
(2002) 05 PAT CK 0087
In the Patna High Court
Case No : C.W.J.C. No. 8645 of 2001

Hira Mahto and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 17-05-2002

Acts Referred:

Constitution of India, 1950 — Article 12

Citation : (2002) 3 PLJR 58

Hon'ble Judges : Aftab Alam, J

Bench : Single Bench

Advocate : Rajendra Pd. Singh, R.K. Singh and Niranjana Kumar, in C.W.J.C. Nos. 8645, 9950, 10042, 11153, 12667, 13242 and 13974 of 2001, Shardanand Mishra, in C.W.J.C. No. 14055 of 2001, P.K. Verma and S.R. Sharan, in C.W.J.C. Nos. 12638 and 13667 of 2001, S.B.K. Manglam, in C.W.J.C. No. 15028 of 2001 and R.S. Pandey, in C.W.J.C. Nos. 14054 of 2001, for the Appellant; Sanjay Singh and Shailendra Kumar Singh, for the Respondent

Final Decision : Dismissed

Judgement

Aftab Alam, J.—Teachers of elementary schools posted in different districts have filed separate writ petitions because their cadre is strictly based. Otherwise all these writ petitions (13 in number) arise from the same (sic) of facts and circumstances and make common prayers. All these cases were, therefore, heard together and are being (sic) disposed of by this common order.

2. Though the Petitioners in different cases of this batch are represented by different counsel, the leading argument was advanced by Mr. Rajendra Prasad Singh, Sr. Counsel appearing in C.W.J.C. No. 8645 of 2001 which was filed by the teachers posted in the district of Darbhanga. But the counter affidavits on behalf of the State were filed in another case of the batch, being C.W.J.C. No. 12667 of 2001; the State's affidavits filed in this case were taken into consideration in all other cases in the batch. In this judgment, therefore, the records of C.W.J.C. No. 8645 of 2001 are used for stating the relevant facts and referring to the

annexures; for taking note of the stand of the State Government, preference is made to the records of C.W.J.C. No. 67 of 2001 in which the State's affidavit were filed.

3. The grievance of the Petitioners in these cases is that though they were appointed as teachers of elementary school which were taken over by the State Government under the Bihar Non-Government Elementary Schools (Taking over Management of Control) Ordinance, 1976 (later made into Act of 1976), on the basis of an order passed by the Commissioner cum Secretary Secondary, Primary and Education department, Government of Bihar they were being posted against posts created under (sic) District Primary Education Project III(sic)EPIII) in schools set up under the (sic)resaid project. According to the petition the schools under the DPEP III project (sic)e set up by, or at least with the aid of, a (sic)ety registration under the Societies Registration Act under the name of Bihar Shiksha Pariyojna Parishad for implementation of the Bihar Education Project. The Petitioners understand that on the basis of financial aid, extended for a limited time, by some international funding agencies and the Central Government, the Parishad was assigned education project which inter alia aimed at providing "alternative schooling and special education programme to enhance the delivery of project benefits particularly to the socially disadvantage group children". The project envisaged construction of a large number of new schools, teachers of which would be paid their salary by the Parishad from the funds received by it, for a limited time, from the international agencies and the Central Government. The Petitioners pointed out that the Parishad was no part of the State Government; it was a body completely distinct and separate from the State Government, and it was held by this Court in its decision, dated 23.9.1999 in C.W.J.C. No. 8822 of 1997 Birgu Paswan v. State of Bihar and Ors. that the Parishad was not even "State" within the meaning of Article 12 of the Constitution. In these premises it was contended on behalf of the Petitioners that the impugned direction for posting them in DPEP III project schools amounted not only to post them outside their cadre but to hand over their services to an altogether different body, as their employer. This was clearly impermissible in law. The worst fear of the Petitioners is that once the funds stopped coming to the Parishad after the expiry of the project period, no salary will be paid to them and for all intent and purposes they will find themselves out of service. Then they will face the daunting prospect of trying to come back in the service of the State Government.

4. At this stage, it would be appropriate to take note of the relevant facts of the case which are brief, simple and without controversy. In 1996 the Bihar Public Service Commission issued advertisement (Annexure-3) for the Second Primary Teachers (Elementary) Competitive Examination, 1996 for appointment of teachers in the nationalised primary schools in the State. The advertisement gave district wise breakup of vacancies and the number of vacancies for the district of Darbhanga was shown to be 254. The advertisement invited applications both from trained and untrained categories of candidates.

5. On the basis of the test(s) held by it the Commission prepared a select list of candidates and forwarded its recommendation to the State Government on 18.8.1999. On the Commission's recommendation, the Petitioners in all these cases, along with others, were appointed as teachers of elementary schools in different districts. The office order, dated 21.12.1999 issued under the joint signatures of the Dist. Supdt. of Education and the Deputy Dev. Commissioner, Darbhanga by which Petitioner No. 1 in CWJC No. 8645 of 2001 was appointed as a teacher for elementary school is brought on record as Annexure 4, as a sample. On the basis of their respective appointment orders, the Petitioners gave their joining before the competent authority and started getting their salary, against sanctioned posts, from the respective district treasuries. On 2.3.2000 the Secretary in the Department of Secondary, Elementary and Adult Education issued a circular letter (Annexure 5) advising all the concerned authorities about the Government decision that all teachers, appointed on the basis of the Second Elementary Teachers (Primary) Competitive Examination, 1996 who were untrained must be asked to complete the one year in service training before their posting in schools. The letter also indicated the training institutions where the teachers of the different districts were to be sent for their in-service training. At the same time the freshly appointed teachers who had the required qualification in tamers" training from before were posted different primary schools in their respective districts. Following the Secretary's letters dated 2.3.2000, an order was issued by the Regional Deputy Director of Education, Darbhanga under his memo No. 533, dated 12.5.2000 (Annexure 6) by which 385 freshly appointed untrained teachers were directed to report at the training institutes, indicated against their names in the order, for their in-service training. On the basis of the order of the Regional Deputy Director of Education, the teachers were relieved from the respective offices of the Block Education Extension Officer. One such order of relieving, dated 12.6.2000 (Annexure 7) by the Block Education Extension Officer, Bahadurpur in the case of Petitioner No. 1 is at Annexure 7, as a sample. The Petitioners joined their respective training institutes within a few days thereafter and on completion of their one year in-service training they came back to their respective places of posting i.e. the offices of the respective Block Education Extension Officers. On joining the office of the Block Education Extension Officer, the Petitioners once again started getting their salary from that office.

6. On 5.9.2000 while the Petitioners were still in the midst of their in-service training, the Dist. Supdt. of Education Darbhanga issued a letter (Annexure 10) addressed to all the Block Education Extension Officers and Area Education Officers. In this letter, it was stated that approval was given for setting up 175 schools in the district along with 350 teaching units i.e. the posts of teachers. It was further stated that these teaching units were approved by the Bihar Shiksha Pariyojana Parishad and the payment of salary to the teachers posted against those units will also be made from the Bihar Education Project Fund. The letter went on to direct concerned officials to take steps for the (sic)up of the new

schools as indicated list appended to that letter by faquir necessary lands and extending help in instruction of the school building.

7. Shortly before the Petitioners joined respective offices of the Block Education Officers, a circular letter, 2.4.2001 was issued by the Commissioner-cum-Secretary, Secondary, Pri and Adult Education (Annexure 1) intiate the concerned officials about the (sic) ment decision that on completion of training the freshly appointed teach would be posted against the newly (sic)d teaching units for the State Elementary schools, set up in the 1st phase (sic)E.P. III. It was further stated that in of the agreement between the State Government, the Central Government and world Bank necessary funds were allocation for payment of salary against the created posts in the D.P.E.P. III pro-(sic)ne and those posts were required to (sic)d up without delay. The letter went give the direction to make the postings newly appointed teachers against sts created in this category following described procedure, but without any

8. On 7.6.2001 the Commissioner-Secretary to the Government advocate circular letter (Annexure 2) to all (sic)et. Magistrates. In this letter a direct as given for the posting of the newly (sic)ted teacher on return from their in(sic) training. The postings were to be in the following order:

- (i) Against vacant units under (sic).P. III.
- (ii) Against available units in schools (sic)ch were closed (for want of teacher.
- (iii) In such schools where there is only one teacher.
- (iv) Schools in rural areas.

9. It was thus reiterated that the freshly appointed teachers on completion of their in-service training were to be first appointed against the units created and approved for schools set up under D.P.E.P. III.

10. All the Petitioners are aggrieved by the letters of the Commissioner-cum-Secretary to the Government, dated 12.4.2001 and 7.6.2001 (Annexures 1 and 2 respectively) and all writ petitions in this batch are filed seeking to challenge the directions contained in the two letters. All the Petitioners strongly resist the direction to post them in the newly set up schools under D.P.E.P. III and contend that they can be posted only in the nationalised high schools for which they were appointed.

11. On the other hand the Respondents assert that the Petitioners' apprehension and fear are completely misconceived. It is totally incorrect to say that the schools under D.P.E.P. III were set up by the Parishad or that on being posted in those schools the Petitioners will go out of the employment of the State Government and become employees of the Parishad. The Petitioners seem to be misinformed about the true nature of those schools and that appears be the cause of their misapprehensions in connection with their posting in those schools. On behalf of the Respondents it was emphasised that the schools under

D.P.E.P. III were neither set up by the Parishad nor did they belong to the Parishad. The schools were set up by the State Government and the teaching units/posts of teachers were approved and sanctioned by the State Government. The Parishad itself was established under the administrative control of the Department of Primary Education, Government of Bihar as recipient of the financial aid coming from outside the State under the District Primary Education Programme III for a period of five years. It was further emphasized on behalf of the Respondents that the schools set up under D.P.E.P. III were integral part of the system of Primary Education in the State and on the expiry of the five year programme period all financial liabilities in connection with those schools will be shouldered by the State Government. This would be evident from the resolution of the State Government issued on 31.3.1999 (Annexure-A). By this resolution which was issued with the concurrence of the department of Finance, the State Government gave its sanction for setting up 2845 schools and created 5690 teaching units (in the unified State of Bihar). The State Government further expressed its resolve to bear the expenditure incurred on these posts on the expiry of the programme period as "Committed expenditure".

12. Mr. Sanjay Singh, Standing Counsel No. IX submitted that much of the confusion in this case was caused because the Petitioner tried to see the schools through the provisions of the Memorandum of Association of the Parishad. Mr. Singh submitted that the Memorandum of Association of the Parishad was hardly of any help or relevance for understanding the true nature of these schools. According to him the schools were set up under the District Primary Education Programme III, Bihar which in turn was taken up under the Development Credit Agreement which was an agreement between the Government of India (called the Borrower) and the International Development Association (called the Association). Mr. S.C. IX stated that the programme period was five years and though it was launched on 2.10.1997, the formal commencement of the programme began on 1.4.1998 and will close on 31.3.2003. After that date all the financial liabilities in connection with the schools will be borne by the State Government as committed and undertaken by the State Government in its resolution, dated 31.3.1999, unless the programme was extended and the parties to the Development Credit Agreement consented to continue the financial aid for a further period.

13. Mr. S.C. IX further stated that the financial size and source of this project for the undivided State of Bihar was Rs. 651.88 crores. The project was a central sponsored programme and its cost was shared by the Government of India and the State of Bihar in the ratio 85: 15. The Government of India in turn was getting financial assistance in the form of loan from the World Bank and in the form of grant from UNICEF.

14. Mr. S.C. IX extensively referred to the provisions of the Development Credit Agreement, relevant extracts from which are at Annexure-H to the supplementary affidavit filed by the Secretary, Department of Primary Education.

Mr. S.C. IX invited my attention specially to the following provisions of the agreement:

(A) Whereas the borrower, having satisfied itself as to the feasibility and priority of the project described in Schedule 2 to the Agreement has requested the Association to assist in the financing of the project.

(B) X X X X X.

(C) The project will be carried out by the borrower and the State of Bihar with the assistance of Bihar Shiksha Pariyojna Parishad (BSPP) as well as the assistance of the borrower and as part of such assistance the borrower will make available to the BSPP the proceeds of the Credit as provided in this Agreement.

15. Mr. S.C. IX also referred to the following portions of Schedule II to the Agreement, containing the description of, the project:

The objectives of the project are to build and strengthen Bihar's State, district and Sub-District institutional ca-(sic) to ensure that rope (sic) children, specially Socially Disadvantaged Group children, complete a five year primary education cycle of appropriate quality in(sic) ar's low literacy districts.

"The project consists of the follow-(sic) parts, subject to such modifications thereof as the Borrower and the Association agree upon from time to (sic)pe achieve such objective.

"(a) Construction of new schools and class-rooms and repairing and reabilities existing facilities to create approximately 4,00,000 new student (sic)aces and (b) establishing a school construction Innovation Fund to facilitate research experimentation and evaluate alternative cost-effective school facilities construction techniques and to (sic)nance the construction of prototypes of such facilities.

"Sanctioning about 5,700 new teaching position and appointing teachers.

16. He also referred to Annexure 1 to agreement, containing the assurance by the Govt. of Bihar in course of operations in connection with the programme:

(d) Carry out and cause the BSPP (sic) carry out, the project in accordance (sic)th the DPEP Guidelines and the PIP agreed with IDA (Para 4 and Annx. 2)

(e) X X X X X.

(f) X X X X X.

(g) Take all necessary measures (sic)ensure that at least 95 percent of the teacher's posts in the project districts, arting the third year of the project, amain filled throughout the project implementation period (paras 4, 20 and 21 (sic)d Annex. 2).

(h)XXXXX.

(i) X X X X X.

(j) XX XXX.

(k) x x x x x.

"(I) Ensure that no involuntary resettlements arises from any use of land, or change of land-use for the project, except to the extent that IDA agrees in writing prior to such resettlement that the arrangements for such involuntary resettlement are satisfactory to IDA (para 18).

(m) X X X.

(n) X X X.

"Sanctioning new teaching posts and appointing teachers.

17. On the basis of the provisions of the Development Credit Agreement, Mr. Sanjay Singh strongly contended that the setting up of the new schools, sanctioning the posts of teachers for the schools and posting teachers against the newly sanctioned units were all the responsibilities of the State Government. He further contended that it would be incorrect to suggest that the D.P.E.P. schools were out side the system of primary schools of the State Government and submitted that the setting up of these schools and the postings of teachers there were made strictly in terms

of the provisions of the Bihar Non-Government Elementary Schools (Taking Over of Management and Control) Act, 1976.

18. The State's counter affidavits were filed in CWJC No. 12667 of 2001 which was filed on behalf of the teachers of Purnea. Citing, therefore, the example of Purnea, Mr. S.C. IX pointed out (by referring to Annexures I to L) that the schools under D.P.E.P. III were set up on the recommendation of the committee constituted in terms of Section 6 of the Act and the postings of the teachers were also made by the competent authorities under the Act. He, therefore, submitted that it would be quite incorrect and erroneous to suggest that the schools under D.P.E.P. III were something de hors or out side the legal frame work.

19. Mr. Rajendra Pd. Singh, learned Senior Advocate leading the arguments on behalf of the Petitioners submitted that what was stated about Purnea did not apply to many other districts. According to him the schools under D.P.E.P. III in the district of Darbhanga were not set up following the provisions of the Act. In support of his submission, he relied upon Annexures 10 and 11. These annexures however, do not suggest that the schools under D.P.E.P. III in the district of Darbhanga were set up in violation of the provisions of law. Moreover, this fact was not specifically pleaded in the writ petition and, therefore, the State Government was not required to show in case of each of the districts that the schools were set up following the provisions of law. The case of Purnea was cited only as an example and I see no reason to disbelieve the averments made in this regard by the State.

20. Mr. Rajendra Pd. Singh then submitted that a close scrutiny of the Memorandum of Association of the Parishad, particularly the clauses dealing with the aims and objectives and the powers and functions of the Parishad and the provisions of the Development Credit Agreement will make it plain and clear that the D.P.E.P. programme was intended to create a system of education and set up a chain of schools not as an integrated part of the pre-existing system of schools of the State Government. But as a parallel and alternate system to reach into areas and to (socially disadvantaged) sections of society to whom the benefit of education had not reached hitherto.

21. Mr. Singh submitted that the action of the State Government in having the D.P.E.P. schools integrated to the pre-existing schools will frustrate the very purpose and object of the programme and the State Government was trying to implement the programme in a manner calculated to subvert it.

22. Mr. Singh pointed out that the advertisement, on the basis of which the appointments of all the Petitioners were made was issued in the year, 1996. (sic) advertisement had given the total number of vacancies in existence till the time of (sic) issuance. And on the State's own showing 5690 teaching units, meant for the D.P.E.P. III school, were sanctioned by it by resolution, dated 31.3.1999. It was, therefore, apparent that in the advertisement of the year, 1996 the teaching units sanctioned in March, 1999 for the schools under D.P.E.P. III were not taken into account. Now, the State Government was posting teachers appointed on the basis of the 1996 advertisement against posts created and sanctioned in 1999 for schools under D.P.E.P. III. As a consequence, a large number of posts in the pre-existing schools for which the 1996 advertisement was issued, would remain vacant and cause dislocation in the working of those schools.

23. Citing the case of Darbhanga, Mr. Singh stated that in that district there were 5855 sanctioned posts of elementary school teachers against which the total number of teachers (taking into account those appointed on the basis of 1996 advertisement) was 5262. There was, therefore, a shortage of 593 teachers. In these circumstances, if a large number of teachers were to be sent to the new schools set up under D.P.E.P. III, the student-teacher ratio (sic) in the pre-existing nationalised schools was further suffer adversely.

24. The criticism of Mr. Singh that the Petitioners who were being posted in the schools under D.P.E.P. III were not originally appointed against those posts cannot be said to be without substance and in fact both Mr. Sanjay Singh, SC IX and the Secretary, Primary Education (who was present on the last date of hearing of this batch of cases) plainly admitted the fact Singh, however, explained that State had no other option. The programme is for a period of five years and programme period is to come to an end 31.3.2003. The posts were sanctioned March, 1999. He also referred to Annexure I to the Development Credit agreement in terms of which it was the responsibility of the State Government "to take all necessary measures to ensure that at least 95% of the

teachers" posts in the project districts, starting the third years of the project remain filled throughout the project implementation period." Mr. SC IX submitted that in these circumstances had State Government initiated the procedure for recruitment of teachers for the school under the D.P.E.P. III, the programme period would have come to an end long before any appointment could be made. In other words, the entire programme could have remained a non-starter and the State Government would have lost the enormous financial aid which unfortunately comes to this State very infrequently. In close circumstances, in order to save the program, the only option before the State Government was to post the teachers appointed on the basis of the 1996 advertisement to the schools set up under D.P.E.P.

25. I feel that the State's point of view is not without merit. Ideally, the teachers for Knew schools should have been appointed separately. But the notorious delay taking place in any large scale recruitment procedure in this State is well known and the State is not wrong in saying that in these circumstances the teachers for the newly sanctioned schools were sought to be appointed through a fresh process of recruitment, the programme period would have been over before the appointments could be finalised. S.C. IX further assured the Court that such recruitment will be taken up without any undue delay for filling up the vacancies resulting from the diversion made in the postings of teachers.

26. As regards Mr. Singh's criticism regarding the wrong implementation of the programme and his submission that under the Agreement, the schools under D.P.E.P. III were not meant to be integrated to the pre-existing systems of schools but were required to function as a parallel alternate system of education, that is an issue which cannot be agitated in these writ petitions filed on behalf of the teachers. The criticism may or may not have any substance but a correct implementation of the agreement/programme is a matter between the Government of Bihar, Government of India and the funding agencies. In case the Government of Bihar is not implementing the agreement in its true spirit, then it would be for the Government of India and the funding agencies to take it to task but it is not open to the Petitioners to question their posting in those schools on this ground.

27. After unsuccessfully assailing the impugned postings on these larger, general issues, Mr. Rajendra Pd. Singh sought to assail the action of the State Government in posting the Petitioners in schools under D.P.E.P. III on some narrower issues based on the statutory provisions. Mr. Singh submitted that the Petitioners were appointed as teachers for nationalised schools, that is, Non-Government schools taken over by the Government and their conditions of service were governed by the Bihar Non-Government Elementary Schools (Taking Over of Management and Control) Act, 1976 and the three rules framed thereunder, namely, (i) Bihar State Taken Over Elementary School Teachers' Promotion Rules, 1993, (ii) Bihar State Taken Over Elementary School Teachers (Transfer and Disciplinary Proceeding) Rules, 1994 and (iii) The Bihar State

Taken Over Elementary School Teachers Recruitment Rules.

28. Learned Counsel submitted that the provisions of the Act and the three Rules were confined in their application to the schools which were nationalised under the provisions of the Act and the provisions of the Act and the three Rules cannot be extended in their application to schools later on set up by the Government and to teachers posted in those schools. According to Mr. Singh, the posting of the Petitioners in schools under D.P.E.P. III will, therefore, put them beyond the frame-work of the Act and the three Rules governing the service conditions of the teachers of the nationalised schools.

29. I am unable to accept the submission and it appears to me to be incorrect to say that the provisions of the Act and the Rules cannot be extended in their application to schools set up, later on, by the Government. Section 6 clearly envisages establishment of new schools, their improvement and extension of primary education and this is sufficient to show the fallacy in the submission that the provisions of the Act would remain confined in their application, for all times to come, to the nationalised schools and their teachers.

30. Mr. Singh next submitted that the teachers of the nationalised schools formed a separate cadre which was distinct and different even from the cadre of the preexisting Government schools. He further submitted that in the schools under D.P.E.P. III the Petitioners will clearly be on post outside the cadre. In this regard, he submitted that the Petitioners on being posted in the schools under D.P.E.P will admittedly be paid their salary not from the exchequer of the State Government but from a different source of funds and this alone, according to Mr. Singh, would show that the Petitioners were on posts out-side the cadre.

31. I am once again unable to accept the submission. The source of funds from which an employee is paid his salary is indeed significant but it may not always be the determining factor to judge the dual(sic) of cadres. In the totality of facts and Circumstances of the case, the mere fact that the Petitioners on being posted in the D.P.E.P. Mil schools will receive their salary for a certain period, from a different source of funds does not appear to me to be sufficient to hold that in D.P.E.P. III school they will be outside the cadre of elementary school teachers.

32. It may be stated here that on the issue of cadre the Court closely grilled the State counsel and the Secretary, Primary Education. The State has filed affidavits (sic) which it is repeatedly asserted that the teachers on being posted in the school under D.P.E.P. III will fully remain within the cadre of elementary school teachers. It was stated on behalf of the State the though the source of funds will be different the teachers posted in the D.P.E.P. III schools will receive their salary like other teachers, from the Dist. Supdt. of Education. It was clarified that the Parishad will receive the funds from the Central Government which it will make available to the Dist. Supdt. of Education and the actual payment of salary will be made by the Dist Supdt. of Education. The Secretary state that all times the

State Government was continue to be the employer of the Petitioners and in case of any default in payment of salary, it would be the liability of the State Government and the claim of the Petitioners would lie against the State Government and not against the Parishad (sic) any other agency. It was further stated the controlling authority of teachers board posted in schools under D.P.E.P. III and (sic) the pre-existing nationalised schools will be the Dist. Supdt. of Education. What is even more, significant, the postings will be rnut(sic) ally transferable, that is to say, a teacher posted in the school under D.P.E.P. III ma(sic) (sic)nt to a nationalised school and a posted in a nationalised school (sic)e transferred to a D.P.E.P. III schools, service conditions of the Petitioners (sic)her primary school teachers will be (sic)ned by the provisions of the Act and (sic)ned rules framed there under.

33. In these facts and circumstances, unable to hold that postings in the (sic)ols under D.P.E.P. III will put the Petitioner in positions outside their cadre.

34. However, before concluding the judgment, it may be stated that Mr. S.B.K. Manglam appearing in CWJC No. 15028 of 2001 stated that even in making postings in the shools under D.P.E.P. III, the local authorities were proceeding on a pick and chose basis and were not following the directions issued by the Secretary, Primary Education. To this, S.C. IX replied that the Government would ensure that postings were made strictly on the basis of the directions issued by the Government and not in any arbitrary manner.

35. The Government must ensure that its directions with regard to postings of teachers are faithfully implemented by the local authorities. It is made clear that if a case comes to the notice of the Court where Government norms/directions are violated in making the postings, the court may not take an indulgent view of the better.

36. For the reasons stated above, I find no merit in the challenge to the impugned orders/decisions as contained in annexures 1 and 2 to CWJC No. 8645 of of 2001 All the writ petitions, therefore, fail (sic) are dismissed but with no order as to costs.