

(2017) 05 PAT CK 0025

In the Patna High Court

Case No : 1249 of 2013

Biresh Prasad Son Of Late Yogendra Singh

APPELLANT

Vs

The State Of Bihar

RESPONDENT

Date of Decision : 08-05-2017

Acts Referred:

Citation : (2017) 05 PAT CK 0025

Hon'ble Judges : Ajay Kumar Tripathi, Nilu Agrawal

Bench : DIVISION BENCH

Advocate : Ajoy Kumar Chakraborty, Vivek Anand

Final Decision : Allowed

Judgement

1. For the reasons indicated in the Interlocutory Application, namely, I. A. No. 7167 of 2013, the delay in filing of this appeal is condoned.
2. I. A. No. 7167 of 2013 is allowed.
3. The writ application of the appellant was dismissed by the Learned Single Judge vide order, dated 19.03.2012. He refused to quash the order, dated 06.05.2008, which was Annexure - 6 to the writ application, wherein the District Superintendent of Education, East Champaran informed all the subordinate authorities under him that Physical Trained Teachers would be entitled to Matric-Untrained-Scale and not Matric-Trained-Scale, which was being drawn by such Teachers. A direction was also issued for recovery of the

amount. Even the salary of the appellant was stopped, awaiting refixation of his pay and recovery of excess paid amount. This order is Annexure - 7 to the writ application, whose quashing was also sought.

4. While assailing the order, dated 19.03.2012, passed by the Learned Single Judge, submission of the learned counsel for the appellant is that the Matric-Trained-Scale, which was given to the Physical Trained Teachers, had due approval of the Finance Department of Government of Bihar. Omission has been committed by the Learned Single Judge in not appreciating Circular No. 885, 29.11.1980, by which the State Government had taken a decision that 20 per cent of Primary Teachers appointed as Physical Trained Teachers will be paid Matric-Trained-Scale of pay and similar decision of stopping pay and non-payment of Trained-Scale to Physical Trained Teachers was a subject matter of consideration in C. W. J. C. No. 8481 of 1990, wherein the Learned Single Judge allowed the writ application and granted the relief (a copy of which is Annexure - 1 to the Memo of Appeal). Failure to follow the precedent has resulted in the dismissal of the writ application, causing serious prejudice to the interest of the appellant. Even non-interference with the direction of recovery is an unfair decision, because the appellant is a low paid employee and recovery being made now after almost 20 years of the benefit having been extended, causes serious financial distress.

5. With due respect to learned counsel representing the appellant, the Learned Single Judge has extensively considered the submission made at the bar, but he was bound by certain decisions on such issues, especially a decision of a Division Bench, which was a case of Binod Kumar Singh versus

State of Bihar & ors., reported in 1995 (2) P.L.J.R. 378. The Learned Single Judge had this to say after placing reliance on such decision and findings:

"6. In the considered opinion of this Court the only question, therefore, involved in this writ application is as to whether a teacher having not completed the teachers training course in Education is entitled to get salary of the post of Matric trained teacher in a Government Primary School. It is not in dispute that the petitioner did/does not possess the requisite qualification of being a trained teacher which is compulsory for grant of pay scale of a Matric trained teacher. In fact this issue was gone at length by this

Court in the case of Binod Kumar Singh (supra), wherein it was held as follows:

"8. From the above narration of facts it is clear that the secondary schools and the elementary schools do not stand at par. As institutions imparting education they are distinct from each other. The method of teaching is different and so is the staffing pattern. At the primary level, a teacher is supposed to teach all subjects and, therefore, there is no subjectwise appointment. At the secondary level teaching is more of specialisation and therefore, appointments of teachers are made subjectwise. In secondary schools there are sanctioned posts of teachers in physical education and the prescribed qualification for appointment to that post is diploma or degree in physical education. In elementary schools there is no such sanctioned post.

9. Counsel for the petitioners was not in a position to counter the stand of the respondents that the circulars issued with respect to secondary schools are not applicable to elementary schools. The circulars/ letters relied upon by the counsel for the petitioners except letter no. 885 dated 29.11.90 relate to secondary schools. Letter No. 885 dated 29.11.80 does mention that teachers in physical education in elementary schools will also get the scale of trained teachers but as was rightly pointed out by the counsel for the respondents, the letter merely incorporates the minutes of the proceeding of a Committee. The Government decision in this regard is contained in Circular No. 197 dated 17.2.81 paragraph 7 of which categorically states that graduate teachers in physical education will be reckoned but they will not be entitled to the benefits of Matric trained

scale until they acquire the requisite qualification, namely Bachelor of Education.

10. The above policy is being followed since the very beginning Circular No. 690 dated 17.2.66 which is perhaps the earliest circular on the point with respect to elementary schools, also contained similar provision. It noted the importance of physical education as a part of elementary schools curriculum and the fact that the physical trained teachers were not being appointed as they were not trained. The State Government after considering the matter back a decision to appoint such persons who had done 9 months" course in physical education as teachers

in elementary but they would be entitled to the scale of "trained" teacher only after successfully completing the training course in a primary teachers' training school. The 1985 circular bearing no. 307 dated 19.2.85 also provided for two scales; matric untrained scale (Rs.535-765) to ordinary physical trained teachers and the Matric trained scale (Rs.580- 860) to ordinary physical trained teachers and the Matric trained teachers who have done two years teachers training course in elementary school.

11. The term "training" in the context connotes qualification of Degree or Diploma in Education, called teachers' training and the term "trained" means a person who has successfully completed the teacher's training course and has got the certificate (B.T./T.T. granted by the Bihar School Examination Board at the primary level) or Diploma/ Degree (Dip. in Ed/ B.Ed./M.Ed.) granted by the University. Some confusion appears to have arisen as physical training (a loose expression for physical education) is some times understood as akin to teachers training, which is not correct Physical Education and Education are two different subjects. Teachers' Training is a specialised professional course with emphasis on methodological aspects of teaching.

12. It is permissible to link pay with the qualifications (see AIR 1988 S.C. 349) and, therefore, granting higher scale to "trained" teachers can in no way be said to be arbitrary. The circulars of the State Government are clear and leave no room for doubt that teachers in physical education or "physical trained" teachers not possessing the requisite qualification in teachers' training are not entitled to the "trained" scale.

13. Recently, a Division Bench of this Court in cases, relating to Project Schools CWJC No. 10397 of 1992 and analogous cases (Kumud Kumari Srivastava vs. State of Bihar & ors .) disposed of on 1.5.95 [1995(2) PLJR 215] dealing with similar claim has observed:-

"The petitioner has a certificate/ degree in physical training and on that basis tries to present herself as possessing the minimum qualification of "trained graduate". The contention is wholly untenable. In the light of what has been stated above, Education is altogether a different subject than physical training and what is required by way of minimum qualification is a degree of Bachelor of Education and any certificate or degree in physical training. Hence any one possessing any certificate or degree in physical training cannot claim to fulfill the minimum qualification."

14. The judgment in 1979 BBCJ 184 was rendered in the context of a secondary school teacher and so far as the judgment in the case of

Jagnandan Singh & ors. (supra) is concerned, it would appear that no counter affidavit was filed on behalf of the State and the State counsel conceded before the Court that a physical trained teacher is entitled to the Matric trained scale. The aforementioned aspects of the matter were not brought to the notice of the learned Judge. The judgment was thus passed in ignorance of the relevant

provisions and therefore, does not have any binding force as a precedent.

15. For the reasons stated above, the question framed at the outset is answered in the negative and it is held that teachers in physical education not possessing the requisite certificate, diploma or degree in education, cannot be said to be trained teachers and are not entitled to the scale of trained teachers until they acquire the requisite qualification. The claim of the petitioners is thus not maintainable.

16. The writ petitions are accordingly, dismissed."

7. It has to be noted that the aforesaid view taken by the learned Single Judge was affirmed by the Division Bench in the order dated 20.1.2003 while dismissing L.P.A.No. 703/1995 filed by Binod Kumar Singh & ors. wherein it was held as follows:

"The petitioners claim equality with the teachers of secondary school. The petitioners are physical trained teachers in the elementary school. The qualification of a teacher in a secondary school is different from the qualification of a teacher in an elementary school.

In a secondary school the basic qualification is a graduate. But this is not so in an elementary school and the petitioners do not possess this qualification.

The petitioners rely on government order that elementary school physical trained teachers will be considered at par with the secondary school teachers provided they obtain the qualification. The equality rests on fiction that the petitioner will acquire the qualification as teachers in the secondary school.

The petitioners have yet to acquire the qualification.

Thus, comparison is not similar and the learned judge has committed no error in not granting relief which the petitioners sought. Dismissed."

8. In view of the aforementioned authoritative pronouncement by the Division Bench affirming the view of the learned Single Judge in the case of Binod Kumar Singh (*supra*) there would be hardly any scope for further argument that a teacher in the Primary School in order to be paid salary in the Matric trained teachers pay scale must have the prescribed qualification of being teachers training in Physical Education, inasmuch as the teacher having completed training in Physical Education is not entitled for grant of Matric trained pay scale.

9. As a matter of fact in view of the aforementioned authoritative pronouncement in the case of Binod Kumar Singh (*supra*) both by the learned Single Judge and the Division Bench that this Court in the order dated 13.5.2008 in C.W.J.C.No. 3175/2004 (*Bachcha Nath Jha & ors. vs. the State of Bihar & ors.*) had held that the teachers having trained in Physical Education possession the requisite qualification either Diploma or degree in teachers training Education cannot be held to be trained teachers and are not entitled to scale of trained teachers

until they acquire requisite qualification. In the case of Bachcha Nath Jha this Court had also found that there were certain teachers in Primary Schools who were not possessing the requisite qualification of teachers training in Education and yet were being paid salary as a Matric trained teacher. It was in this background that this Court had passed an order not only for taking action against the guilty persons who had granted Matric trained pay scale to the Physically trained teachers but had also given a direction to the Principal Secretary of the Human Resources Development Department to take necessary action in all over the State for maintaining parity as with regard to payment of salary to the Physically Trained Teacher in the pay scale of Matric untrained teacher, the relevant portion of the order of this Court dated 13.5.2008 in the case of Bachha Nath Jha (supra) reads as follows:

"At this stage, Mr. Ram Suresh Rai, learned Senior counsel appearing on behalf of the petitioner submits that this Court had found that such practice of illegal payment in the district of East Champaran was going on and the same has led to action against the headmasters of all the districts of East Champaran, but he is of the view that similar malpractice is also going on in other districts of the State also. In other words, he submits that the practice of payment of salary to the teachers of physical education despite being not trained in education in the trained pay scale of teachers is going on all over Bihar.

If that be so, this Court would direct the Principal Secretary of Human Resources Development Department to take remedial steps keeping in view that there is an affidavit on his

behalf that such malpractice has been stopped all over Bihar and any teacher being paid such salary though eligible for payment of salary in the pay scale of trained teachers has been also subjected to recovery of the excess amount paid to them. Thus, if in future it is found by this Court that such a stand in the affidavit filed in the present case was false, this Court will have no option but to proceed against the Principal Secretary, Human Resources Development Department. The Principal Secretary of the Human Resources Development Department is thus directed to ensure that no such payment is being made to any of the teachers of physical education in the trained pay scale who are untrained/ do not possess the requisite training qualification."

6. The Learned Single Judge, further, took note of a decision of the High Court, which was the case of Bachcha Nath Jha & ors. Versus State of Bihar & ors., which was C. W. J. C. No. 3175 of 2004, decided on 13.05.2008.

7. The only issue, now, which is left for consideration, is whether the recovery order, which has been passed and which was not interfered with by the Learned

Single Judge, is required to be reconsidered. This Court directed the official respondents vide order, dated 06.02.2017 as to what was the quantification of the amount, which was required to be recovered and what was the period for which such recovery was required to be made.

8. The supplementary counter affidavit filed on behalf of Respondent Nos. 2 and 3 indicate that the recovery is for the payment made between 13.05.1988 to 29.02.2008 that is extended over a period of 20 years and total amount which is required to be recovered is about Rs. 3,34,929 /- (three lacs, thirty four thousand, nine hundred and twenty nine) of which Rs. 1,02,000 /- (one lac and two thousand) has already been recovered till date.

9. Looking at the fact that the appellant is not a well paid employee, but a Physical Teacher of Primary School. He has drawn advantage or was allowed to draw advantage of a trained pay-scale for almost 20 years by the State authorities. The sudden discovery is a recent phenomenon. Now through the impugned order in the writ application, they want to rectify the said position as well as recover the amount so involved. This Court is inclined to consider submission of learned counsel for the appellant with regard to recovery part.

10. The Hon"ble Supreme Court in a recent decision, rendered in the case of State of Punjab and ors. Vrs. Rafiq Masih (White Washer) and ors., reported in [(2015) 4 SCC 334] had this to say, while considering similar matter of recovery from Class-III and Class-IV employees in the following words:

"18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference,

summarize the following few situations, wherein recoveries by the employers, would be impermissible in law: (i) Recovery from the employees belonging to Class-III and Class-IV service (or Group C and Group D service). (ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery. (iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued. (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post. (v) In any other case, where the court arrives at the conclusion that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover." 11. If the above principle and the framework, which

have been laid down by the Hon'ble Supreme Court is applied to the present case, we come to a opinion that since the appellant was allowed to draw the advantage for over 20 years, the sudden decision to make recoveries when even his pay- scale has been reduced, will have a telling effect financially not only on him, but also his family and children.

12. The Court, therefore, is inclined to modify that part of the order of the Learned Single Judge, where he has

refused to restrain the respondents from recovering the amount from the appellant. The order of recovery as contained in Annexure-6 & 7 to the writ application, both dated 06.05.2008 and limited to the issue of recovery, is hereby quashed.

However, no interference is warranted with regard to the decision of the respondents to re-fix the pay-scale of the appellant on matric untrained scale.

Appeal stands allowed only with regard to the recovery part.