

(2015) 08 JH CK 0012
In the Jharkhand High Court
Case No : L.P.A. No. 422 of 2008

The State of Jharkhand and Others

APPELLANT

Vs

Shanti Devi and Others

RESPONDENT

Date of Decision : 20-08-2015

Acts Referred:

Bihar Non-Government Elementary School (Taking Over of Control) Act, 1976 —
Section 4, 4(2)
Constitution of India, 1950 — Article 226

Citation : (2015) 4 AJR 723 : (2015) 4 JLJR 507

Hon'ble Judges : Dhirubhai Naranbhai Patel and Ratnaker Bhengra, JJ.

Bench : Division Bench

Advocate : K.M. Verma, G.P.I., for the Appellant; R.N. Sahay, Senior Advocate, for the Respondent

Final Decision : Allowed

Judgement

Dhirubhai Naranbhai Patel, J.—This Letters Patent Appeal has been preferred against the judgment and order delivered by the learned Single Judge in W.P. (C) No. 1237 of 2003 dated 7th August, 2008, whereby, the petition preferred by respondent No. 1 (original petitioner) was allowed by the learned Single Judge and, therefore, the appellants (original respondent Nos. 1 & 4) and have preferred this Letters Patent Appeal.

2. Factual Matrix.

? Respondent No. 1 (original petitioner) is widow of a teacher, who has expired on 2nd June, 1974. The widow is seeking family pension because of the death of her husband.

? It appears that by virtue of Bihar Non-Government Elementary Schools (Taking Over of Control) Act, 1976 (herein after to be referred as "the Act, 1976" for the sake of brevity) management of several Non-Government Schools were taken over by the erstwhile State of Bihar. By virtue of Section 4(2) of the Act, 1976,

every officer, teacher or other employees, holding any office or post in the school, taken over by the State Government, shall be deemed to have been transferred to and become an officer, teacher or employee of the State Government, with such designation, as the State Government may determine, with the same remuneration, same tenure and on the terms and conditions of service, prevailing prior to taking over of the said school and shall continue with the same, unless and until such tenure, remuneration or terms and conditions of the service are duly altered by the State Government.

? It appears that prior to taking over of management of the schools, the teachers of those schools were getting the benefits under the "Triple Benefit Scheme", introduced by Education Department's Notification No. 3431 dated 4th September, 1964. This "Triple Benefit Scheme" was pertaining to Provident fund-cum-Insurance-cum-Pension.

? Thus, it appears that there was no provision for family pension under the said scheme from 1964.

? It further appears that whatever the benefits available to those teachers prior to taking over the management of Non-Government Schools, were to be continued as per Section 4(2) of the Act, 1976, unless and until they are amended by the State Government.

? It further appears from the facts of the case that the aforesaid benefits were slightly modified or altered, with effect from 1st April, 1976 and now family pension is also included into the benefits, to be given to those teachers.

? As the husband of respondent No. 1 (original petitioner), who was a teacher, has expired on 2nd June, 1974, he was not covered by the subsequent changes in the "Triple Benefit Scheme" and therefore, the widow of the said teacher having been denied the benefit of family pension, a writ petition bearing W.P.(C) No. 1237 of 2003 was preferred by her, which was allowed by the learned Single Judge vide order dated 7th August, 2008 and, hence the original respondent Nos. 1 to 4 have preferred this Letters Patent Appeal.

3. Arguments canvassed by the counsel for the Appellants.

? It is submitted by learned counsel for the appellants that the deceased teacher was an employee of Non-Government School. Management of Non-Government Schools was taken over by virtue of the Act, 1976 with effect from 1st January, 1971 as per Section 4(2) thereof and the terms and conditions of service were not altered, but, whatever was in existence, was to be continued even after taking over of the management till those terms and conditions of service are altered by the State Government.

? It is further submitted by the learned counsel for the appellants that as on date of taking over of the management, the "Triple Benefit Scheme" was in force with effect from 1st April, 1962, the teachers were entitled to Provident Fund-cum-Insurance-cum-Pension benefits. Family pension was not part and parcel of the

said Scheme. The Act, 1976 maintained the terms and conditions of the employment, as they were prior to taking over of management. This Act, 1976 is made effective from 1st January, 1971. In this case, the teacher has expired on 2nd June, 1974. Thus, as on the said date when the teacher expired, the only benefits available to the teachers were under the "Triple Benefit Scheme", 1964.

? It is further submitted by the learned counsel for the appellants that subsequently with effect from 1st April, 1976 i.e. after approximately two years from the date of death of the teacher (husband of the original petitioner) the Act, 1976 came into force and, therefore the benefits of subsequently introduced family pension cannot be given to the wife of deceased teacher (original-petitioner). These aspects of the matter have not been properly appreciated by the learned Single Judge, while allowing the writ petition bearing W.P.(C) No. 1237 of 2003.

? It is further submitted by the learned counsel for the appellants that concept of family pension was unknown to the teacher for the period prior to 1st April, 1976. This concept has been introduced from 1st April, 1976 to make payment of family pension to the spouse of teacher, who has expired and, therefore also wife of deceased teacher (original-petitioner) was not entitled to family pension, because her husband has expired on 2nd June, 1974.

? It is further submitted by the learned counsel for the appellants that a confusion was created by the original petitioner on the ground that whatever were the benefits to be given to the government employees, are now also to be given to the teachers after taking over of the management of the schools. But, the circular which was meant for State Government employees, introduced in the year 1964 vide Finance Departments Memo No. Pen-103/64/9505-F.I. dated 3rd September, 1964, was not applicable to the teachers and this aspect of the matter has not been properly appreciated by the learned Single Judge, while allowing the writ petition bearing W.P.(C) No. 1237 of 2003.

? It is further submitted by the counsel for the appellants that the circular issued and meant for the government employees are not automatically applicable to the teachers, after taking over of the management by virtue of Bihar Non-Government Elementary Schools (Taking Over of Control) Act, 1976, especially reading to Section 4(2) thereof. What is expressly not given to the teachers, has been presumed by the learned Single Judge and hence, the judgment and order delivered by the learned Single Judge deserves to be quashed and set aside.

? Learned counsel appearing for the appellants relying upon a decision, rendered by Hon"ble Patna High Court in the case of State of Bihar and Others Vs. Arya Devi and Others--> , has submitted that the similar was the issue before the said High Court about the family pension and the benefit of family pension was denied to the employee, who has expired prior to 1st April, 1976.

? It is further submitted by the learned counsel for the appellants that the husband of the original petitioner had served in the erstwhile State of Bihar and

has also expired prior to bifurcation of the State of Jharkhand and, therefore, the cause of action will be arising within the erstwhile State of Bihar, since the State of Jharkhand has been bifurcated with effect from 15th November, 2000 under Bihar Reorganization Act, 2000 and hence, the writ petition preferred by the wife of deceased teacher (original petitioner) before High Court of Jharkhand was not tenable at law.

4. Arguments canvassed by the learned counsel for respondent No. 1 (original petitioner).

? Learned counsel appearing for respondent No. 1 (son of original petitioner) submitted that no error has been committed by the learned Single Judge in allowing the writ petition bearing W.P. (C) No. 1237 of 2003, vide order dated 7th August, 2008.

? It is further submitted by the learned counsel for respondent No. 1 (son of original petitioner) that the Act, 1976 was made effective from 1st January, 1971 whereas her husband has expired on 2nd June, 1974 and, therefore, the original petitioner was entitled to get family pension, as per the Family Pension Scheme, introduced for the State Government employees vide Finance Department's Circular dated 3rd September, 1964 and this aspect of the matter has been properly appreciated by the learned Single Judge, while allowing the writ petition, preferred by the original petitioner.

? It is further submitted by the learned counsel for respondent No. 1 that looking to the provisions of the Act, 1976, when the management of Non-Government Schools has been taken over by the erstwhile State of Bihar, automatically all the teachers became the employees of the State Government and hence, the benefit under Family Pension Scheme, floated by the State of Bihar in the year, 1964, should also be made available to the teachers.

? It is submitted by the learned counsel for respondent No. 1 that the cut-off date prescribed by State i.e. 1st April, 1976 is absolutely arbitrary in nature in view of the fact that the widows of those teachers who have expired prior to 1st April, 1976, will not get family pension whereas the widows of such teachers who have expired after the cut-off date will get the benefit of family pension. This classification has no nexus with the goal to be achieved and it is not reasonable in nature.

? It is further submitted by the learned counsel for respondent No. 1 that Hon"ble Patna High Court in the case of Lalita Devi and Another Vs. State of Bihar and Others, , has also held that such a classification is not reasonable in nature.

? It is further submitted by the learned counsel for respondent No. 1 that neither Resolution No. 1069 dated 3rd June, 1977 nor Resolution No. 4426 dated 31st August, 1974 was relied upon by the appellants before the learned Single Judge in the writ petition and hence, these documents cannot be now relied upon by

the appellants in this Letters Patent Appeal.

? It is submitted by the learned counsel for respondent No. 1 that under the existing or prevailing "Triple Benefit Scheme" of the year, 1964 there was already mentioning about the benefit of pension. This includes family pension also. These aspects of the matter have been properly appreciated by the learned Single Judge and hence, this Letters Patent Appeal may not be entertained by this Court.

Reasons:

5. Having heard learned counsel for both the sides and looking to the facts and circumstances of the case, we hereby quash and set aside the judgment and order delivered by learned Single Judge in W.P.(C) No. 1237 of 2003 dated 7th August, 2008, mainly for the following facts and reasons:--

"(i). By virtue of Bihar Non-Government Elementary Schools (Taking Over of Control) Act, 1976, management of several Non-Government Elementary Schools was taken over by Government i.e. erstwhile State of Bihar. This Act was made effective with effect from 1st January, 1971.

(ii). Section 4(2) of the said Act, 1976, which is in Hindi language, translation of which has read and re-read by the learned counsel for both the sides, reads as under:--

"Every Officer, teacher or other employee holding any office or Post in the school taken over by the State Government shall be deemed to have been transferred to and become an officer, teacher or employee of the State Government with such designation as the State Government may determine and shall hold office by the same tenure, at the same remuneration and on the terms and conditions of service as he would have held before the taking over the said schools and shall continue to do so unless and until such tenure remuneration, terms and conditions of service are duly altered by the State Government."

(emphasis supplied)

(iii). As per the prevailing terms and conditions of the service relating to teachers, they were entitled to certain benefits under the "Triple Benefit Scheme" of the year 1964, made effective from 1st April, 1962. These benefits were Provident Fund-cum-Insurance-cum-Pension scheme benefits. At that time concept of family pension was not introduced for the teachers. For the government employees there was already a concept of family pension, in existence, by virtue of Finance Department's Memo No. PEN-103/64/9505-F.I. dated 3rd September, 1964.

(iv). Thus, it appears that the teachers were governed by the "Triple Benefit Scheme" whereas additional benefit was extended to the government employees.

(v). It is vehemently submitted by the learned counsel for respondent No. 1 in this Letters Patent Appeal that by virtue of the Act, 1976 which is made effective from 1st January, 1971, the teachers have automatically become government

employees and therefore, they were entitled to the benefit of the family pension. This contention is not accepted by this Court, mainly for the reason that looking to Section 4(2) of the Act, 1976 whatever were the terms and conditions of the service applicable to the teachers were to be continued even after taking over of the control and management of Non-Government Schools, unless and until the said benefits were amended by the government.

(vi). The amendment was brought into force by the government i.e. benefit of family pension was given to the teachers with effect from 1st April, 1976. Admittedly husband of original petitioner has expired on 2nd June, 1974 i.e. prior to approximately twenty two months from 1st April, 1976 or in other words, the concept of family pension was introduced for the teachers for the first time after twenty two months from the date of death of the husband of original petitioner and, therefore, the original-petitioner was not entitled to the benefits of family pension. This aspect of the matter has not been properly appreciated by the learned Single Judge and hence, the judgment and order delivered by the learned Single Judge in W.P.(C) No. 1237 of 2003 dated 7th August, 2008 deserves to be quashed and set aside.

(vii). It appears that the learned Single Judge has erred in applying the circular issued by the Finance Department dated 3rd September, 1964 to the teachers. This circular was meant for State Government employees only. At the relevant time, the teachers were not the government employees. Even by virtue of the Act, 1976. Automatically the said circular issued by the Finance Department dated 3rd September, 1964 cannot be made applicable to the teachers. Looking to Section 4(2) of the Act, 1976 the teachers were entitled to the benefit under the "Triple Benefit Scheme" floated in the year 1964, which was separately and especially meant for the teachers, which was made effective with effect from 1st April, 1962. The benefit under the said scheme was to be continued even after taking over of the management of Non-Government Schools as per Section 4(2) of the Act, 1976, till the terms and conditions of the services are duly altered or modified by the State Government.

(viii). As stated herein above, alteration in the terms and conditions of the services of the teachers was made with effect from 1st April, 1976, especially for the family pension, but, unfortunately the teacher (husband of original petitioner) has expired on 2nd June, 1974 and, therefore the original petitioner is not entitled to the family pension.

(ix). What benefits are to be given to the teachers or to their widows or to the children of the deceased teachers, is a policy decision to be taken by the Government. The High Court will not alter the policy decision taken by the Government while exercising power under Article 226 of the Constitution of India. The High Court will not replace even a better policy than the existing one, because the Court is not a Cost-Accountant or Charter Accountant or Economist and more so, when financial aspect is involved. The terms and conditions of service are to be decided by the Government. It happens that whenever any cut-

off date is prescribed, there are bound to be a few persons who are falling on the wrong side of the cut-off date, but, that does not mean that the cut-off date prescribed by the Government is arbitrary in nature. There cannot be any cut-off date which can please each and every one. In the facts of the present case the benefit of family pension is introduced with effect from 1st April, 1976. Unfortunately, husband of original petitioner has expired on 2nd June, 1974 and, therefore, the original-petitioner was not entitled to the family pension. Court cannot be more sympathetic than the law. Sympathy beyond the law is cruelty to others. No writ much less, a writ of mandamus can be issued, upon the State Government for breach of any public duty, which is never in existence. There was no legal obligation on the part of the State to give family pension to the widows of those teachers, who have expired prior to 1st April, 1976 and hence, there is no corresponding right vested in the widows of those teachers, who have expired prior to 1st April 1976. Once such legal obligation for the public duty is not vested in the State, no writ of mandamus can be issued upon the State. These aspects of the matter have not been properly appreciated by the learned Single Judge, while allowing the writ petition.

(x). Learned counsel appearing for respondent No. 1 submitted that certain letters were not part and parcel of the writ petition e.g. Annexure-1 to the memo of Letters Patent Appeal. Such letter is not relied upon even by this Court, while passing the order in Letters Patent Appeal.

(xi). It is contended by the learned counsel for the respondent No. 1 that "Triple Benefit Scheme" is having a concept of pension and, therefore, automatically concept of family pension is inbuilt. This argument of respondent No. 1 is also not accepted by this Court, mainly for the reason that:

(a) the Court cannot presume the concept of the family pension in the "Triple Benefit Scheme, floated by the Government in the year, 1964;

(b) family pension is normally certain percentage of original pension, to be given to the family members of the deceased employee. If the Court has to presume the concept a family pension then this Court will also has to presume about the percentage of the family pension and the Court will not presume the percentage of original pension which may be treated as a family pension, in case of death of original pensioner;

(c) The Court is not a policy maker of the government rather it is an interpreter thereof. We are not inclined to presume, as suggested by learned counsel for respondent No. 1. We would like to follow a theory of positivism, as was floated by Austine, especially in the case of policy decision taken by the Government. This is not a case of one widow or two. The judgment is applicable in rem and we do not want to create any additional financial burden by virtue of our presumption about the family pension, than what is never envisaged by the government in the "Triple Benefit Scheme" floated in the year, 1964; and

(d) the government is ready and willing to give benefits under the "Triple Benefit

Scheme" to those teachers who have retired prior to 1st April, 1976 or to the family members of the deceased teachers, who have expired prior to 1st April, 1976, so far as pension is concerned. So far as family pension is concerned, the legal heirs of those teachers who have retired or expired after 1st April, 1976 will not get the benefit of the family pension. In the facts of the present case, husband of original petitioner has expired on 2nd June, 1974 and, therefore, she was not entitled to the family pension under the "Triple Benefit Scheme".

(xii). As we are allowing this Letters Patent Appeal by quashing and setting aside the judgment delivered by learned Single Judge in W.P.(C) No. 1237 of 2003 dated 7th August, 2008, on the aforesaid ground.

(xii). Hon"ble Patna High Court in the case of State of Bihar and Others Vs. Arya Devi and Others--> , especially in paragraph 10, 11, 13 and 14 as under:

"10. From the facts discussed above, in substance the submission of the learned Counsel for the appellant-State of Bihar is that the judgments under appeal are against law and the judgments in the case of Sharda Devi v. State of Bihar (supra), and in the case of Lalita Devi v. State of Bihar (supra) which have been followed by the judgments under appeal must be held to be incorrect because in the aforesaid judgments the Court failed to appreciate that benefit of Family Pension was not available to teachers of Non-Government elementary schools prior to take over of such schools by the Act enacted in the year 1976. In this regard, it would, therefore, be appropriate to consider the provision of Section 4(2) of the Act. Sec. 4 of the Act provides the consequences of taking over, Sub-section (2) of Sec. 4 provides as follows:

Every Officer, teacher or other employee holding any office or Post in the school taken over by the State Government shall be deemed to have been transferred to and become an officer, teacher or employee of the State Government with such designation as the State Government may determine and shall hold office by the same tenure, at the same remuneration and on the terms and conditions of service as he would have held before the taking over the said schools and shall continue to do so unless and until such tenure remuneration, terms and conditions of service are duly altered by the State Government.

11. Elucidating such argument, it was submitted on behalf of appellants that had the Court taken note of this provision it would have been clear that the teachers or employees of these schools even after take-over and after they had become teachers/employees of the State Government were to hold office on the same terms and conditions of service as held before the taking over of the schools unless and until the terms and conditions of service were duly altered by the State Government. The words duly altered have not been defined in the Act to mean duly altered by statutory rules and hence, according to learned Counsel for the appellant, in absence of any statutory rule to the contrary, such alteration could be done even by executive instructions. If it is held that the instructions of 1976 did not alter the terms and conditions of service as provided in Sec. 4(2) of

the Act then the effect would be to deprive the benefit of Bihar Pension Rules and of Family Pension contained therein even for employees and teachers who retired or died on or after 1-4-1976.

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13. Having considered all the relevant facts, the earlier judgments and the provisions of the Act and after taking into account the submissions of rival parties, this Court finds sufficient force in the submissions advanced on behalf of the appellants in these appeals and is, therefore, left with no option but to differ with the views expressed by the learned Single Judge in the case of *Sharda Devi v. State of Bihar* (supra) and *Lalita Devi v. State of Bihar*, (supra), and hold that those judgments do not lay down the correct law. There is no material on record or any law to hold that the teachers of Non-Government elementary schools were entitled to the benefits of Family Pension under the liberalised scheme of 1964 as contained in Bihar Pension Rules which is applicable only to employees of State Government. After take-over of the schools under the provisions of the Act, such teachers, by virtue of Sec. 4(2) of the Act continued to be governed by their earlier service conditions and, therefore, could not have claimed to have become employees of State Government in respect of other service conditions until their conditions of service were altered by the State Government in view of instruction of 1976 providing for application of Bihar Pension Rules only to those teachers who retired on or after 1-4-1976 and also providing that those teachers who retired or died earlier shall be entitled to the benefits of Triple Benefit Scheme. No doubt, the judgment of the Division Bench in the case of *Sona Devi v. State of Bihar* (supra), in the facts of that case did not consider the 1964 Notification relating to Family Pension and thus, left the matter open but its findings on the question of arbitrariness or otherwise of instruction dated 7th June, 1976 and validity of the cut-off date were binding on the learned Single Judge. We also find no material to take a different view on the aforesaid aspect of the matter than what has been taken by the Division Bench in the case of *Sona Devi v. State of Bihar* (supra).

14. In the case of *Lalita Devi v. State of Bihar*, (supra), it was erroneously presumed that besides the Triple Benefit, pensionary benefits including Family Pension benefit as provided in the Bihar Pension Rules were available to the teachers of elementary schools taken over by the State of Bihar under the provisions of the Act. This led to further error in holding that by fixing 1-4-1976 as the cut-off date for application of pensionary benefits, the State had changed the conditions of service to the detriment of teachers of schools concerned. On the basis of aforesaid discussions, it has to be held that such teachers and employees of elementary schools taken over under the Act who retired or died prior to 31st March, 1976 shall be entitled only to the benefit under the Triple Benefit Scheme and only those who retired after 31st March, 1976 shall be governed by the Bihar Pension Rules including provisions for Family Pension. The instruction or decision of the State Government dated 7th June, 1976, though

not a statutory rule is valid and the cutoff date fixed thereunder suffers from no arbitrariness. In view of aforesaid findings and discussions, we are left with no option, but to overrule the judgments of learned Single Judge in the case of Smt. Sharda Devi v. State of Bihar and Ors,(supra) and also in the case of Lalita Devi v. State of Bihar(supra)."

(emphasis supplied)

In view of the aforesaid decision wherever a teacher has expired prior to 1st April, 1976, the legal heir(s) of the said deceased teacher will not be entitled to family pension. We are in full agreement of the ratio decidendi, propounded by Hon"ble Patna High Court in the aforesaid decision.

6. As a cumulative effect of the aforesaid facts and reasons and judicial pronouncements, we hereby quash and set aside the judgment and order passed by learned Single Judge in W.P.(C) No. 1237 of 2003 dated 7th August, 2008. This Letters Patent Appeal is accordingly, allowed and disposed of.