

(1993) 04 OHC CK 0019
In the Orissa High Court
Case No : Civil Revision No. 13 of 1991

Biswanath Pati

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 15-04-1993

Acts Referred:

Citation : (1993) 76 CLT 128 : (1993) 1 OLR 519

Hon'ble Judges : B.L. Hansaria, C.J.; S.C. Mohapatra, J; R.K. Patra, J

Bench : Full Bench

Advocate : D.P. Dhal, for the Appellant; S.K. Das, Government Advocate, for the Respondent

Judgement

B.L. Hansaria, C.J.—Education is the life-blood of a nation. The source has to be nourished well, as, if it dries up or gets polluted, the stream of national life shall get vitally affected." it is education which develops intelligence and it is intelligence which distinguishes man from animal. Realising the very important role education plays in the life of a person, the Supreme Court in Miss. Mohini Jain Vs. State of Karnataka and others, even regarded education as a fundamental right. This decision, however, came to be modified in Unni Krishnan v. State of Andhra Pradesh JT 1993 (I) SC 474 by saying that right to get education up to primary stage is a fundamental right. The learned Judges recognised the great importance of education in the life of an individual as well as of the nation. It would be enough to note what Kohan, J. in his concurring judgment stated in this regard. According to him, education is at once social and political necessity and victories are gained, peace is preserved, progress is achieved, civilisation is built up and history is made, not in the battle-fields but, in educational institutions which are seed-beds of culture for children in whose hands quiver the destinies of the future are trained there (see paragraph 148). It was then observed in paragraphs 175 and 176 that education is enlightenment ; it is the one that lends dignity to man.

2. The aforesaid shows how important it is to see that educational institutions

are manned by proper persons and that the children attending the institution are taught by qualified persons. This would happen, inter alia, if the service conditions of the persons taking up teaching job in the schools and colleges are well looked after. It is with the facet that the review petition is concerned with and the question posed for determination is one which has far-reaching consequence in so far as aided educational institutions of the entire State are concerned. The same relates to as to who are entitled to the benefit of validation and regularisation conferred by the Orissa Aided Educational Institutions (Appointment of Teachers Validation) Act, 1989 (Orissa Act 9 of 1989 (for short, "the Validation Act")), as amended by Orissa Act 18 of 1989.

3. Before examining that point at issue, we may say a few words about the need being felt by the legislature from time to time to enact Validation Act of the type at hand. The history of The State's efforts to lay down the conditions as to who would be eligible to be appointed as teachers whether in schools or colleges and in what manner the schools and colleges should function is long. Before the Orissa Education Act was enacted in 1969, the Government used to issue circulars/instructions/resolutions from time to time. They came to be pieced together and the compilation was given the name of "Orissa Education Code". This Code contains various resolutions even of 1904, to wit, the one finding place in paragraph 7 stating that a primary Sanskrit school is a primary school in which one period a day is devoted to the teaching of Sanskrit. Then came the Orissa Education Act, 1969, Section 27(4) of which gave statutory status to the rules contained in the Code subject to certain conditions mentioned in that sub-section. Rules visualised by Section 27 came to be framed gradually and the one with which we are concerned is the Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 (for short, "the Rules"). Rule 5 of the Rules laid down the procedure of appointment of staff in aided institutions, the sum and substance of which is that there shall be a Selection Board and it would process all the applications received for appointment to the vacancies and would thereafter prepare a list in order of merit keeping in view the number of vacancies. From this list candidates are to be allotted to the concerned institutions strictly in order of merit as per vacancies. These Rules permit the Managing Committee or the Governing Body as the case may be, to fill up vacancies without applying to the Selection Board for a specified period without any approval in some situations, and with prior approval of the Inspector in case of a school and the Director in case of a college in other situations as provided therein.

4. It, however, so happened that the Selection Board constituted under the Education Act could not conduct recruitment tests regularly for which teachers/lecturers had to be appointed on ad hoc basis against regular vacancies in aided educational institutions in public interest. These persons rendered service for a considerable length of time and a need was felt to regularise their service, even though they had not come through the Selection Board which would be apparent

from the Statement of Objects and Reasons of the Bill pertaining to Act 9 of 1989. It is with this purpose that validation enactments came to be passed in the State from time to time these being Orissa Acts 14 of 1978, 27 of 1978, 27 of 1981, 6 of 1982 and finally in 1989 by Orissa Act 9 of 1989 which was amended by Act 18 of 1989. It is the last Act with which we are concerned.

5. It would be necessary to know what was the language of the Bill relating to the Act as it was introduced. It is Section 3 of the Bill which is material for our purpose, which reads as below :

"Notwithstanding anything contained in the Education Act or in the Rules or Regulations framed thereunder ;

(a) graduate teachers, intermediate and matriculate teachers, physical education teachers and classical teachers of aided schools appointed by the managing authorities of such schools on ad hoc basis on or after the 1st December, 1976 but not later than the 31st December, 1984; and

(b) lecturers of aided colleges appointed by the managing authorities of such colleges on ad hoc basis on or after the 1st December, 1976 but not later than the 31st December, 1984 ; and

(c) lecturers appointed validly and lawfully in aided colleges till the 1st March, 1981 after termination of their ad hoc appointments in Government colleges, who are continuing as such teachers or, as the case may be, lecturers validly and lawfully, except those whose appointments have been validated by the Orissa Aided Educational Institutions (Appointment of Teachers Validation). Act, 1981, shall for all in ents and purposes, be deemed to have been validly and regu- larly appointed, and no such appointment shall be challenged in any Court of law merely on the ground that the appointment was made otherwise than in accordance with the procedure laid down in the Education Act and the Rules and Regulations framed there- under."

6. When the Bill was discussed in the Assembly, the aforesaid section came to be amended and need was felt to make provision that for an incumbent to get the benefit of the Validation Act, he must have put in one year's continuous service, which amendment was accepted and incorporated in the Act with the result that Section 3 as finally enacted read as below

"3. Validation of certain appointments- Notwithstanding anything contained in the Education Act or in the Rules or Regulations framed thereunder,

(a) graduate teachers, intermediate and matriculate teachers, physical education teachers and Hindi teachers of aided schools appointed by the managing authorities of such schools on ad hoc basis on or after the 1st December, 1976 but not later than the 31st December, 1984 ;

(b) lecturers of aided colleges appointed by the managing authorities of such colleges on ad hoc basis on or after the 1st December, 1976 but not later than

the 31st December, 1984; and

(c) lecturers appointed validly and lawfully in aided colleges till the 1st March, 1981 after termination of their ad hoc appointments in Government colleges,

who have continuous service as such teachers or lecturers for a period of at least one year without any break or with a break or breaks in one or more aided Schools or Colleges and who are continuing as such teachers or whose services have been terminated after the 31st December, 1984 save for misconduct or, as the case may be, lecturers validly and lawfully, except those whose appointments have been validated by the Orissa Aided Educational Institutions (Appointment of Teachers Validation) Act, 1981, shall, for all intents and purposes, be deemed to have been validly and regularly appointed, and no such appointment shall be challenged in any Court of law merely on the ground that the appointment was made otherwise than in accordance with the procedure laid down in the Education Act and the Rules and Regulations framed thereunder;

Provided that the validation of appointments as aforesaid shall not put persons-

(i) appointed as teachers or lecturers, as the case may be, during the period between the 1st December, 1976 and the 31st December, 1984 on the recommendation of the Selection Board ; or

(ii) whose appointments as teachers or lecturers, as the case may be, were the validated prior to the commencement of this Act,

in a disadvantageous position in any manner whatsoever.""

(Emphasis ours)

7. The aforesaid shows that though in the Bill "continuous service for a period of at least one year" was not contemplated, the Act contained this condition. A need for amendment was, therefore, felt and the Act came to be amended by Act 18 of 1989. As to why the need for amendment was felt is discernible from the following Statement of Objects and Reasons :

"The intention of Government was to validate the appointment of teachers/ lecturers appointed in the Aided Educational Institutions on ad hoc basis up to 31-12-1984. Because of the amend- ment in the Assembly requiring one year"s continuous service of such teachers/lecturers for validation of their services, which was accepted and incorporated in the Validation Act, 1989, the intention of Government to validate appointments of all ad hoc teachers and lecturers upto 31-12-1984 was not satisfied. In order to make the intention of the Government effective there is need for this amendment. This Bill seeks to achieve the above objective."

8. To achieve the aforesaid objective, Act 18 of 1989 was enacted whose Section 2 reads as below :

"2. Amendment of Section 3-In Section 3 of the Orissa Aided Educational

Institutions(Appointment of Teachers Validation)Act,9 of 1989, for the words "who have continuous service as such teachers or lecturers for a period of at least one year without any break or with breaks in one or more Aided Schools or Colleges and who are continuing as such teachers or whose services have been terminated after the 31st December, 1984" occurring below clause (c), the words who have rendered service as such teachers or lecturers for a period of at least one year without any break or with a break or breaks in one or more Aided Schools or Colleges and who were continuing as such teachers or whose services have been terminated after the 31st December, 1985" shall be substituted"

(Underlining ours)

9. Three changes were thus brought about in Section 3 of the Principal Act. The first is that the requirement of continuous service was given up. Secondly, which is the most important for our purpose, instead of the section stating "who are continuing as such teachers" in its main part, it read "who were continuing as such teachers". Thirdly, the date of termination which was mentioned as 31-12-1984, was specified as 31-12-1985.

10. We have been called upon to decide what is the effect of the aforesaid changes. In order to answer this, we have to first note what were the essential conditions under the principal Act for a teacher/lecturer to get regularised or validation of his service. This came to be examined by the apex Court in Rabinarayan Mohapatra v. State of Orissa, AIR 1991 SC 1286. The following three conditions were mentioned in this context in paragraph ;

"1. The appointment by the managing authority of the school on ad hoc basis must be on or after the 1st December, 1976 but not later than 31st December. 1984;

2. The service as such teacher is continuous for a period of at least one year without any break or with a break or breaks in one or more aided schools :

3. Is continuing as such teacher or his services were terminated after the 31st December, 1984, save for misconduct."

11. In Rabinarayan's case, the amendment effected by the Orissa Act 18 of 1989 had not been examined as the same was not required to be. The amendment, however, having obviated the necessity of "continuing as such teacher"" the question is whether satisfaction of the first two conditions of the three mentioned above would be enough to bring a case within the purview of the Validation Act as amended. According to Shri Patnaik appearing for the petitioner, this has to be the result not only because the requirement of continuous service was given up but also because the amendment stated that the benefit would be available to those teachers "who were continuing" when the Validation Act came into force, whereas the earlier requirement was that those teachers "who are continuing" would get the benefit.

12. Strong reliance is placed by Shri Patnaik on two Bench decisions of this Court

to sustain his submission. The first is OJC No. 4038 of 1990 in which the effect of amendment came to be considered and in the order passed on 30-4-1991 it was stated that the intention behind the substitution of the word "are" by "were" was that the Legislature wanted to include cases of teachers whose services had been terminated before the appointed day because there could have been no rationality for giving the benefit to a teacher who was in service on 31-12-1984 or for that matter on 31-12-1985, and refusing the same to one whose service had been terminated "a day before". The Bench, therefore, stated that there could be no rational nexus in drawing a distinction between the teachers in service on 31-12-1984/31-12-1985 and those whose services had been terminated "some time before".

13. The aforesaid decision was referred approvingly by another Bench in OJC No. 2071 of 1991, judgment in which was delivered on 8-10-1991. In paragraph 8 of that judgment it was stated that the intention behind the amendment was to extend the benefit of the validation law to ad hoc teachers whose services had been terminated prior to 31-12-1984/31-12-1985. This interpretation was stated to be in consonance with the intent and purpose for which the Validation Act, which was characterised even as a beneficial legislation, enacted. It was further observed that to construe otherwise would mean depriving the advantage of the beneficial legislation to a teacher whose services happened to be terminated just before the appointed day.

14. Relying on the aforesaid two decisions, a submission was made, when this case came up for hearing before another Bench, that as the petitioner satisfied the first two conditions of Rabinarayan's case, as he was appointed on 28-7-1978 and had held the post till 31-7-1979, his service has to be validated though the same came to be terminated on 31-7-1979. This submission was advanced by Shri Patnaik because, according to him, if the benefit of the amended provision has to be made available to a teacher whose service had been terminated any time prior to 31-12-1984, or for that matter 31-12-1985, the retro-activity Cannot be confined by stating that the termination should have been "just before" or "some time before" the appointed day, which were the two expressions used in the aforesaid two OJ Cs. Learned counsel submitted that on logic and on principle, the retro-activity of the operation of the amendment cannot be confined to the terminations to any fixed period and it has to be taken to its logical end, the result of which would be that requirement of the third condition mentioned in Rabinarayan's case would cease to be operative. This submission having been made and the Bench hearing the case having felt that acceptance of this submission would have very wide ramification, the matter was required to be referred to a larger Bench and it is because of that reference that the matter has been placed before this Bench.

15. Before this Bench also Shri Patnaik has taken the same stand as he had taken before the Division Bench by adding that the Validation Act being an enactment for the protection of and for giving permanent status to the ad hoc

teachers, the same should be liberally construed and the benefit of the same should be made available to the petitioner by adopting such interpretation of the provision as would advance the larger cause of the society.

16. Ever since the decision of Rattan Lal and Others Vs. State of Haryana and Others, the apex Court has been discouraging the system of ad hoc appointment which was described as "pernicious system of appointment" which subjects ad hoc teachers to an arbitrary "hire and fire" policy. It was pointed out that the teachers who constitute the bulk of unemployed are compelled to accept these types of appointments on ad hoc basis with miserable conditions of service and the situation is exploited, which is not a sound personnel policy which is bound to have repercussions on the educational institutions and the children studying there.

17. Similar thoughts were expressed in Rabinarayan's case to which our attention is invited by Shri Patnaik. This is what was stated in paragraph 6 of that judgment in this connection :

Under the Constitution the State is committed to secure right to education for all citizens. Bulk of our population is yet illiterate. Till the time illiteracy is effaced from the country the resolution enshrined in the Preamble cannot be fulfilled. Education is the dire need of the country. There are enough schools nor teachers. to teach. insecurity is writ large on the face of the teaching community because of nebulous and unsatisfactory conditions of service. In order to make the existing educational set-up effective and efficient, it is necessary to do away with ad hocism in teaching appoint merits. An appointment on 89 days basis with one day break (it may be pointed out that Rabinarayan's case was from this State and in the present petition also the appointment had been on 89 days basis with breaks) which deprives at teacher of his salary for the period of summer vacation and other service benefits is wholly arbitrary and suffers from the vice of; discrimination",

18. On attention of the learned counsel for both sides being drawn by the Court to the proviso to the principal Act which had remain- ed unamended, it was virtually conceded from the Bar that the amend- ment could not be given the meaning proposed from the Bar because in that case many teachers/lecturers who had come to be appointed on the recommendation of the Selection Board between 1-12-1976 and 31-12-1984 and those whose services had been validated prior to the commencement of the present Act would be put in a disadvantageous position, as the acceptance of the submission from the Bar may require their dislocation, which would not be permissible because of the proviso.

19. We do not, however, propose to go by concession we have to apply our own mind because of the very important point involved and the wide rectifications any decision in this regard would have. As what has been stated in the proviso is being considered by us to find out the meaning of the Act, we may say a few words about the roll of a proviso in a section. According to S. Sundaram Pillai and

Others Vs. `R. Pattabiraman and Others, a proviso has four different purposes. These being, as stated in paragraph 112, (i) qualifying or excepting certain provisions from the main enactment ; (ii) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable ; (iii) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquired the tenor and colour of the substantive enactment itself ; and (iv) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision.

20. Let us see which of the aforesaid purpose(s) the present proviso may be said to serve. According to us, the proviso at hand serves the first and the third of the aforesaid purposes inasmuch as it qualifies certain provisions of the main enactment and has been so embedded in the Act to acquire the tenor and colour of the substantive enactment itself. We have said so because the proviso protects the rights of those teachers/lecturers who had been appointed during the period between 1-12-1976 and 31-12-1984 on the recommendation of the Selection Board or whose appointments had been validated prior to the commencement of this Act by stating that they would not be put in a disadvantageous position, the effect of which is that it has created a substantive right in favour of the persons protected by the proviso and this may as well be read as qualifying the right given by the main provision of the enactment in the sense that whatever is permissible to be done under the main enactment would in no way affect the right of the persons mentioned in the proviso. It is apparent that the teachers whose services have stood validated by the Act under consideration cannot in any way be put in a disadvantageous position to give relief to a teacher like the review-petitioner.

21. The aforesaid reading of ours of the proviso is not confined merely to the language used, which, according to us, amply bears the interpretation we have put on the proviso, but also because persons protected being, inter alia, those who had been appointed on the recommendation of the Selection Board there interest has to be kept high in mind by us because the scheme of the Rules to which we have referred earlier is that the normal procedure for appointment of teachers is filling up of the vacancies by candidates recommended by the Selection Board. The persons whose names find place in the select list are those who had entered the arena of competition, proved their merit and after selection did look forward to their absorption. We cannot sacrifice their expectations, nay rights, at the altar of the ad hoc appointees who come through back-door or by side window. The reality prevailing in the field cannot be overlooked and the reality is that the teachers who are appointed on ad hoc basis have to please their appointing authorities in very many ways and it is not merit which is the pre-dominating factor in selecting ad hoc teachers but something else. These appointees cannot, therefore, be taken to be as meritorious as the persons selected by the Selection Board, and so, the larger interest of imparting sound education requires us to favour the Selection Board candidates in preference to

ad hoc appointees.

22. The observations of ours may not be understood to mean that the right conferred on ad hoc appointees by the Validation Act as amended should not be made available to them if it is due. But, we would have a cautious approach in the matter and would keep in the fore-front as our guiding star the larger interest of the society and the nation, which is to have the better of the two as teachers in our schools and colleges.

23. Let us now see whether the amendment by Act 18 of 1989 affects the law laid down in Rabinarayan's case, according to which the three conditions noted above are to be satisfied for getting the benefit of the Validation Act, and if so, to what extent, and what, according to us, is the position which emerges after the Validation Act was amended by Act 18 of 1989. As already noted, the driving force behind the amendment was the amendment of the principal Act by the Assembly requiring one year's continuous service, which did not find place in the Bill as introduced. So, when the principal Act mentioned in its main provision that the benefit would be available to those teachers whose service had been terminated after 31st December, 1984, the Legislature thought that as one year's continuous service has been laid down as a condition for getting the benefit of the Validation Act, and as the last date of appointment had been mentioned in Clauses (a) and (b) as 31st December, 1984, the teachers/lecturers appointed on 31st December, 1984, would not get the benefit of the Act because of the requirement of one year's continuous service, which would have required them to serve upto 31st December, 1985. It is because of this alone that in the main provision of the principal Act, which has stated about termination after 31st December, 1984, the date came to be mentioned by the amending Act as 31st December, 1985 and as teachers whose services would have been terminated after 31st December, 1985, would not have been in service when the principal Act came into force, which was on 29th May, 1989. It was thought necessary by the draftsman that the proper verb to be used as regards those teachers would be who were continuing as such teachers (when the principal Act came into force) and not are continuing as by the time the principal Act came to be enacted, they had ceased to be in service. According to us, this is the reason for substitution of the word "are" for "were", and so, nothing much can be read in this change.

24. The aforesaid being the real purport of the amendment and the effect of the same, we say with respect that what had been observed by the two Benches of this Court which decided O.J.Cs. 4038/ 90 and 2071/91 relating to the effect of the amendment was not correct. According to us, despite the amendment effected by Act 18 of 1989, all the three conditions mentioned in Rabinarayan's case shall have to be satisfied subject to certain modifications in the language. The three conditions as modified would read as below, according to us :

1. The first appointment (by the Managing Committee) in a school on ad hoc basis must be on or after the 1st December, 1976 but not later than 31st

December, 1984.

2. The teacher has rendered service for a period of at least one year without any break or with a break or breaks on one or more aided schools.

3. He was continuing as such teacher on the date the principal Act came into force, namely, 29-5-1989, or his service was terminated after 31-12-1935, save for misconduct.

25. In view of the above, we reject the contentions advanced by Shri Patnaik and hold that the aforesaid two O.J.Cs.were not correctly decided. May we say here that the effect of acceptance of Shri Patnaik's submission would have been that an ad hoc teacher who had joined any aided school on 1-12-1976 and had served for one year, i.e., up to 1-12-1977, could come to this Court even in, say, 1993, praying for validation of his service and adjustment accordingly in any school, i.e., a person who had been out of job for about 16 years could have claimed the benefit of the Validation Act and if law would have required acceptance of his claim, in appropriate case, this Court, despite delay, might order for his reinstatement, which, apart from causing displacement of some duly selected persons, would have been akin to putting a dead wood in service which would not have served any purpose of the institution or of the society.

26. Before parting, we have three observations to make. The first is that according to us the Validation Act does not take care of what we would" like to call "contingent appointments", meaning appointments made against leave vacancy or substituted vacancy. We have felt necessary to make this aspect clear because it may be that in a case where a regularly appointed teacher goes for training which is to last, say, for three years these teachers come to be appointed, each for one year in his leave vacancy. If we were to grant the benefit of the Validation Act to all those three persons, which would have to be done if the contention as advanced by Shri Patnaik were to be accepted, it is apparent that the salutary provision of the Validation Act would be completely nullified and a chaos would result because as against one post there would have been even four contenders-one regular appointee and three leave vacancy appointees. Such a result cannot just be countenanced. The second observation of ours is that those teachers alone would be entitled to the benefit of the Validation Act whose appointments come Within the staffing pattern. To put it clearly, the teachers appointed against additional sections would not be entitled to the benefit of the Validation Act unless the opening of the additional sections is approved as required by the provisions holding the field. Even then, the claim for regularisation would be entertained from the date of approval of the opening of the sections and not from any prior date. We thirdly observe that the stand taken by the State in this important case has been faltering and varying. This should not have happened in a case of the present nature.

27. Let the records be placed before the Bench which heard this review for final disposal of the case in accordance with the opinion expressed by us.

S.C. Mohapatra, J.

28. I agree.

R.K. Patra, J.

29. I agree.