

(1986) 09 PAT CK 0002

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 2916 of 1986

Raghav Singh and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 17-09-1986

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (1987) PLJR 1024

Hon'ble Judges : N.P. Singh, J;A.K. Sinha, J

Bench : Division Bench

Advocate : Ganesh Prasad Singh, Syed Farman Ahmad and Santosh Kumar Sinha, for the Appellant; Daman Kant Jha, G. A. Bipin Bihari Singh, J. C. to G.A. and Shialendra Kumar Sharma, J.C. to G.A. for the State, for the Respondent

Final Decision : Dismissed

Judgement

N.P. Singh, J.—The petitioners, who are Headmasters and Assistant Teachers in different Elementary Schools, have questioned the validity of orders of their transfers from the Schools in question on the ground that they being the office bearers of the Primary Teachers' Association, cannot be transferred, in view of the decision of the State Government, which was communicated by the Deputy Secretary, Department of Education, to all the District Education Officers and District Superintendents of Education by his letter dated 21.7.1978. It is the case of the petitioners that the different Schools, in which they are Headmasters and Teachers, have been taken over by the State Government under the provisions of the Bihar Non-Government Elementary Schools (Taking Over of Control) Act, 1976 (hereinafter referred to as "the Act"). It has been asserted that no rules have been framed under the said Act and as such the service conditions including transfers of the different teachers of the said School are governed by the executive instructions issued from time to time by the Department of Education. One such instruction was issued by the aforesaid letter dated 21.7.1978 saying that the office bearers of the recognised service associations of the teachers of

the Elementary School should not be transferred during the period they held such offices unless their transfer is in the public interest.

2. On 9.7.1986, a Bench of this Court passed an order directing the respondents to seek instructions so that this writ application may be disposed of at the stage of admission itself. Some persons have filed an application for intervention, challenging the claim of some of the petitioners that they are still continuing as the office bearers of recognised teachers' association. The parties were heard, in detail, at the stage of admission itself.

3. On behalf of the petitioners it was submitted that, in view of the decision aforesaid taken by the State Government in respect of the transfer of the office bearers of the teachers' association of different Elementary Schools, it was not open to the respondent-District Superintendent of Education to transfer the petitioners from the Schools in question to different Schools. It was pointed out that in absence of a rule framed under the Act, the circular shall be deemed to be the rule within the meaning of Article 309 of the Constitution and infraction thereof shall invalidate the orders of transfer issued in respect of the petitioners. In this connection reference was made to the well known judgment of the Supreme Court in the case of *Suit Ram Sharma v. State of Rajasthan* (A.I.R. 1967 S.C. 1910) and *Union of India v. K.P. Joseph* (A.I.R. 1973 S.C. 303) where it has been pointed out that it is open to the State Government to issue executive instructions to supplement the rules already in existence or in absence thereof. But the question is as to whether all such executive instructions shall have statutory force and shall be mandatory in nature which can be enforced in the Court of law. It need not be pointed out that all provisions even of statutory rules may not be mandatory in nature so as to nullify any decision or action taken in contravention thereof. Reference in this connection can be made to the judgment of the Supreme Court in the case of *State of U.P. v. Manbodhan Lal* (A.I.R. 1957 S.C. 912) where it was pointed out:

When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in respect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done."

It is a well settled rule of construction that statutes creating public duty are directory whereas those conflict (sic) private rights are imperative. It will be all the more difficult to hold an administrative decision in respect of a public policy to be mandatory in nature.

4. this Court has considered the question aforesaid in the case of *Man Singh v. State of Bihar* (1982 P.L.J.R. 368). The petitioner of that writ application was challenging his order of transfer on the ground that it was contrary to the policy

and procedure laid down for transfer and posting of Government employees, as notified by order dated 1.11.1980. The learned Judges after applying the test for determining the provision to be directory or mandatory, came to the conclusion that the decision of the State Government laying down the procedure for transfer of the Government employees was only directory in nature.

5. Recently a Full Bench of this Court had to consider the effect of circulars issued in respect of the settlement of fishery rights in the case of Chetlal Sao v. State (1986 B.B.C.J. 109 : 1986 PLJR 149). In that connection it was observed as follows: -

Field of the settlement of tanks for fishery or other sairati rights has not been covered by any statutory provisions or rule nor can the ephemeral directions issued from time to time in the governmental discretion be given the status of a statute or raised to the pedestal of being binding either on the State or the citizen.....It is held that the administrative instructions or circulars issued from time to time for the lease of fishery rights in tanks (Sairats) vested in the State are not statutory in nature and consequently not binding."

6. On behalf of the petitioners it was urged that circulars and orders issued by the State Government are meant to be followed. It is true that whenever any administrative instruction is issued or a decision is taken by the State Government it is expected that the authorities shall follow them in form and substance. But if there is any contravention thereof the person concerned cannot move this Court for a writ of mandamus, because such administrative instruction does not have the force of a Statute. I do not understand as to how the communications issued by the Department of Education to the different District Education Officers and the District Superintendents of Education saying that the office bearers of the recognised teachers Association should not be transferred from one place to another during the period they hold the said offices unless it is against the public interest can be held mandatory in nature so as to nullify the orders of transfer issued in respect of the petitioners. It is in my view, only a directive by the State Government to its Officials in respect of transfer of teachers of the Elementary Schools. I must observe that I have failed to appreciate the object behind such directive being issued by the State Government. The Schools are not industries which need trade unions to protect the interest of its employees while bargaining with the management. The service in the different schools are more or less in the nature of dedication to the different institutions as such there should not be much scope for trade union activities.

7. A learned Judge of this Court in the case of Ram Balak Singh v. The State of Bihar and others without taking into consideration the nature and effect of the aforesaid communication dated 21.7.1978 quashed the transfer of the petitioner of that writ application saying that as he was an office bearer of the recognised association of teachers of Elementary Schools he should not have been transferred till he continued to hold the office in question. I regret my inability to

agree with the aforesaid view and the same is overruled. Accordingly, this writ application is dismissed. The order of status quo passed by this Court is vacated.

Ashwini Kumar Sinha, J.

I agree.