

**(1984) 07 PAT CK 0008**

**In the Patna High Court**

**Case No :** Civil Writ Jurisdiction Case No. 4121 of 1984

Mateshwar Singh and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

**Date of Decision :** 04-07-1984

**Acts Referred:**

Bihar Non-Government Secondary Schools (Taking Over of Management and Control) Act, 1981 — Section 15, 9

**Citation :** (1985) PLJR 416

**Hon'ble Judges :** S.S. Sandhawalia, C.J.; P.S. Sahay, J

**Bench :** Division Bench

**Advocate :** B.C. Ghose, Basudeo Prasad, Ganesh Prasad Singh, Mukteshwar Singh No. 2, Rajendra Prasad Singh, Tej Bahadur Singh, Chandra Shekhar, Shantanu Kumar, Srinandan Prasad Singh and Pramod Kumar Sinha, for the Appellant; K.P. Verma, A.G., with R.N. Roy, Mani Lal, S.C. IV, with Madan Mohan Prasad Singh No. 2, J.C. (in C.W.J.C. 4121/83) with Kisto Kumar Gupta, J.C. (In C.W.J.C. 4067/83) Mr. J.P. Shukla, G.P. 2. (In C.W.J.C. 184/84 and 5813/83), Rameshwar Prasad, G.P. 6, with O.P. Agrawal, J.C. (In C.W.J.C. 4858/83), Tara Kant Jha and Mathura Nath Roy (for intervenor respondent in C.W.J.C. 4067/83), for the Respondent

## Judgement

P.S. Sahay, J.—This judgment will govern all the cases which have been heard together and points are also common. In C.W.J.C. No. 4121 of 1983 a prayer has been made to quash Annexure-3 the rules framed by the State under the provisions of the Bihar Act 33 of 1982 (hereinafter referred to as "the Act"). There is also a prayer to quash Annexures-4 and 5, directions issued by the Director of Secondary Education setting out certain terms, in the service conditions of the petitioners who are all teachers of School. In C.W.J.C. No. 4067 of 1983 prayer is to declare 5(a) of the Rules framed by the State Government as illegal and without jurisdiction and for" quashing Annexures-4 and 5, the direction given by the Director, as mentioned earlier. In C.W.J.C. No. 3817 of 1983 rule 5 of the Service conditions has been challenged. The service-conditions, so framed, have also been challenged in C.W.J.C. No. 5813 of 1983.

In C.W.J.C. 184 of 1984 the posting of respondent No. 5 as headmaster in place of the petitioner is under challenge. In C.W.J.C. No. 4858 of 1983 prayer has been made for quashing Annexure-1 dated 6.10.1983 by which respondent No. 5 has been posted as headmaster of the School where the petitioner was working. In order to appreciate the points, which have been raised in these applications it will be necessary to state necessary facts. Formerly there were Government Schools owned by the State Government and the teachers were governed by the Service conditions of Government Servants. There were private Schools run by private individuals, Trusts and other Bodies, managed by the Managing Committee who were the appointing authorities with different set of service conditions, scale of pay, other benefits etc. etc. Prior to the year 1958 there were only High Schools and the Government issued directions from time to time for the management of the affairs of the Schools. Some of those directions were challenged by a Managing Committee of a School and the matter went up to the Supreme Court and in the case of Sri Dwarka Nath Tewari and Others Vs. State of Bihar and Others it was held that the orders or circulars issued by the State Government to the private schools had no statutory force. After 1958 new Schools came into existence which were known as Higher Secondary Schools, in which persons having minimum qualification of M.A. degree were appointed as teachers in High Schools. In the year 1966 post of Assistant Headmaster was created in the School in which there were more than 320 students. In 1968 two posts of Post-graduate teachers were created. This led to some heart-burning among the teachers, who were appointed before them and then it was decided that fifteen per cent of the teachers, who were graduates, will be promoted to selection grade with higher scale of pay. In 1971 the Higher Secondary Schools were abolished and 10 plus 2 plus three scheme was introduced. The Assistant Headmaster of the Schools were given post graduate scale of Rs. 450-755 with effect from 4.7.1975 and since there were limited post of Assistant Headmasters, objections were raised by the trained graduates and they were brought on par in the same scale of pay by the rules framed in the year 1978. The Headmasters were given the scale of Rs. 1000-1820 and the seniority was to be reckoned from the date of appointment as Headmaster. Selection grade to the teachers was given in the scale of 490-1650.

2. After the judgment in the case of Dwarka Nath Tiwary (supra) Bihar Act 13 of 1960 Was enacted for the Management of the private Schools and thereafter there were series of Ordinances regarding the control and management of the private. Schools of the State Government starting from, the year, 1974 to 1976, the last one was Ordinance No. 169 of 1976. Thereafter the Bihar Secondary Education Board Act, 1976 (Bihar Act 25 of 1976) came into force with effect from 31.12.1976. Various notifications were also issued from time to time for giving effect to the provisions of the Ordinances and the Act. the State Government then decided to take over all the private Schools of this State, and Ordinance No. 146 of the 1980 was issued on 11.8.1980 being the Bihar non-Government Secondary Schools (taking over of management and control)

Ordinance 1980. This was followed by subsequent ordinances and ultimately the Bihar non-Government Secondary Schools (taking over of management and control) Act, 1981 (Bihar Act 33 of 1982) was enacted which came into force with effect from 24.1.1984.

3. In pursuance of the ordinance issued in the year 1980 all private Schools were taken over by the State Government with effect from 2.10.1980. u/s 4(3) of the Act all teachers and other employees of the private Schools became Government servants and they were to superannuate at the age of 58 years. It will also be relevant to mention that prior to the taking over each School was treated as one unit and there was no question of determining inter se seniority between the teachers of two different Schools. There was no unified cadre. But after taking over the Schools it became necessary for the State Government to create a cadre and to frame rules regarding the service conditions of the teachers and other employees whose services had been taken over. The State Government was given power to lay down the service conditions of the teachers and other employees u/s 9 of the Act. In pursuance of section 9 rules have been framed, which are under challenge in all the writ petitions and came into force with effect from 26.9.1983. A copy of the rules has been filed and marked Annexure-6. The details of these rules will be discussed in detail when the challenge to the validity of these rules will, be considered.

4. It has been averred in the petition that the rules so framed have not been placed before the two houses of the Legislature for fourteen days, as required u/s 15 of the Act and, therefore, the rules are not valid rules and cannot be enforced. It has further been stated that the rules are arbitrary, discriminatory and without any rationale and is fit to be quashed. In the counter affidavit filed on behalf of the State in C.W.J.C. No. 4121 of 1983 it is stated that the rules have been framed after taking into consideration the various provisions and the various orders, which were, prevalent at the time of taking over and also taking into consideration the service conditions and pay of the teachers of different grades. This aspect of the matter will be discussed when I shall refer to the rules while considering the submission of the learned counsel appearing on behalf of the parties.

It has also been stated in one of the counter affidavits that the rules were placed in the Legislature but since the Legislatures sat for a few days only it could not be placed for fourteen days continuously.

5. Mr. B.C. Ghose and Mr. Basudeo Prasad, appearing on behalf of the petitioners, have submitted that since the rules were not placed before both the House for fourteen days continuously, as required u/s 15 of the Act, the rules are not at all enforceable and have to be Quashed. Reliance in this connection has been placed in the case of Managing Committee, T.K. Ghosh Academy and Another Vs. State of Bihar and Others, The learned Advocate General, appearing on behalf of the State, has, on the other hand, contended that since the rules have been framed u/s 9 of the Act it was not necessary to place those rules

before the Legislature and section 15 of the Act will not be attracted. His alternative submission is that even if it was necessary to place the rules before the Houses for fourteen days and it has not been done, it will not invalidate the rules, because the direction is directory and not mandatory. In support of his contention reliance has been placed in the case of *Atlas Cycle Industries Ltd. and Others Vs. The State of Haryana*,

6. Before considering the rival contentions of the parties on this point it will be necessary to refer to some of the provisions of the Act, which are relevant for this case.

Section 2(k). "Prescribed" means prescribed by the Act or the rules framed thereunder.

Section 4(3). The age of superannuation of Headmasters, teachers and other employees of the Schools taken over by the State Government shall be 58 years. The other terms and conditions of their services shall continue to be the same as it was before taking over the management and control of the School until any alteration is made therein by the State Government in the prescribed manner.

Section 9. Service conditions:-- The service condition of the Headmaster, teacher and non-teaching staffs of the nationalised secondary schools shall be determined by the State Government.

Section 15. Every rule made under this section shall be laid as soon as possible after it is made before each house of the State Legislature while it is in session for the total period of 14 days which may be comprised in one session or in two successive sessions, and, if, before expiry of the session in which it is so laid or the session immediately following both the Houses agree in making any modification in the rule or both the Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be, such modification or annulment shall not affect the validity of any thing previously done under the rule.

7. Now it has to be considered whether the rules have been framed under-section 9 and if that be so, then the other contention of the learned Advocate General that it was not necessary to lay before both the Houses. The opening paragraph of the rules (Annexure 6) is as follows:

In exercise of the powers conferred by section 9 of the Bihar Non-Government Secondary Schools (taking over of management and control) Act, 1981 the following rules relating to service conditions of headmasters, teachers and non-teaching employees of the nationalized secondary Schools have been framed by the State Government.

8. Thus, from a plain reading it is absolutely clear that the rules have been framed u/s 9 and the State Government has the power to frame such rules which will be clear from section 9 extracted above. Now the question for consideration is whether these rules have to be placed before the Legislature as required u/s

15. In this connection learned counsel, appearing on behalf of the petitioners, have laid much stress on the definition 2(k) and has submitted that whatever has been prescribed under the Act have to be laid before the Houses u/s 15. Learned Advocate General has submitted that 2(k) says that prescribed by the Act and not under the Act and if anything has been done under the Act, then it will not be necessary to place it before the House. The contention is that rules have to be framed u/s 15 and no rules can be framed under the Act or even u/s 9 of the Act. Reliance, in this connection, has been placed in the case of Dr. Indramani Pyarelal Gupta Vs. W.R. Nathu and Others, where the distinction has been made by "an Act" and "under the Act." By "an Act" would mean by the provisions directly indicated by the statute and "under the Act" what is not directly found in the statute itself but is conferred or imposed by virtue of the powers enabling them to be done, in other words, bylaws made by subordinate law making authority which is empowered to do so by the parent Act, The distinction is, thus, what is directly done by the enactment and what is done indirectly by the rule making authorities which are vested with powers in that behalf by the Act. A power conferred by the law is not conferred by the Act for the context the expression conferred by the "Act" would mean conferred exclusively or by necessary implication by the Act itself Therefore, by-laws would be subordinate legislation under the Act. But, I have already mentioned that under rule 2(k) prescribed mean"s prescribed under the Act or under the Rules on any action taken u/s 9 is also sanctioned Under the Act and it is quite different from the Rules and this pointedly refers to 2(1) and these rules are to be framed u/s 15 of the Act. From the scheme of the Act, I have no hesitation in holding that the action taken under the Act is quite independent from framing rules, for the former procedure laid down u/s 15 of the Act is not be followed whereas in the latter it is a must. Simply because the service conditions have been given the name of the rules that, in my opinion, will not be the rules as envisaged u/s 2(1) of the Act. This contention of the learned counsel appearing for the petitioners has to be rejected.

9. From the relevant provisions of the Act, which have been mentioned above, there is no doubt that u/s 9 power has been given to the State Government to frame the service conditions. This power is independent by itself and, in my opinion, it is not necessary to place the rules before the House and section 15 will not be attracted. Any other rule, which may be framed and for those rules the provisions laid down u/s 15 have to be followed. Reading section 4(3) also it is clear that the State Government, after taking over, has power to make alteration in the service-conditions in the prescribed manner (underlined by me) and that manner has been laid down in section 9. It is difficult to accept the contention raised on behalf of the petitioners that for section 9 procedure laid down u/s 15 will have to be followed. Learned counsel for the petitioners has laid great stress on section 21 of the Act which is as follows:

Repeal and Savings--(1) All rules framed and orders issued by the erstwhile Bihar Secondary Education Board or by the State Government before these rules

came into force will be deemed to be repealed from the date from which these rules came into force.

(2) Notwithstanding such a repeal anything done or any action taken in exercise of any power conferred by or under the said rules will be deemed to have been done or taken in exercise of the powers conferred by or under these rules, as if these rules were in force on the date on which such thing was done or action taken.

The argument is that if the rules are not placed before the House, they are not rules at all and u/s 21, quoted above, old rules cannot be repealed. Learned Advocate General, on the other hand, has contended that if section 9 gives powers to the State Government to frame rules and if rules are framed, then the rules when they came into existence shall repeal the old rules. He has also laid great stress on the words "will be deemed to be repealed" occurring in sub-clause 21. In my opinion, the contention is also well-founded and should be accepted. If the rules are framed under the purported exercise of powers given u/s 9, then the rules will be valid from the day it comes into force and all other previous rules relating to the service conditions shall come to an end.

10. In view of the fact that I have held that the rules have been framed u/s 9 and section 15 has no application and, therefore, laying of the Rules before the two houses of legislature will not be necessary as contended by the learned Advocate General. In that view of the matter, it will not be necessary to consider the alternative submission of the learned Advocate General that even if those rules required to be placed in the Houses and have not been placed that will not invalidate the Rules and the case law relied upon by the parties in the cases of *Managing Committee of the T.K. Ghosh Academy Vrs. State of Bihar* and *M/s. Atlas Cycle Industries Vrs. State of Haryana (supra)* have not to be considered for the decision of the instant case.

11. Now I propose to consider the other vital submissions of the learned counsel for the petitioners that the rules so framed with special reference to seniority, are arbitrary, discriminatory and violative of Article 14 of the Constitution. In this connection both Mr. B.C. Ghose and Mr. Basudeo Prasad have drawn our attention to the various provisions of the rules relating to seniority and classification of cadre with reference to the scale of pay of teachers of different categories in order to show that seniority cannot be determined only on the basis of higher scale of pay and higher qualification also cannot be the basis of rating such persons as seniors to others. Mr. Ganesh Prasad Singh, Mr. Rajendra Prasad Singh and Mr. Chandra Shekhar, appearing in some cases have also drawn our attention to the various paragraphs of the petition and the counter affidavit filed on behalf of the State. Their submission is also to the effect that the rule has no rational and has been drafted in a most haphazard manner causing great prejudice to the petitioners. Learned Advocate General, on the other hand, has contended that whenever there is a taking over of certain organisations or institution there is always a merger of various classes of post and while making a

unified cadre and rules relating to seniority. State Government has to take into account various factors into consideration. The result is that there, is always some sort of heart burning in certain quarters because it is not possible to satisfy all. Therefore, the contention is, what the court has to see, whether the rules have been framed in a bona fide manner and whether the rules are in the larger interest of the persons whose services have been taken over.

12. Mr. Basudeo Prasad has, further, submitted that cadre and seniority go together and persons acquiring some additional qualifications cannot be rated senior to others and it will amount to discrimination. This contention, I am afraid, cannot be accepted. Additional qualifications of employees, technical or non-technical have always been considered as well established principle for giving additional benefits to the employees in the shape of emoluments, promotion etc. In the case of *The State of Jammu and Kashmir Vs. Shri Triloki Nath Khosa and Others*, which related to integration of Assistant Engineers appointed directly and by promotion into a common class and this was challenged and it was held that after persons drawn from different sources are integrated into one class, they can be classified for the purposes of promotion on the basis of their educational qualification and such qualification cannot be struck down either under Article 14 or 16 of the Constitution of India. It has further been held that classification is primarily for the legislature or for the statutory authority charged with the duty of framing the terms and conditions of service : and if, looked at from that stand point of the authority making it the classification is found to be based on reasonable basis, it has to be upheld and the Courts cannot sit in appeal over the legislative judgment in order to determine whether on a comparative violation of rival theories which one has to be preferred.

13. In the case of *V.T. Khanzode and Others Vs. Reserve Bank of India and Another*, a common seniority list was prepared of the different officers of the Bank which was also challenged and it was held by their lordships as follows:

No scheme governing service matters can be foolproof and some section or the other of employee is bound to feel aggrieved on the score of its expectation being falsified or remaining to be fulfilled. But the fact that the scheme does not satisfy the expectations of other employees does not render it arbitrary, irrational perverse or mala-fide.

Similar observation has also been made in the case of *J. Kumar v. Union of India*, AIR 1982 SC 1064 where it has been held that it is well settled that the service conditions pertaining to seniority are liable to alteration by subsequent changes that may be introduced in the rules and except to the extent of protecting promotions that have already been earned under the previous rules, the revised rules will operate to govern the seniority and future promotion prospects of all the persons in the concerned service. It is, therefore, open to the Government to introduce: new principle of seniority so as to affect right for future promotion. These decisions, in my opinion, fully answers the contention raised on behalf of the petitioners and as I have already observed that framing of Rules for

integrates service is a difficult task and cannot be put in the form of a straight jacket in order to satisfied all.

14. Learned Advocate General has also drawn our attention that formerly also then was a merger when the Higher Secondary Scheme was abolished. A decision was taken to absorb the teachers appointed under the new Scheme and to merge them in the Subordinate Education Service (Upper Division). This was challenged by the members of the Subordinate Education Service (Upper Division) on the ground that the persons who were absorbed subsequently must rank junior to the teachers who were already in the cadre on that date. The action taken by the authorities, in this connection, was held to be valid and it is reported in the case of Yogendra Thakur Vs. State of Bihar and Others, to which I was also a party. I have given my most anxious consideration to the various provisions relating to seniority which have been challenged and on a closer scrutiny I find that though there may be some sort of loop holes here and there but by and large it is in the larger interest of the teachers and by no imagination can be said to be arbitrary, discriminatory or mala-fide. Therefore, this contention of the learned counsel for the petitioners have also to be rejected. In view of the assurance given by the learned Advocate General that Annexure-7 and Annexure-8 will not be given effect to, it is not necessary to consider them.

15. C.W.J.C. 4858 of 1983 was filed by Bachu Sharma, Headmaster of the School, and a prayer was made for quashing Annexure-1 by which respondent No. 5, Shabindu Prasad Sharma, had been posted as Headmaster of the School where the petitioner was working. While admitting the application on 16.11.1983 the prayer for stay was rejected. It was ordered that the Director of Secondary Education may appoint any other person other than respondent No. 5, Shabindu Prasad Sharma, as Headmaster of the school. Subsequently, it seems that by order dated 27.12.1983 Bachu Sharma, Assistant Teacher, was appointed as acting Headmaster by Annexure-1. Respondent No. 5, Shabindu Prasad Sharma, challenged the validity of Annexure-1 in C.W.J.C. 184 of 1984 and the application was admitted on 17.1.1984 and status-quo had been ordered to be maintained. The new Rules framed by the State Government relating to service conditions of teachers have been held to be valid and now in view of the fact that status-quo has been ordered in C.W.J.C. 184 of 1984 the Director of Secondary Education, respondent No. 1, will 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. For the reasons, given above, I find that there is no merit in these applications and they are, accordingly, dismissed. But in the facts and circumstances of these cases, parties shall bear their own costs.