

(1984) 08 PAT CK 0007

In the Patna High Court

Case No : Letters Patent Appeal No. 66 of 1983

Madan Kant Mishra

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 21-08-1984

Acts Referred:

Bihar Nationalised Secondary Schools (Conditions of Service) Rules, 1983 — Rule 21, 21(2)
Bihar Non-Government Secondary Schools (Taking over of Management and Control) Ordinance, 1980 — Section 15, 16

Citation : (1985) PLJR 107

Hon'ble Judges : S. Sarwar Ali, J;Birendra Prasad Sinha, J

Bench : Division Bench

Advocate : Rajendra Prasad Singh and Tej Bahadur Singh, for the Appellant; J.N. Jha (Standing Counsel I) with Rajendra Jha, Junior Counsel for the State and Janardan Sinha and P.C. Das, for the Respondent

Judgement

Birendra Prasad Sinha, J.—The question which has come up for consideration in the present appeal is whether on the state of law as existing on the date of issue of the order contained in Annexure-3 there could be transfer of a Headmaster of a school to a newly nationalised school? The learned single Judge who heard and decided the writ application has found that such a transfer is permissible. Hence this appeal.

2. The appellant Madan Kant Mishra who was an assistant teacher in Kameshwar Singh High School Pandaul was appointed as a temporary Headmaster on 31.1.1982 on the retirement of Shri Baidya Nath Choudhary, the permanent Headmaster. The appellant had been declared as senior most assistant teacher of the School vide Annexure-1 dated 16.4.1981. Respondent No. 4 Shri Sadanand Jha was transferred by the Director-cum-Special Secretary, Department of Education, Government of Bihar and was posted as the Headmaster of Kameshwar Singh High School, Pandaul vide letter dated 9.2.1982, Annexure-3, of the writ application. This order was communicated to the petitioner by the

District Education officer, Madhubani vide letter dated 15.3.1982, Annexure-4 to the writ application. The appellant challenged the above mentioned order, posting Shri Dayanand Jha (respondent No. 4) as the Headmaster of the school on the ground, inter alia, that this order was violative of the statutory order of the Government issued through Circular letter No. 501 dated 20.11.1981, regarding promotion of teachers to the post of Headmaster. It was contended that unless the district wise seniority list had been prepared every nationalised school had to be treated as one unit and promotion had to be given to the senior most teacher of that school. It was further contended that no Rules had been framed regarding service conditions of the teachers as contemplated by the Bihar non-Government Secondary School Taking over of Management and Control Ordinance, 1980 and unless Rules were framed it was not permissible to transfer any headmaster from one school to another.

3. All the non-Government High Schools were taken over by the State Government under the provisions of the Bihar Non-Government Secondary Schools (Taking over of Management and Control) Ordinance, 1980 (hereinafter referred to as the Ordinance). Since then all such schools came under the direct control of the State Government and the teachers and Headmasters of all such schools became Government servants. In purported exercise of powers u/s 15 of the said Ordinance the Government issued an order bearing No. 510 dated 20.11.1981 in relation to promotion to the post of Headmasters which was vacant prior to 2.10.1980 in the nationalised schools. That order is contained in Annexure-5 of the writ application. It appears from the said order that the matter of preparation of the rules regarding the service conditions of the teachers of the nationalised secondary schools was still under consideration of the State Government and it was likely to take some time before all the formalities were fulfilled and a final shape given. Accordingly, the State Government decided that in nationalised Secondary Schools the vacant posts of the Headmasters prior to the date of nationalisation i.e. 2.10.1980 should be filled up by promotion amongst the teachers of High schools having the requisite qualification and fitness (for the post) treating each school as an independent unit and on the vacancies caused on 2.10.1980 or thereafter promotion should be made in accordance with the rules after preparing cadre of teachers and their seniority list". The order came to be considered by a Division Bench of this Court in the case of Sheo Nath Prasad Vs. The State of Bihar and Others, . It was held that this order was really issued in exercise power u/s 16 of the Ordinance and not u/s 15. It was further held that this order in express and unambiguous term directed that each school would be treated as an independent unit for the purpose of filling up vacancies by promotion for the post of Headmasters arising before 2.10.1980 and it further provided that the vacancies arising on or after 2.10.1980 would be filled up in accordance with rules after preparation of the district wise gradation list of the teachers.

4. The Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act, 1981 came into force on 24.1.1982 which repealed the

previous Ordinance. The Rules called the Bihar Nationalised Secondary Schools (Service Condition) Rules, 1982 were framed u/s 15 of the Act and came into force on 25th September, 1983. Respondent No. 4 Shri Sadanand Jha had been transferred and posted as the Headmaster of the school vide letter dated 9.2.1982 (Annexure-3) prior to the coming into force of these Rules. Admittedly, therefore, the promotion of teachers to the post of Headmasters was governed by the statutory order of the Government issued through Circular letter No. 501 dated 20th November, 1981 at the time respondent No. 4 was transferred and posted as the Headmaster of this school. This statutory order is in two parts. It provides that the vacancies in the post of Headmasters occurring prior to the nationalisation i.e. on 2.10.1980 could be filled up by promotion among teachers of the High Schools having the requisite qualification and fitness for the post treating each school as an independent unit. As regards vacancies arising on or after 2.10.1980 promotions should be made in accordance with the Rules after preparing district wise gradation list of teachers. In the present case the vacancy occurred after 2.10.1980 but prior to the coming into force the Rules (hereinbefore mentioned). The question for consideration is how the vacancies occurring after 2.10.1980 and prior to the coming into force of the Rules could be filled up? Such a matter came to be considered by me in the case of Shri Dayanand Jha v. The State of Bihar (C.W.J.C. No. 19 of 1981, disposed of on 1st of September, 1981) in which it was held that the Circulars which used to govern the terms and conditions of service of teachers and other employees of the schools prior to coming into force of the Ordinance of 1980 shall continue to govern their service. The Circular of the Government in the Education Department No. 2305 dated 25th of July, 1977 provided the mode of appointment of Headmasters by promotion. According to it every school was deemed to be an unit until district wise cadre was created and teachers used to be promoted on the recommendation of the Education Service Commission on the basis of certain qualifications which were laid down. It further laid down that pending appointment of Headmasters, the Education Board would fill up the post by acting or incharge Headmaster. It was, accordingly, held that in absence of Rules no post of Headmaster could be filled up by transfer. A similar view was taken by Ali Ahmad, J. in the case of Yadu Nandan Prasad v. The State of Bihar and others (1982 B.B.C.J. 359) (: 1982 P.L.J.R. (NOC) 27). It was held that until the service conditions were framed by making Rules the teachers will continue to be governed by the service conditions which were in force prior to taking over and teachers of one school could not be transferred to another school. A contrary view, of course, had been taken by B.P. Jha, J. in Brajnandan Prasad Vs. State of Bihar and Others, .

5. The matter was fully considered by a Division Bench of this Court in the case of Sheonath Prasad (supra). It was observed that the statutory order dated 20th of November, 1981 referred to above clearly laid down that promotions should be made in accordance with the Rules after preparing the cadre of teachers and their seniority list. It followed that appropriate Rules in this regard had to be

framed before any promotion to the post of Headmaster could be made. The manner in which posts had to be filled up on promotion had been specifically laid down and it would be frustrated if transfers are permitted from one school to another filling up the posts without promotion. It was held that the statutory order dated 20th of November, 1981 by necessary implication excluded the applicability of Rule 56 of the Bihar Service Code.

6. Section 4(3) of the Ordinance provided that the age of superannuation of the Headmasters, teachers and other employees of the schools taken over by the Government shall be 58 years. The other terms and conditions of their service shall continue to be the same as before taking over of the management and control of the schools by the State Government until any alteration was made by the State Government. I have referred to the Government Circular No. 2305 dated 25th July, 1977 which was later modified by Instruction No. 222/79-2800 dated 29th November, 1979. This Government Circular lays down the guide line in relation to the appointment and promotion of Headmaster and Assistant teachers. It provides that till the establishment of District Cadre every school will be regarded as an unit. These instructions were issued in exercise of powers u/s 63 of the Bihar Act 25 of 1976 and have statutory force. According to these Circulars appointment of Headmasters has to be made from amongst the eligible teachers of the school. The procedure for appointment has also been laid down. They would continue to have the statutory recognition and enforceability until such time an alteration is made in the prescribed manner. It follows that the post of Headmasters cannot be filled up in any other manner.

7. There is no controversy that on 9.2.1982 the date on which respondent No. 4 was posted in this school neither the Rules had been framed nor the service condition had been altered in the prescribed manner. Accordingly, the post of Headmaster of this school as on 9.2.1982 had to be filled up in accordance with the Government Circular dated 25th July, 1977 as modified from time to time.

8. Learned counsel for the respondent, however, urged that since the Rules have been framed now and all the previous Rules and Circulars have been repealed, reliance cannot be placed upon the various Orders and Circulars which governed the service conditions of teachers and the question of their promotion. He also urged that posting of respondent. No. A as Headmaster in the school should now be deemed to have been done under the provisions of the Rules. Rule 21 of the Rules repealed the Rules made on the matters concerning these Rules made by the dissolved Board of Secondary Education or by the State Government. It reads as under:

21. Repeal and Saving-Prior to the enforcement of these Rules, any Rules made on the matters concerning these Rules by the dissolved Board of Secondary Education or by the State Government or any order issued with respect thereto, shall be deemed to have been repealed from the date these Rules came in force.

(2) Notwithstanding such repeal, anything done or any action taken in exercise of

any power conferred by or under the said orders shall be deemed to have been done or taken in the exercise of powers conferred by or under these Rules, as if these Rules were in force on the day on which such thing or action was done or taken.

Learned counsel for the respondent is not correct in his submission. Rule 21(2) saves all action or actions taken under the previous statutory Orders or Circulars. The petitioner had been appointed as temporary Headmaster of the school on 31.1.1982 in accordance with the statutory orders in force at that time. Respondent No. 4, therefore, could not be placed as the Headmaster of the school and his transfer to the said school by Annexure-3 must be held to be illegal and without jurisdiction.

In the result this appeal must succeed and the judgment and order passed by the learned single Judge is set aside and consequently the order dated 9.2.1982 contained in Annexure-3 transferring and posting respondent No. 4 as the Headmaster in Kameshwar Singh High School, Pandaul, is quashed. In the facts and circumstances of the case there shall, however, be no order as to costs.