

(1976) 12 PAT CK 0017
In the Patna High Court
Case No : C.W.J.C. No. 2924 of 1975

Nand Kishore Prasad Mandal

APPELLANT

Vs

President, Bihar Secondary Education Board and Others

RESPONDENT

Date of Decision : 01-12-1976

Acts Referred:

Bihar General Clauses Act, 1914 — Section 27
Bihar High Schools (Conditions of Service) Rules, 1972 — Rule 4
Road Traffic Act, 1930 — Section 81

Citation : (1977) PLJR 277

Hon'ble Judges : Lalit Mohan Sharma, J; Birendra Prasad Sinha, J

Bench : Division Bench

Advocate : Balabhadra Prasad Singh, Indu Shekhar Prasad Sinha, Fanish Singh and Madan Mohan, for the Appellant; Prabha Shankar Mishra, Rajendra Prasad Singh, Mahi Narayan Jha, Krishna Murari and Madan Mohan Prasad Singh, for the Respondent

Final Decision : Dismissed

Judgement

Lalit Mohan Sharma, J.—The petitioner no. 1, a teacher in the High School, Madhepura, has prayed for quashing of the order as contained in Annexure 8 to the writ application passed by the Bihar Secondary Education Board, Respondent no. 3, on 4.11.1975. The petitioner no. 2, who was the Secretary of the Managing Committee of the school, has joined him in the case. Admittedly, late Shri Lala Surendra Prasad was the Headmaster of the school who died on the 2nd October, 1974, According to the case of the petitioner, the Managing Committee of the school by its resolution dated 17.10.1974, as contained in Annexure 1 to the writ application, substantively promoted him to the post of the Headmaster. The petitioner no. 2, the Secretary, according to the further case in the writ application, wrote to the respondents for approval of the appointment as resolved in Annexure 1. The respondent no. 2, the Secretary of the Education Board, directed the petitioner no. 2 to maintain status quo, but when clarification was sought for of the order, the respondent no. 2 informed, by the letter as

contained in Annexure 2 to the writ application dated 12.11.1974, that the petitioner no. 1 would continue as the Headmaster, pending the final appointment in that post. The petitioner no. 1 accordingly acted as the Headmaster from 17.10.1974 until the impugned order in Annexure 8 was passed. In the writ application, several other facts are mentioned, but Mr. Balabhadra Prasad Singh, learned counsel for the petitioners, while making his argument, stated that those facts are not material for the purposes of his argument and he was, therefore, not placing them. By his order contained in Annexure 8, the Board has directed that pending final appointment of the Headmaster of the School, Respondent no. 4 would be the acting Headmaster and the order as contained in Annexure 2 passed in favour of the petitioner no. 1 was cancelled.

2. Before proceeding further, it would be useful to mention the relevant statutory provisions which have been referred to and relied upon by the learned advocates for the parties. In 1960, the Bihar Legislature passed Bihar High Schools (Control of Administration) Act, 1960 to control and regulate the administration of private High School in the State. The Act was a short one having only 10 sections and Section 3 provided for establishment of a Board of Secondary Education. Section 5 said that there would be a Managing Committee for every school. Section 8 bestowed, on the State Government, the power for making rules for carrying out the purposes of the Act. In 1972, the Government framed the Bihar High Schools (Conditions of Service) Rules, 1972 (hereinafter referred to as the Rules). The power to appoint teachers including the Headmaster was vested in the Managing Committee of the school under Rule 4. On the 21st May, 1974, the 1960 Act was replaced by an Ordinance being Ordinance no. 112 of 1974 and since then a number of ordinances have been passed from time to time. On the 22nd July, 1974, Ordinance 153 of 1974 was passed and remained effective till 14th January, 1975 when it was replaced by another ordinance. The interpretation of some of the provisions of ordinance no. 153 of 1974 has been the subject of a serious controversy in this case. On the 22nd April, 1976, Ordinance no. 124 of 1976 came into force and the parties have referred to some of the sections of the Ordinance also. It may, however, be stated here that except some small changes, the contents of the ordinances have remained similar.

3. The original text of these ordinances as well as of 1972 Rules has been in Hindi, but both sides have referred to the English translation of the relevant provisions, some of which have appeared in the official Bihar Gazette.

4. The provisions relating to services in schools were included in Chapter VI containing Sections 37 to 49 of ordinance no. 153 of 1974. Section 37 stated that the Board should regulate the recruitment and conditions of service of the staff of the schools including the headmaster and teachers and Section 38 laid down that no headmaster or teacher should be appointed except in accordance with the provisions of the ordinance. The remaining sections of this chapter laid down the procedure and other connected matters to which detailed reference will

be made hereinafter. Section 64 repealed the 1960 Act and its Sub-section (3) was in the following terms:

Until such time as the prescribed regulations etc. are not framed under this ordinance, all such regulation, directions, departmental orders which were in force before the promulgation of this Ordinance, shall continue to be in effect provided that they are not contrary to the provisions of this Ordinance, as if they were framed under this ordinance.

[Admittedly the above quoted Section 64(3) has been wrongly mentioned in English Translation as Section 64(2)(iii) and Hindi text has been correctly published in the official Gazette].

5. Mr. Balabhadra Prasad Singh, appearing for the petitioner, contended that even after repeal of the 1960 Act, the 1972 Rules framed thereunder survived and the appointment of a Headmaster by promotion continued to be governed thereunder. The provisions of ordinance no. 153 of 1974 which were in force in October, 1974, when the decision of the Managing Committee of Madhepura High School as contained in Annexure 1 was taken, did not provide for the promotion of an Assistant Teacher to the post of a Headmaster and u/s 64(3) thereof, the 1972 Rules were saved. Alternatively, the counsel said that the rules must be held to continue in force u/s 27 of the Bihar General Clauses Act. On the 17th October, 1974, therefore, the Managing Committee was, under the 1972 Rules, fully authorised to appoint petitioner no. 1 as the Headmaster. The decision of the Managing Committee in this regard was, however, subject to the approval of the prescribed authority, admittedly the District Education Officer but as laid down in clause 8 read with clause 10 of Rule 4, in absence of the opinion or a direction of the District Education Officer within a month, the decision was to be deemed to have been approved. Mr. Singh argued that as the disapproval of the Managing Committee's resolution in Annexure 1 by the District Education Officer was not expressed within a month, the appointment of petitioner no. 1 on a permanent basis became effective and there was no vacancy in the post in respect of which the order in Annexure 8 could be passed. He stated that he did not intend to place other facts or raise other questions mentioned in the writ application and the ground urged by him was sufficient for the purpose of the case.

6. The application was opposed by Respondents 1 to 3 for whom Mr. Prabha Shankar Mishra appeared, as also by Respondent no. 4. The main contention of Mr. Mishra has been that the 1972 Rules also were repealed along with the repeal of the 1960 Act and, thereafter, the power of appointment of the headmaster and teachers exclusively vested in the District Education Officer or in an officer so authorised by the Board in accordance with the procedure laid down in Chapter VI of ordinance no. 153 of 1974. He also urged that even assuming that the 1972 Rules were effective on the relevant date, no importance could be attached to the resolution (Annexure 1) as the provisions of the Rules had not been followed. Learned counsel for Respondent no. 4 further supplemented this

argument by saying that although the approval by the District Education Officer of Annexure 1 was not sought for by the Managing Committee, as required under Rule 4, the District Education Officer having learnt of it, positively disapproved it. Mr. Mahi Narain Jha, appearing for Respondent no. 4 further argued that the Managing Committee, in fact, did not pass the questioned resolution in Annexure 1 and the order in Annexure 2 was made under a misapprehension and when the correct position was appreciated, the order in Annexure 8 was rightly passed. He referred to several of the annexure, annexed to the counter affidavit of Respondent no. 4.

7. The first and the main question which arises for decision is whether the 1972 Rules remained operative after repeal of the 1960 Act. Section 64(3) quoted above would Indicate that what were saved, were earlier regulations, directions and departmental orders and not the Rules. When this was pointed out by Mr. Mishra, Mr. Singh preferred to rely upon Section 27 of the Bihar General Clauses Act only.

8. The rules having been validly framed under the 1960 Act must be regarded as part of the Act itself [see (1) Saligram Singh V. Emperor, ILR 23, Patna. 22.] Ordinarily, on the repeal of the Act, the rules also must be presumed to have been repealed. The petitioner, therefore, must positively establish as to how the rules were saved. It is true that in Section 27 of the General Clauses Act, the rules are included, but the question still remains as to whether the rules were saved in this case.

9. Section 27 of the Bihar General Clauses Act reads as follows:--

27. Continuation of orders etc, issued under enactments repealed and re-enacted--Where any enactment is repealed and re-enacted by a Bihar and Orissa Act (or Bihar Act) with or without modification, then, unless it is otherwise expressly provided, any appointment, notification, order, scheme, rule, by-law or form, made or issued under the repealed enactment, shall, so far as it is not inconsistent with the provisions re-enacted, continue in force and be deemed to have been made or issued under the provisions so re-enacted, unless and until it is superseded by any appointment, notification, order, scheme, rule, by law or form, made or issued, under the provisions so re-enacted.

(Words on which the learned counsel for the Respondents laid emphasis have been underlined by me).

Analysing the provisions of the 1974 Ordinance, Mr. Singh contended that the Ordinance provides for the appointment of the teachers only by direct recruitment. The language of Sections 39, 40, 41, 42 and 43 does indicate that they are not dealing with the promotion at all. It is, therefore, suggested that there is a hiatus in regard to appointments by promotion so far as the Act is concerned. The 1972 Rules, so far as they are dealing with the cases of promotion, must, therefore, be held to be not inconsistent with the Ordinance and, therefore, should be deemed to continue in force. In that view, the word

"appointment" in Section 38(a) of the Ordinance, which is quoted below, must be confined to cases of direct appointment:

38(a) No headmaster or teacher or non-teaching staff (except Class IV employees) shall be appointed in any recognised secondary school except in accordance with the provisions of this Ordinance.

10. Mr. Mishra, on the other hand, strongly argued that the prohibition of appointment of a teacher except in accordance with the provisions of the ordinance is absolute in the widest meaning of the term "appointment" including a case of promotion and the 1972 Rules must, therefore, be held to have been repealed being inconsistent with the ordinance. The other reason given by the learned counsel is based upon the words "and be deemed to have been made or issued under the provisions so enacted" in Section 27 quoted above. After giving my anxious consideration to the arguments addressed by the learned advocates, I am of the view that the contentions of Mr. Mishra are correct and must be accepted. For holding that the 1972 Rules remained alive, after the repeal of the 1970 Act and the enactment of the Ordinance, it has to be held that those rules are capable of being framed under the powers conferred by the ordinance; because to apply Section 27 of the Bihar General Clauses Act would be to hold that, by a legal fiction, the rules are deemed to have been made under the provisions of the Ordinance. The framing of the rules is an exercise of power of delegated legislation, which has now become a normal feature of law making, due to pressure on the time of legislature and technical character of modern legislation. It has been firmly established that the limits of delegated powers of a rule making authority should be clearly defined in the enactment. An examination of the provisions of the ordinance of 1974 would disclose that, unlike the 1960 Act, there is no provision for framing of rules. As I have pointed out above the State Government was authorised u/s 8 of the 1960 Act, in widest terms, to make rules for carrying out the purposes of the Act. In the Ordinance, no such power has been included. The only subordinate legislations contemplated are regulations and by-laws to be made by Secondary Education Board for the purpose of carrying into effect the provisions of the ordinance. The purpose of the by laws, as mentioned in Section 62 is to provide for certain matters concerning the functioning of the Board and that of the regulations for carrying into effect the provisions of the ordinance, which admittedly does not contemplate appointment of teachers by promotion. It must, therefore, be held that the Ordinance does not delegate rule making powers on the State of Bihar which had earlier framed the 1972 Rules, or on any other authority. How can, then, those rules be deemed to have been made under the Ordinance? As there is no room where rules can be housed, they must be held to have been repealed with the repeal of the Act of 1960. This finding by itself disposes of the writ application against the petitioner.

11. Mr. Singh relying upon the decisions in (2) Eileen Louise Nicolie V. John Winter Nicolie--1922 (1) Appeal Cases, 284--,(3) Nanak Chand Vs. Chandra

Kishore Aggarwal and Others, . (4) Anant Prasad Lakshminivas Generiwal Vs. State of Andhra Pradesh and Others, and (5) Municipal Council Palai Vs. T.J. Joseph and Others, contended that repugnance between two statutes should not be readily inferred and a presumption should be raised against an implied repeal of an earlier law by a subsequent one. The inconsistency between the two, which will rebut the presumption, must be a positive one. The argument is that as the ordinance is silent on the question of promotion of the teachers, it cannot be deemed to be inconsistent with the 1972 Rules providing for promotions. This, however, does not save the rules from the finding recorded by me in the preceding paragraph. On the question of inconsistency also, I am of the view that the point has to be decided against the petitioner. The 1972 Rules being the result of the exercise of delegated legislative power is more vulnerable after repeal of the 1960 Act than a direct legislative enactment not expressly repealed. Besides, on an examination of the provisions of the Ordinance, and a close scrutiny of the sections of Chapter VI, it appears that the legislature has forbidden any kind of appointment excepting those in accordance with the provisions of the Ordinance. The term "appointment" in Section 38 is not confined to cases of direct appointment only; it includes any other mode of appointment including promotion. To interpret otherwise would be to defeat the purpose of Section 38. Even without the said section, direct appointments have to be made in accordance with the provisions of the Ordinance, as is clear from Sections 39 to 43. The purpose of Section 38 is to forbid other appointments. The only permissible mode of appointment was direct recruitment in accordance with Chapter VI. Besides, the provisions of Chapter VII of the Ordinance also support the view that the Managing Committee was no more vested with the power of appointment of the teachers. Section 52 which deals with the functions of the Managing Committee does not mention such an authority. On the other hand, clause (xi) of Section 52(2) which is in the following terms, indicates that the Managing Committee can make appointments in class IV posts only,

52(2)

(xi) to send its recommendation to the Board for the creation of posts, teachings, administrative, administerial and other posts and to make appointment to be created and approved class--IV posts.

In regard to teaching posts, the Managing Committee can only send its recommendation. During the course of the argument, a supplementary affidavit was filed on behalf of the petitioners stating that the State of Bihar had affirmed the principle of promotion applicable to the teachers, as evidenced by Annexure 11 to the affidavit. Mr. Indu Shekhar Prasad Sinha, who, appearing for the petitioners, followed Mr. Balabhadra Prasad Singh, also veiled upon a communique, Annexure E to the counter affidavit of Respondent No. 4. It may be observed that Annexure 11 was issued at a point of time when ordinance no. 124 of 1976 was enforced and under Sub-section (9) of Section 41, promotion was included as one of the modes of appointment. Due to this difference in the two

ordinances, Annexure 11, to my mind, is not helpful. Besides, the fact that a particular authority in the Education Department misconstrued the correct position in law (either in Annexure 11 or in Annexure E) would not decide the issue. On a consideration of all the relevant materials, the inference is irresistible that the Managing Committee could not appoint a teacher or a Headmaster after the ordinance no. 153 of 1974 came into force. For this reason also, I hold that the 1972 Rules perished along with the 1960 Act. The sole ground relied upon by the learned counsel for the petitioners, therefore, fails and is rejected.

12. Mr. Mishra pressed an alternative argument against the petitioner. He submitted that even assuming that the 1972 Rules were saved and continued to be effective, still the petitioner was not lawfully promoted as the Headmaster by the resolution (Annexure 1). The detailed procedure which the Managing Committee had to follow for appointment of the teachers was given in Rule 4. Sub-rule (6) enjoined the Managing Committee to prepare a panel of three names and to send it to the District Education Officer for approval. The panel was to be accompanied by a number of documents including (i) the decision of the Committee taken at the time of interview, (ii) a statement including the names, qualifications and other special claims of all candidates and (iii) the original applications of all the candidates along with their service records etc. with annexures. This was admittedly not followed in the present case. Sub-rule (7) stated that the District Education Officer would make an enquiry of the recommendation and then send his reply and Sub-rule (8) declared that if the District Education Officer did not communicate its opinion or order within a month, the re-commendation of the Managing Committee would be deemed to have been approved. As the Managing Committee did not send the resolution (Annexure 1) to the District Education Officer for approval, it was contended that, no occasion for the approval or disapproval of the same by the District Education Officer arose. In these circumstances, the Managing Committee's resolution could not be deemed to have been made in accordance with Rule 4 nor could it be assumed to have been approved after a month. Annexure 1 shows that the resolution was decided to have been sent to the Board for approval and not to the District Education Officer. Towards the end of the second paragraph, it was mentioned that letters should be sent to the District Education Officer for transfer of accounts standing in the name of the late Headmaster to petitioner no. 1. Relying upon this statement, Mr. Singh argued that, in substance, it was an intimation to the District Education Officer of the Managing Committee's decision appointing petitioner no. 1 as the Headmaster. I do not think that this statement in Annexure 1 amounts to seeking the approval of the District Education Officer. Annexure 1 in clear terms sought the approval of the Board. To the Education Officer, a mere information was to be sent, with the request for transfer of the account. The resolution was passed without following Rule 4(6) as is indicated above. This background cannot be lost sight of. The argument on behalf of the petitioners that, in substance, Sub-rules (6), (7) and (8) of Rule 4 were followed cannot, therefore be accepted. Mr. Jha, appearing for Respondent

no. 4 further urged that, as a matter of fact, the District Education Officer disapproved the appointment of petitioner no. 1 when he learnt about the same. To substantiate his point, he relied upon Annexures F, G, H, I, A/1, A/2 and J and on the statements in the counter affidavit of Respondent no. 4. By the letter (Annexure F) dated 4.10.74 (That is two days after the death of the Headmaster), the petitioner no. 2 who was the Secretary of the Managing Committee wrote to the Sub-divisional Education Officer, Madhepura in regard to the handing over the documents of the school to the then Acting Headmaster. Admittedly, Respondent no. 4 was the Assistant Headmaster and was the senior most teacher after the death of the Headmaster. Annexure G was also in continuation of this letter. In paragraph 10 of his counter affidavit, Respondent no. 4 stated that petitioner no. 2 was speaking of banding over paper etc. to Respondent no 4. The petitioner no. 1 was not in contemplation before 17.10.74 when the resolution in Annexure 1 was made. The next document (Annexure H) dated 22nd October, 1974 is an important one. Referring to a letter of the Sub-divisional Education Officer, the District Education Officer ordered that Respondent no. 4 should work as the Acting Headmaster till the final appointment to the post was made. In Annexure 1 dated 1.11.74, the District Education Officer categorically stated that after the passing of the Ordinance on 20.5.1974, the Managing Committee had no power to appoint or promote any body to the post of the Headmaster. He clearly disapproved of the appointment of petitioner no. 1 by the Managing Committee and said that Respondent no. 1 should work in that place until the permanent appointment was made. Dealing with this document, Mr. Singh, for the petitioners, contended that the disapproval of the District Education Officer should be treated as void in as much as he also indicated that Respondent no. 4 should work as the Headmaster, under the 1972 Rules, the District Education Officer had no power to appoint any body as the Headmaster and this part of direction of the District Education Officer was ab initio void. As the disapproval was mixed with this illegal direction, the entire thing should be ignored. Reliance was placed on the decision in (6) King V. Minister of Transport [1934 (1) King's Bench, 277)].

13. On a consideration of the facts and circumstances of this case, I am of the view that neither the principle nor the decision relied upon by the learned counsel for the petitioner applies in this case. In the cited decision, the position was that u/s 81 of the Road Traffic Act, an aggrieved person could appeal before the Minister challenging the grant of a road service licence or any condition attached thereto and the Minister was entitled to make an order for the revocation of the licence. The opponents to the grant of the road service licence opposed the running of a service of a motor-coach along a particular route, and appealed to the Minister on the ground that the service was not needed in the interest of the public. The Minister held that the licensee had been operating the service illegally, but the licence would be revoked only after certain authorities were satisfied that adequate provisions had been made for the road service on that route. In substance, the revocation was inextricably attached to a condition.

It was held that the Minister had no power to do so. The only subject matter of the appeal before him was whether the licence had been properly granted and there was no jurisdiction to make an order for future control and revocation. In the present case, there were two separate and clearly defined directions given by the District Education Officer, firstly, that the appointment of petitioner no. 1 by the Managing Committee was illegal and, secondly, that Respondent no. 4 should act as the Headmaster. Even if the second direction was not in accordance with law, there is no reason to ignore the first one. The other materials relied upon by Mr. Mahi Narayan Jha also support the conclusion. I, therefore, hold that although the approval of the District Education Officer was not asked for by the Managing Committee, he had disapproved of the resolution in Annexure 1 when he learnt about it. For this reason also, the petitioner cannot make any claim on the basis of Annexure 1.

14. Mr. Jha further contended that the order as contained in Annexure 8 was lawfully and correctly passed. I do not think it necessary to deal with this argument as the writ application must fall on the findings recorded by me above but I would like to point out that the authority concerned, by the order in Annexure 2 itself appointing the petitioner as acting Headmaster, discredited the Managing Committee decision, but the petitioner did not consider it necessary, at that stage, to come to this Court for enforcement of Annexure 1. Only when the interim arrangement has gone in favour of the Respondent no. 4, the petitioner has thought of his alleged rights under the resolution. I would accordingly dismiss the writ application with costs payable by petitioner no. 1 to Respondent no. 3. Hearing fee is assessed at Rs. 100/-.

Birendra Prasad Sinha, J.

I agree.