
(1994) 05 PAT CK 0017

In the Patna High Court

Case No : C.W.J.C. Nos. 3160 and 6475 of 1993

Narash Jha and Others and Binod Kumar Verma and Others	APPELLANT
Vs	
State of Bihar and Others	RESPONDENT

Date of Decision : 03-05-1994

Acts Referred:

Citation : (1994) 05 PAT CK 0017

Final Decision : Allowed

Judgement

S.N. Jha, J.—As common questions of fact and law arise for consideration, these two writ petitions have been heard together and are disposed of by common order. The representative facts in so far as relevant to the controversy are, however, taken from CWJC No. 3160 of 1993.

2. The petitioner were appointed as Assistant teachers in the Intermediate trained scale on different dates. In course of time on 21th December, 1990, they were promoted to the Graduate trained scale of Rs. 850-1360 pursuant to the decision of the District Education Establishment Committee in the light of circular No. 2440 dated 18th December, 1984 issued u/s 8 of the Bihar Non-Government Elementary Schools (Taking Over of Management and Control) Act, 1976 (in short "the Act"). Their promotion was challenged in this Court in CWJC 5001 of 1991. The said writ petition was disposed of with direction to the Director, Primary Education, to consider the representation which the petitioners of that case were directed to file. It may be stated here that the aforesaid order was passed on concession of the State Counsel that the order dated 28th December, 1990 was not in accordance with law. The Director, Primary Education, accordingly, heard the parties including the petitioners herein. By order dated 8th/15th January, 1990 he held that as the petitioners were appointed as Science teachers in the ISC trained scale, they can be promoted to only the B. Sc. trained scale and then promotion against posts of B. A. trained scale by the Establishment Committee, therefore, was not in accordance with their rules. Thus, on the aforesaid ground the promotion granted to them to the Graduate

trained scale on 28th December, 1990 was cancelled. Consequential orders were issued by the District Superintendent of Education giving rise to these writ petitions.

3. From the above orders of the Director and the counter affidavits it would appear that according to the respondents the Science teachers and Arts teachers belong to and have "distinct and separate" cadres and, therefore, those appointed as Science teachers and getting the Intermediate (I. Sc.) scale are eligible for the graduate scale only against the post of Science teachers and cannot be considered for the said scale against posts of Arts teachers on their doing the graduation in Arts. The only question for consideration, thus, is whether the Science teachers and Arts teachers have separate cadre or not.

4. The circular dated 18th December, 1984 may first be noticed. The said circular superseding the previous circulars on the point, inter alia fixed the scales of pay and provided that from 1st April, 1981 there would be three separate cadres of Matric trained, Intermediate trained and Graduate trained teachers and three grades known as basic grade, junior selection grade and senior selection grade having different scales of pay in each cadre. It also provided that as the cadres of all three grades i.e. Matric trained, Intermediate trained and Graduate trained teachers were different, each grade will be taken to be separate unit and on that basis 20% and 10% posts in the junior selection grade and senior selection grade respectively, will be filled up, the criteria of promotion being satisfactory service and seniority. In that circular no distinction or classification was made between Arts and Science teachers. In other words, the Intermediate trained teachers had one cadre whether they were Science teachers or Arts teachers. Same was the position with respect to the Graduate trained teachers.

5. The respondents have placed reliance on the Bihar Taken Over Elementary School Teachers Promotion Rules, 1993 (in short "the Promotion Rules") framed under Article 309 of the Constitution. According to them the rules having come into effect retrospectively from 1st January, 1986 all cases of promotions to different grades have to be considered in the light of the provisions as contained therein. According to them further, in the said Rules a distinction between Arts teachers and Science teachers has been made out and they cannot be promoted to the higher grade against vacancies or posts of the others.

6. It would appear from the Promotion Rules that the posts have been categorised in as many as 8 grades. As per Rule 2, the definition clause, Grade 1 means Matric Trained Basic Scale (Rs. 1200-2040), Grade 2 means Matric Trained Senior Scale (Rs. 1400-2600), Grade 3 means Matric Trained Selection Grade (Rs. 1640-2900), Grade 4 means Arts Graduate Trained Scale (Rs. 1640-2900) or Science Graduate Trained Scale (Rs. 1640-2900), Grade 5 means Graduate Trained Senior Scale (Rs. 2000-3500), Grade 6 means Graduate Trained Selection Scale (Rs. 2200-4000), Grade 7 means Middle School Headmaster Basic Scale (Rs. 2000-3500) and Grade 8 means Middle School Headmaster Senior Scale (Rs. 2200-4000), Rule 5 prescribes the eligibility for

promotion to higher grades. The said rule reads as follows:

5. Minimum educational and training qualification and minimum tenure of service. -(1) For promotion to Grade 3 Trained graduate and minimum 12 years of service in Grade-2 or Matric trained and minimum 18 years of service in Grade-2.

(2) For promotion to Grade 4 Trained Graduate and minimum 8 years of service in Grade-1 in the event of promotion from Grade-1 to Grade-4 in case of non-availability of teachers in Grade-3 and Grade-2.

(3) For promotion to Grade-6 Trained post-graduate and minimum 12 years of service in Grade-5, or trained graduate and minimum 18 years of service in Grade-5.

(4) For promotion to Grade-7-Trained post graduate in the event of promotion from Grade-4 to Grade-7 in case of non-availability of teachers in Grade-6 and Grade-5 minimum five years of service in Grade-5:

Provided trained graduate teachers belonging to S. C. and S. T. may also be considered for promotion to Grade-7 till 31st March, 1995 if trained post-graduate teachers of these categories are not available.

Rule 6 lays down that the Establishment Committee shall calculate for each year the number of vacancies in the manner laid down therein. Rule 7 provides for preparation of seniority lists, as on 31st of December, of the previous year, and its publication. The seniority list is to be prepared according to the standard or the criteria laid down in Rule 8 in the following manner:

(1) Seniority list No. 1 (which shall be for promotion to Grade-3). In this lists firstly those trained graduate teachers who have completed minimum 12 years of service in Grade 2, shall be placed ; thereafter those matric trained teachers, who have completed minimum 12 years of service in Grade-2 shall be placed ;

(2) Seniority list No. 2 (which shall be for promotion to Grado-4)-

(i) This list shall be prepared separately for Arts and Science teachers.

(ii) The teachers shall be placed in this list in the following order:

(a) Trained graduate working in Grade-3 ;

(b) Trained graduate working in Grade-2 ;

(c) Trained graduate working in Grade-1 ;

and who have completed minimum 8 years of service in Grade-1.

(3) Seniority list No. 3 (which shall be for promotion to Grade-6)-

(i) This list shall not be prepared separately for Arts and Science teachers but for both a consolidated list shall be prepared.

(ii) In this list, flatly those trained post graduate teachers who have completed minimum 12 years of service in Grade-6 shall be placed. Thereafter those trained graduate teachers who have completed 18 years of service in Grade-5 shall be placed.

(4) Seniority list No. 4 (which shall be for promotion to Grade-7 and to Grade 8)-

(i) This list shall be prepared separately for Arts and Science teachers but for both a consolidated list shall be prepared.

(ii) In this list teachers shall be placed in the following orders:

(a) Trained Post-graduate teachers working in Grade-6 ;

(b) Trained Post-graduate teachers working in Grade 5 ;

(c) Post graduate trained teachers working in Grade-4 who have completed minimum 5 years of service in Grade-4:

Provided graduate trained teachers of SC and ST category shall be placed after Post-graduate teachers, if Post-graduate Teachers of these categories are not available upto 31st December, 1994 ;

(iii) From this list teachers working in Grade-4 and Grade-5 may be promoted to Grade-7 and teachers working in Grade-6 may be promoted direct to Grade-8.

7. Learned Advocate General, who appeared for the respondents, drew our attention to Rule 7 (2)(i) and submitted that for the purpose of promotion to Grade 4, namely, the Trained graduate scale, a clear distinction has been made between Arts teachers and Science teachers inasmuch as the said provision envisages preparation of separate lists for Arts and Science teachers. It was urged that the idea underlying preparation of separate lists is to create separate cadres for them. He also went into the rationale of the above classification. It was submitted that if distinction is not drawn between Science and Arts teachers and restriction put at the stage of promotion to Grade 4 there may be a tendency on the part of the Intermediate Science teachers to do Graduation in Arts and in course of time get promotion in the Graduate trained scale affecting teaching in the science subjects for want of science teachers. According to the counsel for the petitioners, the apprehension about dearth of Science teachers is misplaced and misconceived. They have also challenged the so-called classification between Arts and Science Teachers at the stage of promotion to Grade 4 as being arbitrary. It was pointed out that no such classification has been made or carried forward for further promotion to Grade 6 or Grade 7 and 8, as would be evident from Sub-rules (3) and (4) of Rule 7 which provides for preparation of a consolidated list of both Arts and Science teachers,

8. In my opinion, it is not necessary to go into controversy as to whether the classification between Arts and Science teachers for the purpose of promotion to Grade 4 is rational or not. There may be substance in what the Advocate-General says. However, that does not answer the basic question formulated above,

whether the Arts and Science teachers have separate cadre or not. In the well known case of M.G. Sharan and Others Vs. State of Bihar and Others, , it was observed:

A cadre has to be expressly created as it is of vital importance for conferring fundamental rights upon the employees.

Dealing with the question as to how cadre is created, the Court held ;

In order to confer legal right upon a Government servant it is essential that the cadre should also be legally constituted under Article 309 of the Constitution. It cannot be assumed that due to notifications by which the new department is constituted under Article 162 of the Constitution a separate cadre is created. It may be under Article 309 of the Constitution, or it can be created by the State Government under the executive power conferred under Article 162 of the Constitution. But even under Article 162 of the Constitution, it is essential that the cadre should be formally constituted.

(Emphasis added)

Learned Advocate-General was not in a position to refer to any instrument or document by which separate cadres for Science and Arts teachers were created. The term cadre is not a term of art. Rule 12 of the Bihar Service Code defines "cadre" to mean "the strength of the service or a part of a service sanctioned as a separate unit." (Emphasis added). It is true that the promotion Rules have been framed under Article 309 of the Constitution and they refer to separate seniority lists. However, from leading of the rules as a whole it is clear that classification between Arts and Science teachers has been made for a limited purpose, namely, for promotion to Grade 4 alone. Neither at the previous stage nor at any subsequent stage of promotion such a classification has been maintained. It is difficult to visualise that two sets of persons belonging to the same cadre at the stage of promotion to Grades 2 and 3 (Senior scale and Selection scale of Matric Trained teachers) will form different cadres at an Intermediate stage and then again get amalgamated into one cadre (at the later stages of promotion to Grades 6, 7 and 8). it is therefore not possible to treat the rules as amounting to creation of separate cadres for the Arts and Science teachers. It is accordingly also not possible to uphold the impugned classification for the purpose of promotion on the assumption that separate cadres have been created.

9. During course of hearing learned Advocate General referred to circular No. 88 dated 24th January, 1981 issued u/s 8 of the Act an 1 submitted that 10% of the vacancies had been earmarked for science teachers cannot also amount to creation of cadre. If that wore so, those appointed likewise as Sanskrit or Urdu teachers against 10% posts earmarked for them by the same very letter would also be deemed to have separate cadres of their own. Understandably, the State has not taken that stand.

10. Counsel for the petitioners contended that if the classification between Arts and Science teachers for the purposes of promotion to Grade 4 were to be upheld, that the petitioners and others who were initially appointed on the basis of their Intermediate Science qualification would never have any chance of promotion because now after changing over to Arts and doing graduation in Arts it is not possible to again do graduation in science. According to the counsel that interpretation would be contrary to the decisions of the apex Court according to which Service Rules should be fashioned in the manner that every employee gets at least one chance of promotion in whole of his career. In view of what has been said above, it is not necessary to go into this aspect of the matter.

11. On the basis of the above discussions, I am constrained to hold that the classification between Arts and Science teachers in the absence of duly constituted separate cadres for them is arbitrary and, therefore, the petitioners cannot be denied their right of promotion to the Graduate trained scale i.e. Grade 4 merely on the basis of their not possessing the qualification of Graduation in Science. The impugned order of the Director, Primary Education, dated 8th/15th January, 1993, and the consequential order issued by the District Superintendent of Education accordingly cannot be sustained.

12. In the result, these writ applications are allowed, the orders dated 8th/15th January, 1993 (Annexur-7 in both the cases) and 17th March, 1993 (Annexure-8 in CWJC No. 3160 of 1993) and the show-cause notices (in CWJC 6475 of 1993) are quashed. No order as to cost.

I.P. Singh, J.

13. I agree.