

(1985) 03 PAT CK 0003

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 894 of 1981

Lochan Jha

APPELLANT

Vs

The State of Bihar and others

RESPONDENT

Date of Decision : 25-03-1985

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (1985) PLJR 300

Hon'ble Judges : S.B. Sanyal, J

Bench : Single Bench

Advocate : Messrs Ganesh Prasad Singh, Birendra Prasad Verma and Ambika Bhagat, for the Appellant; Messrs C.K. Sinha, Government Pleader No. 1 and Ram Krishna Prasad for the State and Mr. Y.V. Giri, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sanyal, J.—In this writ application the petitioner seeks for quashing Annexure "2" a letter dated 28.1.1981 passed by the District Education Officer, Madhubani, posting respondent no. 4 as the acting Headmaster of Bhola High English School, Deorh. According to the petitioner, he is as assistant teacher of the said school. He passed his Matriculation Examination in the year 1952 and graduated in the year 1958 and also passed the Master of Arts Examination in the year 1959 and was placed in Second Class. Prior to his present appointment, he was an assistant teacher of L.U.S. High School, Mahrail, and R.P.M. High School Bajpatti, till his appointment in the instant school in the year 1961 vide Annexure "1". In the year 1970 the petitioner passed the Diploma in Education Examination from Samastipur Training College and is thus said to be a trained teacher having more than ten years" teaching experience. He is, therefore, possessed of the requisite qualifications for being appointed as Headmaster as laid down in Circular No. 2305 dated 25.7.1977. Respondent No. 3, who was the prior Headmaster of the School in question, retired on 31.1.1981 and it is said that the petitioner being the seniormost teacher in the school, having fulfilled all

the requisite qualifications, was entitled to be appointed as Headmaster but superseding his claim and right to hold the post of Headmaster respondent no. 4 was brought upon his head as Headmaster no sooner the vacancy was caused by the superannuation of respondent no. 3. In so doing, the petitioner's case was not considered as would be manifest from Annexure "2", which is sought to be quashed. Several representations are stated to have been filed against the said posting and no advertisement was brought out for filling up the said vacant post. It is further submitted that the school being a unit, promotion to the school has to be made from the school itself after adjudication of the seniority of the teachers as per the Circular dated 25.7.77 and had that been adhered to, the petitioner, who is already in the selection grade from 1974, could have been automatically appointed as the Headmaster of the school.

The impugned posting has jeopardised the promotional avenues of the petitioner against the rules and principles of justice more so for the reason that respondent no. 4 is junior to the petitioner as he graduated after the petitioner. The action, therefore, is violative of Articles 14 and 16 of the Constitution of India as well.

2. In the counter-affidavit on behalf of the State it has been stated that the petitioner is not the seniormost teacher of the school but his position is no. 4, as would be apparent from Annexure "B". It is further stated that the petitioner was not recommended for appointment to the post of Headmaster by the Secondary Education Commission whereas respondent no. 4 was so recommended as would be apparent from Annexure "C". The petitioner has never acted as incharge Headmaster as claimed. It is also stated that the petitioner belongs to a different cadre of assistant teachers whereas respondent no. 4 was appointed as Headmaster by the District Education Officer on 17.6.80 vide Annexure "D". Respondent No. 4 has been appointed as a permanent Headmaster for the vacant post and he has already taken over as such on 1.2.81 and is so functioning ever since. In paragraph 17 of the counter-affidavit it has been stated that there is no individual advertisement for any post in a school to be filled up. Appointments are to be made out of the panel prepaid by the School Service Board on the basis of advertisement and interview held by the Board and the said panel is drawn up on the basis of probable vacancies throughout the State. An advertisement in this connection was brought about in the year 1978 where the petitioner and respondent no. 4 appeared in the interview held in 1979 pursuant to the advertisement. The commission prepared a panel on the basis of merit cum seniority. The petitioner was not at all in the panel for being appointed as Head master whereas respondent no. 4 finds place in the panel. The contention that the prospect of promotion of the petitioner is done away with is misconceived and wholly unfounded for the reasons aforesaid as well as for the reason that his place in the seniority is below R.C. Mishra, A. Roy and P.P. Mishra.

3. An application has been filed on behalf of R.C. Mishra, the seniormost teacher, to intervene in this writ petition and to be impleaded as petitioner along with the original petitioner Lochan Jha. In the said intervention petition Ram Chandra

Mishra has also assailed Annexure "2" by which respondent no. 4 has been posted to the vacancy caused by the superannuation of the previous Headmaster. The order dated 20.10.82 directed the intervention application to be considered at the time of the hearing of the main writ application.

4. I would first like to dispose of the intervention petition. Mr. Ganesh Prasad Singh has drawn my attention to two judgments of this Court in this connection. In C.W.J.C. No. 4472 of 1982 (Surya Narain Yadav & other, v. State Electricity Board) disposed of on 6.6.83 a Division Bench of this Court while considering service matter allowed the intervenors to be added as party petitioners as in their Lordships view no effective decision could have been arrived at in absence of those intervenors. Similarly in the case of Md. Sulaimaan v. The State (1981) B.B.C.J. 513, F.B. : 1982 PLJR 72 the Court allowed the intervenors to be added as respondents who were supporting the petitioners. I, therefore, allow the intervenor to be impleaded as a respondent in this writ petition and would permit him supporting the case of the petitioner.

5. Mr. Genesh Prasad Singh firstly argued that at the relevant time when the posting order was made superseding the claim of Lochan Jha the school for the purpose of promotion of a teacher to that of the post of Headmaster was treated as a unit. He, therefore, submitted that even though the school was taken over and the power of transfer vested in the State Government pursuant to rule 25 of the Bihar Service Code, the said right would become wholly inapplicable as it would immediately bring the same in conflict with section 4(3) of the Bihar Non-Government Secondary Schools (Taking over of Management and Control) Act, hereinafter to be referred to as "the Act". According to learned counsel, till Rules are framed the service conditions of the petitioner Code not have been altered to his prejudice and admittedly the Rules were not framed. He has strongly relied upon the case of Sheo Nath Prasad v. State of Bihar (1984 P.L.J.R. 556) in this connection. In the said case this Court held that the instruction contained in the notification bearing no. 210 dated 20.11.81, which envisaged that in the nationalised secondary schools the vacant post of the Headmaster prior to the date of nationalisation, that is, 2.10.80, should be filled up by promotion amongst the teachers of the High School having the requisite qualifications and treating each school as an independent unit and on the vacancies on 2.10.80 or thereafter promotion should be made in accordance with the rules after preparing the cadre of teachers and their seniority list, has the statutory force pursuant to the power conferred u/s 16 of the Act-- clause relating to removal of difficulties. It was further held that the said circular will continue to have statutory recognition and enforceability by virtue of section 4(3) of the Act till such time an alteration is made in the prescribed manner and, therefore, till such time the promotion should be effected treating a school a unit for the purpose of appointment to the post of Headmaster. The right of an eligible person cannot be done away with by super imposing some one contrary to law. Learned counsel further contended that the position in relation to the instant case remains the same in spite of the judgment of this Court in C.W.J.C. No. 4121 of 1984

(Mateshwar Singh and others v. State of Bihar and others) decided on the 4th of May, 1984, (1985 PLJR 416) which upheld the legality of the Rule framed on the 9th of June, 1983, and came into operation with effect from 26.9.83 on publication. In the case of Mateshwar Singh (supra) a writ petition was filed challenging the posting of a Head master from outside. After having held the Rules to be *Intra vires*, legal and valid the respondents were directed to reconsider the matter in the light of the new rules and appoint a Headmaster on a permanent basis at an early date in accordance with law. The status quo order passed was withdrawn which meant that the Headmaster posted could not take charge and there was a temporary arrangement appointing an assistant teacher of the school as the Headmaster during the pendency of the writ petition. Learned counsel further referred to two decisions of this Court, namely, Madan Kant Mishra v. State of Bihar (1985 P.L.J.R. 107) as well as the decision in C.W.J.C. No. 1936 of 1980 decided on 9.11.84 in support of his argument that the framing of the rules in year 1983 is irrelevant for deciding the dispute in the instant case inasmuch as the posting of respondent no. 4 was on 28.1.81 long before the framing of the rules changing the service conditions. The judgment in C.W.J.C. No. 4121 of 1984 will not therefore, affect the instant case. In the said two cases the petitioner had been appointed as a temporary Headmaster in accordance with the statutory orders in force at that time and he was sought to be displaced by the posting of the respondent in the said cases. He has drawn my attention to the judgment in C.W.J.C. No. 2943 of 1982 decided on the 8th of February, 1984 (Dudhnath Singh v. State of Bihar) where the appointment of a Headmaster was questioned. Learned counsel further submitted that the petitioner has all the requisite qualifications to be appointed as the Headmaster. His rejection by the Secondary Education Commission from being empanelled is of no consequence. He relied on Annexure "M" a circular issued on the 25th of July, 1977.

6. Mr. Y.V. Giri appearing for respondent no. 4 submitted that this writ petition has no merit. The petitioner was not the seniormost teacher at the relevant time. He was not found fit to act as Headmaster. The petitioner has not even acted as incharge Headmaster. Respondent No. 4 was selected by the Secondary Education Commission and he was appointed as a permanent Headmaster for the vacant post and he is working as such from 1.2.81. The appointment of respondent no. 4 was pursuant to an advertisement in the year 1978 where both the petitioner and respondent no. 4 appeared and the petitioner was rejected from being put in the panel or for that matter to act as Headmaster of any school. For the sake of maintaining efficiency and good standard of education, the Court while exercising writ jurisdiction will not sacrifice an efficient person from being substituted by an inefficient person. He further contended that the circular dated 25.7.77 has been washed away completely no sooner the service rules framed u/s 9 of the Act became operative. According to him, the question is whether in view of the law as it stands now, can the petitioner be appointed as a permanent Headmaster ? If it is not permissible, the writ petition must fail.

7. Having heard learned counsel for the parties, the position that now emerges is that after the framing of the rules the State Government or for that matter the concerned authority is fully entitled to effect transfer and posting in exercise of the powers conferred under rule 12 of the Rules. The alteration in the conditions of service is in consonance with the provisions of section 4(3) of the Act. The cadre of Headmasters is no more confined to a school but statewide. The appointments have to be made only on the recommendation of the School Service Board as envisaged u/s 10(9) of the Act. The decision in Sheo Nath Prasad's case (supra) has, therefore spent its force and is of no avail to the petitioner. But that does not resolve the problem I am faced with. This question in a somewhat different form came to be considered in the case of Madan Kant Mishra (supra) where as well the Government circular dated the 25th July, 1977, as modified from time to time, was sought to be implemented with respect to a period prior to the coming into operation of the Service Rules. The argument that by virtue of rule 21 all circulars issued from time to time stood repealed was countenanced by the Court by referring to rule 21 (2) which saves all action or actions taken under the previous statutory Orders or Circulars. In that case the petitioner had been appointed as a temporary Headmaster prior to the coming into force of the Rules in accordance with the statutory orders in force at that time. This, according to this Court, was assailed from being revoked and or repealed under rule 21(2) of the Service Condition Rules. Somewhat same was the position in C.W.J.C. No. 1936 of 1980 decided on 9.11.1984 where also the petitioner had been appointed a temporary Headmaster prior to the framing of the Rules. The principle arising from the aforesaid two cases, therefore, in my opinion, is that if a person has already been appointed as a temporary Headmaster and/or incharge Headmaster on a date prior to the coming into operation of the Service Condition Rules and if his appointment is in accordance with the statutory orders in force at that time, rule 21(2) of the Service Condition Rules will save such action and any tampering and/or interference by placing of an outsider to the post of Headmaster either by way of transfer or posting must be held to be illegal and without jurisdiction in spite of the coming into operation of the Service Condition Rules in the year 1983.

8. The question, therefore, that arises is whether the petitioner is entitled to the benefit of the aforesaid principle. Admittedly no right accrued to the petitioner on the date respondent no. 4 was posted as Headmaster of the school. He was neither acting as a temporary Headmaster nor was he appointed as incharge Headmaster. On the contrary, it was contended that he was not the seniormost teacher of the school. This fact, however, is in dispute. The intervenor respondent claims to be the seniormost teacher in the school but admittedly he was not appointed as the incharge Headmaster. According to the intervenor respondent, his valuable right has been violated. According to the intervenor respondent, either he or any other competent teacher should have been promoted to the post of Headmaster. According to Annexure "M" a district cadre ought to have been prepared and that was the service condition obtainable on

the date of the impugned posting but no district cadre was prepared. The intervenor respondent fulfils all the requisite qualifications as contained in Annexure "M" and being the seniormost teacher ought to have been appointed as Headmaster in the school in question. He, therefore, also assails the posting of respondent no. 4 as the Headmaster of the school. It is, therefore, manifest from the stand of the petitioner and the intervenor respondent that none of them at any point of time was appointed as Headmaster or to act as Headmaster. No sooner respondent no. 3, the permanent Headmaster, retired, the post was filled up permanently by appointment of respondent no. 4, whose appointment was out of the panel prepared by the Secondary Education Commission. No action was taken under the previous statutory orders or circulars by appointing any one of them, either temporarily or permanently, as Headmaster of the school. As there was no action taken in their favour the question of the applicability of rule 21(2) does not at all arise which only saves all action or actions taken under the previous statutory orders or circulars. The appointment has now to be made after cancelling the posting of respondent no. 4. If such an appointment has to be made now the question that immediately will arise is in what manner. The manner has been laid down in the 1983 Rules. It is well settled in law that if an act has to be done in a particular manner then the doing of that act in any other manner is excluded. Today the appointment, either as temporary Headmaster or permanent Headmaster, of the petitioner or the intervenor respondent does not arise at all since their appointment is no more confined to the school in question but has to be considered on the basis of the State cadre and to face all eligible persons of the State to fill up the said vacancy. Respondent no. 4 was interviewed with the petitioner and he was found more meritorious than the petitioner by the Secondary Education Commission. He was at the relevant day when he was appointed Headmaster in the State panel for being appointed as Headmaster. He is working as Headmaster of the school since 1981. I, therefore, think that in no manner he can be displaced either by the petitioner or by the intervenor respondent. These two persons shall have to be got themselves recommended by the Service Board as required u/s 10(9) of the Act and then only they can obtain an appointment from the State Government. I am, therefore, of the opinion that Madan Kant Mishra's case (supra) is of no assistance to the petitioner. On the contrary, the sheet anchor of the claim of the petitioner based on Circular No. 2305 dated 25.7.77 is non-existent by virtue of rule 21(1) of the Service Condition Rules. Rule 21(2), as I have indicated earlier, is of no assistance to the petitioner. Reliance on the case of Dudhnath Singh (supra) is completely misplaced inasmuch as in that case the appointment as Headmaster was cancelled on the ground that the Headmaster so appointed by issuance of Annexure 1 in the said case was without the recommendation of the Education Service Commission which was essential according to the statutory provisions for the appointment of Headmaster. It was also held that the Managing Committee of the school can appoint a Headmaster by recommending to the District Education Officer the name who in turn will forward the recommendation to the Bihar Secondary Education Board and the Board in its

turn shall refer the matter to the Education Service Commission and the appointment will be made on the recommendation of the Education Service Commission. Neither the petitioner nor the intervenor respondent ever fulfilled the requirements as laid down in the said case.

9. I am not sending the matter back for reconsideration in the light of the new Rules since nothing remains to be considered in view of the reasons I have discussed above. In the result, the writ petition fails and is accordingly dismissed. There will be no order as to costs.