upto 30th August, 1988 on the basis of extent Government circulars/ rules etc. shall be deemed to have been validly made as if the Government decision dated the 27th May, 1967 read with the Finance Department Memo No. 7929-F, dated the 3rd July, 1967, and memo No. 9571-F, dated the 24th My, 1967 were not in existence and shall be deemed that such a decision was never taken and that such circulars were never issued.

It was urged on behalf of the petitioners that when this Court had earlier directed the State Government to implement its decision taken on 27th May, 1967 which was duly circulated by aforesaid communications dated 3rd July, 1967 and 24th July, 1967 while promulgating the Ordinance, it was not open to ignore the aforesaid judicial pronouncements.

9. From time to time under different situations and context a question has arisen as to whether it is open to the legislature either to ignore or to take away the effect of a judgment of a court of competent jurisdiction including High Courts and Supreme Court, by coming out with a legislation having a non-obstante clause or a provision validating the action of the State Government which has been declared to be invalid by the courts. According to the petitioners, Section 9 of the Ordinance is ultra vires because an attempt has been made to exercise judicial power which could not have been exercised by the Legislature. In other words, when that section says "notwithstanding anything contained to the contrary in any judgment, decree or order of any court or any rule or circular, all appointments and promotions of Assistants to higher posts and their confirmations in various Secretariat departments and attached offices made upto

30th August, 1988 on the basis of extent Government circulars/rules etc. shall be deemed to have been made...." The Ordinance purports to nullify the judgments and orders passed by this Court.

10. While judging the scope of a validating provision it should be borne in mind that purpose of such Act or provision on their face is to validate certain invalid actions had no authority in law or have been taken against an existing law including any binding executive order. But such validating provisions have their own limitations. If the action of the State Government which is sought to be validated infringes any constitutional provision, including any fundamental right guaranteed by the Constitution, there is no question of its validation. Similarly, if an Act, has been held to be ultra vires by any court on the ground of legislative incompetence, then any action taken under such an Act cannot be validated. On the other hand, if any action has been taken in absence of authority in law or has been taken in contravention of any provision including any binding executive order, it is always open to the Legislature to vest authority in such person or to delete any statutory provision or to efface an executive order retrospectively a validating Act; in other words, by removing the lacuna found by the Court. One of earliest case on the point is AIR 1941 16 (Federal Court) . Rents had been collected from the tenant without any authority in law. Faced with that situation, Act was passed validating the action of the collection of rents. The Federal Court held that such actions were within the scope of validating Act, and as such not ultra vires. Similar was the position in the case of AIR 1944 1 (Federal Court) appellants had been convicted by courts not duly vested with jurisdiction. It was so declared by the Federal Court. Next day, the Governor-General promulgated another ordinance introducing certain provisions. It was held that the validity given to the sentence that had been passed by the Special courts earlier was within the authority of the Governor General and did not amount to exercise of a Judicial power. In the case of West Ramnad Electric Distribution Co. Ltd. Vs. State of Madras, , a notification which had been declared invalid by the Supreme Court was validated by a subsequent Act. It was held that the subsequent Act could have validated the earlier Act which was held to be invalid, because by the time the second Act was passed the legislature was clothed with the necessary legislative power. In this connection reference can also be made to the judgments of the Supreme Court in the cages of Jaora Sugar Mills (P.) Ltd. v. State of Madhya Pradesh AIR 1965 SC 416 and Udai Ram v. Union of India AIR 1968 SC 1138. In the case of Udai Ram v. Union of India (supra), it was observed as follows:

All these decisions lay down that the power to legislate for validating actions taken under statute which were not sufficiently comprehensive for the purpose, is only ancillary or subsidiary to legislate on any subject within the competence of the legislature and such validating Acts cannot be struck down merely because courts of law have declared actions taken earlier to be invalid for want of jurisdiction. Nor is there any reason to hold that in order to validate action without legislative support, the validating Act must enact provisions to cure the

defect for the future and also provide that all actions taken or notifications issued under the new provisions so as to give them full retrospective effect. No doubt legislatures often resort to such practice but it is not absolutely necessary that they should do so, so as to give full scope and effect to the validating Acts.

11. Again in the case of *Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others*, , a validating Act, validated the tax collected, which had been declared to be invalid by the Court. It was observed as follows:

If the legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law.

12. In the case of *Hari Singh and Others Vs. The Military Estate Officer and Another*, , a Bench of seven learned Judges of the Supreme Court laid down that the validity of a validating law is to be judged by two tests. Firstly, where the legislature possesses competence over the subject-matter, and secondly, whether by validation the legislature has removed the defect which the courts had found in the previous law.

13. In the case of *Tirath Ram Rajindra Nath v. State of U.P.* AIR 1975 SC 405 the validating Act which was under consideration said "notwithstanding any judgment, decree or order of any court" any tax imposed assessed or collected before the commencement of that Act shall be deemed to have been validly imposed, assessed and collected. The Supreme Court pointed out that as the legislature had amended the law retrospectively and thereby removed the basis of the decision of the High Court, such action cannot be considered as encroachment on the judicial power.

14. Again in the case of *Krishna Chandra Gangopadhyaya v. Union of India* AIR 1970 SC 1389 a similar question arose. The validating Act contained a provision saying "notwithstanding any judgment, decree or order of any court, all actions taken, things done, rules, made, notifications issued or purported to have been taken, done, made or issued and rents or royalties realised under any such laws shall be deemed to have been validly taken, done, made, issued or realised, as the case may be, as if that section had been in force at all material times". While judging the validity of that provision, the Supreme Court observed:

...We are fully satisfied that Parliament desired to validate retrospectively what the Bihar legislation had ineffectually attempted. It has used words plain enough to implement its object and therefore the validating Act as well as the consequential levy are good.

In that case also, the validating Act had to be passed in view of a judgment of the Supreme Court declaring the realisation of the rents or royalties by the State

Government without any authority in law.

15. In the case of *I.N. Saksena v. State of Madhya Pradesh* AIR 1976 SC 2250, it was said:

While, in view of this distinction between legislative and judicial functions, the legislature cannot by a bare declaration, without more, directly overrule, reverse or override a judicial decision, it may, at any time in exercise of the plenary powers conferred on it by Articles 245 and 246 of the Constitution render a judicial decision ineffective by enacting a valid law on a topic within its legislative field fundamentally altering or changing with retrospective, curative or neutralising effect the conditions on which such decision is based. As pointed out by Ray C.J. in *Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another*, , the rendering ineffective of judgments or orders of competent courts and tribunals by changing their basis by legislative enactment is a well known pattern of all validating Acts. Such validating legislation removes the causes for ineffectiveness or invalidity of actions or proceedings is not an encroachment on judicial power.

16. Coming to the facts of the present case by the earlier judgments, this Court had issued writs of mandamus directing the State Government to implement its own decision dated 27-5-1967 in respect of joint cadre and one gradation list of the Assistants in the different Departments of the Secretariat and offices attached thereto which were circulated by communications dated 3rd July, 1967 and 24th July, 1967 referred to above. Section 9 of the present Ordinance says that "notwithstanding anything contained to the contrary in judgment, decree or order of any court... all appointments and provision of Assistants to higher posts and their confirmation in various Secretariat departments and attached offices made upto 30th August, 1988...shall be deemed to have been validly made as if the Government decision dated the 27th May, 1967 read with the Finance Department memo No. 7929-F, dated the 3rd July, 1967 and memo No. 9571 F, dated the 24th July, 1967 were not in existence and shall be deemed that such a decision was never taken and that such circulars were never issued". The effect of Section 9 will be that in eye of law the aforesaid Government decision dated 27th May, 1967 and memoes dated 3rd July, 1965 and 24th July, 1967 were never in existence and no such decision had ever been taken to have a joint cadre of the Assistants of the Secretariat and its attached offices with effect from 27th May, 1967. It is a settled principle that a statutory fiction introduced in any Act or Ordinance has to be given full effect and one should not allow his imagination to boggle while reaching the inevitable result of such statutory fiction. Reference in this connection may be made to the well known judgment in the cases of *East End Dwellings Co. Ltd. v. Finsbury Borough Council* 1952 AC 109 and *The State of Bombay Vs. Pandurang Vinayak Chaphalkar and Others*, .

17. It need not be pointed out that this Court had issued writs of mandamus only to implement the decision taken by the State Government on 27th May, 1967 which was communicated by memos dated 3rd July, 1967. If by statutory fiction the aforesaid decision and the communications have become non-existent, then

the very basis on which the earlier judgments of this Court had proceeded, disappeared. In other words, after making the executive decision to have a joint cadre and a combined gradation list with effect from 27th May, 1967 non-existent it was open to the Legislature to statutorily determine 30th August, 1988 as the date from which there shall be a joint cadre of Assistants of the Secretariat and attached offices. After having removed the basis of the judgments of this Court, in my view, it is open to say while exercising legislative power that notwithstanding anything contained to the contrary in any judgment or order, all appointments and promotions of Assistants to higher posts made upto 30th August, 1988, shall be deemed to have been validly made.

18. On behalf of the petitioners reliance was placed on the judgment of the Supreme Court in the case of *D. Cawasji and Co., Mysore v. The State and Anr.* AIR 1984 SC 1980. From a bare reference to the facts of that case it shall appear that an attempt had been made to validate the Collection made by the Municipal Corporation of the City in question without removing the lacuna which had been pointed out earlier by the court. In that connection it was pointed out as follows:

The amendment does not proceed to cure the defect or the lacuna by bringing in an amendment providing for exigibility of sales tax on excise duty, health cess and education cess. The impugned Amending Act, may not, therefore, to be a validating Act. A validating Act seeks to validate the earlier Acts declared illegal and unconstitutional by courts by removing the defect or lacuna which led to invalidation of the law. With the removal of the defect or lacuna resulting in the validation of any Act held invalid by a competent court, the Act may become valid, if the validating Act is lawfully enacted.

Reference was also made on behalf of the petitioners to the case of *Utkal Contractors and Joinery (P) Ltd. and Others Vs. State of Orissa*, . There also the question which fell for consideration was as to whether the State while purporting to amend the Act had encroached upon the judicial power. It was said as follows:

The legislature may, at any time, in exercise of the plenary power conferred on it by Articles 245 and 246 of the Constitution render a judicial decision ineffective by enacting a valid law. There is no prohibition against retrospective legislation. The power of the legislature to pass a law postulates the power to pass it prospectively as well as retrospectively. That of course, is subject to the legislative competence and subject to other constitutional limitation. The rendering ineffective of judgments or orders of competent Courts by changing their basis by legislative enactment is a well known pattern of all validating acts. Such validating legislation which removes the causes ineffectiveness or invalidity of action or proceedings cannot be considered as encroachment on judicial power. The legislature, however, cannot by a bare declaration, without more directly overrule, reverse so set aside any judicial decision.

19. In the present case, as I have already pointed out above, once Section 9

obliterates the decision of the State Government dated 27th May, 1967 along with the communications dated 3rd July, and 24th July, 1967 which were the foundation for issuance of the writs by this Court, the joint cadre of the Assistants in the different Departments of the Secretariat and offices attached thereto shall be deemed to have been constituted with effect from 30th August, 1988, the date fixed in Section 3 of the Ordinance. Now it is not open to the petitioners to challenge any promotion given prior to 30th August, 1988 by different departments on the basis of the aforesaid decision of the State Government dated 27th May, 1967 which in eye of law never existed.

20. During the hearing of the writ application on behalf of the petitioners it was also urged that the joint gradation list has not been in accordance with law. It is not possible, to examine individual grievances in this respect allegations and in absence of persons who have been placed above the petitioners in the gradation list so prepared. How are, it will be open to the petitioners to file representations in respect of such grievance before the competent authority who shall consider the same in accordance with law.

21. This writ application is, accordingly, dismissed but, in the case, there shall be no order for costs.

N. Panday, J.

22. I agree.