

(1984) 05 PAT CK 0029

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 327 of 1984

Nand Keshwar Singh and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 22-05-1984

Acts Referred:

Bihar Non-Government Elementary School (Taking Over of Control) Act, 1976 —
Section 3, 3(2), 3(3), 3(4), 3(4)(a)

Citation : (1985) PLJR 608

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

Bench : Single Bench

Advocate : S.C. Ghose, Madhukar Krishna Sinha and Rajendra Prasad, for the Appellant; K.P. Verma, Advocate-General, Rameshwar Prasad, Govt. Pleader No. VI and Bipin Bihari Sinha for the State, for the Respondent

Judgement

S.B. Sanyal, J.—This Writ application is for quashing Annexure 5, by which respondent No. 2, the Director (Primary Education), Department of Education, Government of Bihar, has rescinded, revoked and cancelled Annexure 2, whereby the Janta Sarvodaya Madhya Vidyalaya, Dhandhar, was taken over under the Bihar Non-Government Elementary Schools" (Taking over of Control) Act, 1976 (hereinafter to be referred to as the "Act"). There are twenty-three petitioners in this application who are Headmaster, Assistant teachers and peon working in Janta Sarvodaya Madhya Vidyalaya, Dhandhar, which was established in the year 1966 and started receiving Government aid from 1.1.1976. The school was an aided elementary school and used to be administered and governed by a Managing Committee. By a resolution dated 6.6.1982 (Annexure 6), the Managing Committee of the school took a decision to voluntarily hand over the control and management of the school to the Government with effect from 1.1.1982. On 20.7.1982, after the decision of the District Committee of the Gaya district to takeover the management of the school from 1.1.1982, the District Superintendent of Education, Gaya (respondent No. 3) issued an order on 26.7.1982 (Annexure 2) intimating to take over the management of the school

as per offer made by the Managing Committee. On 29.4.1983, the services of the petitioners were also taken over (Annexure 3)." On 5.11.1982, this school was amalgamated with another primary school of Dhandhar (Annexure 4). It is said that thereafter the petitioner started getting their salaries from the State Government and kept on rendering their services in the said school. On 6.7.1983, the petitioners were served with a notice to show cause as to why the order taking over the school and the nationalisation of their services by respondent No. 3 be not cancelled. It is said that the matter was being heard and the petitioners sought, some adjournments and they were assured of adjournment, but thereafter suddenly the impugned order (Annexure 5) was brought out on 12.12.1983 stating that the order No. 3425 dated 26.7.1982 (Annexure 2) be cancelled as the take over of the school was without the consent and approval of the State Government and the power of take over is vested in the State Government. This is assailed by the petitioners as being illegal, void and without jurisdiction.

2. The State has filed a counter-affidavit, and in paragraph 3 of the said counter-affidavit, they have stated that it is the State Government alone who is competent to pass an order of take over of any school and this power is neither vested in the District Committee nor in the District Superintendent of Education or any other authority other than the State Government. It has also been stated that in the instant case, the approval of the State Government was neither sought for nor it was granted by the authorities. In paragraph 5 of the said counter-affidavit, it is said that the District Committee, of which the District Superintendent of Education is the Secretary, is a mere recommending body and any final decision in the matter of taking over of any school vests exclusively with the State Government.

It is further stated that the District Committee constituted by Circular No. 4206 dated 1.7.1973 (page 667 of the Compendium the Bihar. Elementary Education Rules and Regulations) was prior to the promulgation of the Act. In that view of the matter, the Committee which purported to specify the date, of take over was incompetent and, therefore the take over order (Annexure 2) was illegal and was rightly cancelled by the impugned order (Annexure 5). It has also been stated that the District Superintendent of Education has acted in excess of his jurisdiction. The particular District Superintendent of Education, who passed the said order dated 26.7.1982 (Annexure 2) was subsequently suspended by the Government on 23rd July, 1983 as he had purported to act illegally. It has also been stated in paragraph 10 of the counter-affidavit that the school in question has neither been nationalised by the State Government, nor the District Committee recommended its nationalisation, as envisaged under the Act. The entire action of the District Superintendent of Education is cooked up plan and respondent No. 2, who is the Head of the Directorate of Primary Education, is vested with power to deal with this matter and he has rightly nullified the illegal order passed by respondent No. 3. It is further stated that the order passed by respondent No. 2 has the sanction and concurrence of the State Government

(vide Annexure "D").

3. The petitioners have filed a reply to the counter-affidavit wherein it has been stated that the school in question was permanently recognised in the year 1967 and at the relevant time the school had the strength of 806 students comprising of 8 classes on its roll. The petitioners also filed another affidavit annexing the resolution of the Managing Committee dated 6.6.1982 handing over the management and control of the school voluntarily to the State Government (vide Annexure 6). In course of arguments, the petitioners have also filed another affidavit annexing the resolution of the District Committee dated 20.7.1982 as Annexure 10, bearing the signatures of all the persons constituting the Committee. The petitioners have further stated that a take over order brought out by the same District Superintendent of Education, Gaya, under similar circumstances, was cancelled by the same Director on the same date, which has been quashed by this Court in C.W.J.C. No. 172 of 1984 (Jainandan Pd. and others v. The State of Bihar and others) decided on 30.3.1984.

4. Learned counsel for the petitioners contended that the school being recognised as well as admittedly aided elementary school, by virtue of operation of section 3(2) of the Act, once the Managing Committee hands over voluntarily the control and management of the school to the Government, under the mandate of the statute, it shall be taken over by the State Government with effect from the date which shall be determined by the District Committee, referred to in sub-section (4) of section 3 of the Act. Sub-section (4)(a) of section 3 of the Act envisages that the District Committee will comprise of Deputy Development Commissioner/Administrator in the case of a Municipality, who shall be the Chairman of the Committee and the District Superintendent of Education shall be the Secretary. The members of the Committee would be the District Education Officer, District Inspector of Schools, Sub divisional Education Officer of the concerned subdivision and Deputy Inspector of school concerned. This Committee shall examine the feasibility of take over of such schools by the State Government and will further determine the date from which it would be taken over. The personnel of the District Committee could be changed from time to time.

Learned counsel for the petitioners contends that after passing of the resolution dated 6.6.1982 (Annexure 6) by the Managing Committee of the school and the Gaya District Committee noticed under the Act having determined the feasibility, viability and also having determined the date of take over the Secretary of the Committee, who is the District Superintendent of Education, both in his capacity as the Secretary as well as in the capacity of the power conferred upon him, vide letter No. 7/13-0172/74 Ed. 3213 dated 24.6.1974 (page 687 of the Compendium-The Bihar Elementary Education Rules and Regulations), issued Annexure 2 communicating the take over of the school with authority to make payment to the teachers. He further submitted that nationalisation of all elementary schools have been done under the same and similar fashion by the

District Superintendent of Education, who is competent authority as envisaged in the Circular referred to above.. Learned counsel further contended that the Director (Primary Education) has no power to recall the order dated 26.7.1982 passed by the District Superintendent of Education (respondent No. 3) and this power cannot be found out in any of the provisions of the Act. Learned counsel further contended that had it been a school unaided by the Government, a take over of such school was required to be made by the mode provided u/s 3(3) of the Act, that is, by publication of a notification in the Official Gazette with effect from the date specified. Issuance of a notification and publication thereof in the Official Gazette is not at all necessary with respect to aided elementary schools where the Managing Committee hands over control of the school voluntarily to the Government. According to the learned counsel, the words "shall be taken over by the State Government" manifests that there is no discretion left to the Government in the matter of take over, subject, however, to the determination of the date by the District Committee referred to in sub-section (4) of section 3 of the Act. With reference to the averment made in paragraph 5 of the counter-affidavit learned counsel submitted that Circular No. 4206 dated 1.7.1973. does not at all relate to constitution of a District Committee, but it relates to a Circular for payment of salary. Annexure 2, the take over order, itself states that the said take over is pursuant to the recommendation of the District Committee and the said District Committee, which took the decision, is the Committee constituted under the Act, and not before the Act. The statement made in paragraph 5 of the counter-affidavit filed by the State is reckless, even without looking into the circular referred to therein, since the Committee constituted under the Circular No. 4206 dated 1.7.1973 relate to something else, therefore, wholly irrelevant. District Committee as envisaged under the Act was not constituted by the said Circular.

5. Learned Government Pleader No. VI submitted that the District Superintendent of Education has acted without jurisdiction as he had no power under the Act to take over the school in question, which could only be done by the State Government by a notification published in the Official Gazette. He further submitted that there is no undisputed document which shows that the District Committee took a decision as required under the Act, and all said and done, the matter has never been referred to the State Government by the District Committee and, therefore, the whole action is without jurisdiction. He also submitted that the alleged take over with retrospective effect is unauthorised. It can only be prospective, that is, from a future date when the Managing Committee volunteers to hand over the management of the school to the Government. The learned Advocate General also appeared and he contended that the District Superintendent of Education, Sri Md. Zubair, does not command good reputation and he has been suspended from service. The State Government has received many complaints against him. It is, therefore, necessary that the matter be referred back to the State Government for finding out whether the instant school could be taken over, and if so, from which date. As far as the State

Government is concerned, they have no papers to show that the concurrence of the State Government was obtained before Annexure 2 was issued by the District Superintendent of Education nor any other document or papers have been produced to indicate that even in respect of section 3(2) take over, State Government's sanction and approval has been taken for other elementary aided schools, Managing Committee of which has voluntarily handed over the management of the school. He very vehemently argued that the District Superintendent of Education is not an authority who can take decision on behalf of the Government and cannot at all issue an order of take over. The said power wholly vests in the State Government.

6. Having heard learned counsel for the parties and having given my thought over the matter, I am of the opinion that section 3(2) of the Act stands on a different footing than section 3(3) of the Act. Section 3(2) contemplates take over of an aided elementary school. The take over is permissible only when the Managing Committee hands over the control of the school voluntarily to the Government. The Committee constituted u/s 3(4) of the Act thereafter examines the feasibility and determines the date of taking over. Once the District Committee performs this function, there is a deemed take over by the State Government. No discretion is left to the State Government thereafter in not taking over such an aided elementary school. Section 3(2) of the Act nowhere requires any publication of a notification in the Official Gazette of taking over of a school. It is true, the take over must be by the State Government. The Act has been brought into operation from 1.1.1971. It may be stated here that before the promulgation of the Act, the harbinger of the Act were several Ordinances containing same and similar provisions right from 1.1.1971. The Ordinances are several, finally resulting in the passing of the Act by the Legislature. A circular issued on 24.6.1974, in paragraph 3 dealt with the matter contained in section 3(2) of the Act, when a Managing Committee voluntarily hands over the control of the school to the Government. The said circular (page 682. of the Compendium The Bihar Elementary Education Rules and Circulars, 1979 Edition) envisages conferment of power on the District Superintendent of Education and Municipal Education Officer to pass necessary orders for nationalisation of elementary schools and also provides for payment of salaries if the other requirements for nationalisation are fulfilled. It reads as hereunder:

The said Circular indicates that so far as cases coming u/s 3(2) of the Act are concerned, the District Superintendent of Education is competent to pass an order of nationalisation, of course, on fulfilment of the other conditions laid down under the said section and u/s 3(4)(a).

7. From Annexure 2, I find that the order was issued on the recommendation of the District Committee. There is a reference, however, of circular No. 4206 dated 1.7.1973 (1976 is a mistake for 1973). Learned counsel for the State states that the Committee constituted under the said Circular was incompetent to discharge the functions required of them u/s 3(4) of the Act. The reason assigned by the

learned counsel is that the Committee constituted prior to the Act by the said circular stood automatically dissolved in view of section 9 of the Act. The argument is wholly misconceived, because of the misreading of Annexure 2. In the first part of Annexure 2, it refers to the said circular No. 4206 dated 1.7.1973. This circular has got nothing to do with the constitution of any District Committee. It relates to payment of salary only. Annexure 2 has not been passed pursuant to that circular. Annexure 2 thereafter runs "Rajya Sarkar dwara gathit samiti ke sarb sammat nirnay ke aalok me". It is, therefore, manifest that the said Annexure 2 was issued pursuant to the unanimous decision of the District Committee constituted under the Act. The State Counsel in course of the argument contended, after having made that argument, which was found to be not based on correct assessment of Annexure 2, that there has been no sitting of the District Committee at all who could have at all determined the date or taken a decision in this regard. Learned counsel for the petitioners brought out a photostat copy of the decision of the District Committee for my perusal. As that was not proper way of acceptance of a document, I directed the petitioners to file a regular affidavit annexing a photostat copy of the said document. The petitioners' counsel did so by serving a copy thereof on the State counsel. After having perused the said document, learned counsel for the State wanted time which, however, was not allowed. As the case was heard at length and the stand of the State Government was changing from time to time, I thought no useful purpose will be served by granting adjournment in this case. I am therefore, of the opinion that all the formalities required was complied with, as is manifest from Annexure 2.

8. Learned counsel for the State referred to a decision in the case of State of Bihar and Others Vs. Chandradip Rai and Others, and contended that unless the State Government takes over the management and control of the school, the Court cannot give a direction to the State Government to do so. The argument is sound. In this case, however, the school has been taken over vide Annexure 2. The person who passed the order of take over was authorised to do so. He did it on the basis of the recommendation of the District Committee. In that view of the matter, this case is of assistance to the learned counsel for the State. I may point out that while their Lordships referred to a notification to be published in the Official Gazette, the reference is to section 3(3) of the Act. Section 3(3) of the Act deal with take over of un-aid-ed schools. It does not apply to take over of aided elementary schools the take over follows whenever there is a voluntary handing over of the school subject to the determination of date by the District Committee.

9. The view, I have taken in this case is fully supported by the judgment of this Court in C.W.J.C. No-172 of 1984, where respondent No. 2 recalled a similar order passed by the District Superintendent of Education and the same argument was put forward on behalf of the State, that is, there is no order of the State Government taking over of elementary school His Lordship held that once the District Committee passes a unanimous resolution for taking over of the school

with effect from a certain date, the requirement of sub-section (2) of section 3 for the purpose of take over is complete, and no other act is required on the part of the State Government to complete the process of take over of the school.

10. In the instant case, the same is the situation. Nothing has been placed before me to show that the District Committee did not pass any resolution. The State could have done so by producing the minutes of the District Committee. On the contrary, the petitioners have produced photostat copy of the resolution bearing the signature of the members of the District Committee (Annexure 10). The stand of the State Government in this regard is not firm. At times they say that the Committee constituted was automatically dissolved after the enactment of the Act and, therefore, the action taken by them is a nullity. Sometimes their stand is that the approval of the State Government was not taken by the District Committee and/or by the District Superintendent of Education before issuance of Annexure 2. I am in respectful agreement with the decision in the case of Jainandan Prasad *supra*) that no other act on the part of the State Government is required, particularly in cases coming within the sweep of sub-section (2) of section 3 of the Act when after voluntary parting of the management in favour of the State Government and after the District Committee completes their action as required in law, the process of take over comes to an end.

11. The argument of the learned Advocate General that the District Superintendent of Education is not above suspicion is neither here nor there. I am satisfied that the order (Annexure 5) issued by respondent No. 2 recalling the order contained in Annexure 2 is illegal, void and without jurisdiction and it is, therefore, fit to be quashed. In the result, this writ petition is allowed. Let a writ of mandamus be issued quashing the order contained in Annexure 5 to the writ petition and the respondents are directed to deal with the petitioner in accordance with law. In the circumstances of the case, there will be no order as to costs.