
(1980) 07 PAT CK 0001
In the Patna High Court
Case No : C.W.J.C. No. 2956 of 1975

Yogendra Thakur

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 04-07-1980

Acts Referred:

Constitution of India, 1950 — Article 162, 166, 17, 309

Citation : (1981) 29 BLJR 374

Hon'ble Judges : P.S. Sahay, J;Lalit Mohan Sharma, J

Bench : Division Bench

Judgement

Lalit Mohan Sharma, J.—In this writ application, the petitioner has challenged a gradation list of the teachers in upper division of the Subordinate Education Service (Annexure 8) attached to the letter dated 26-2-1975 addressed to the Deputy Director of Education (Annexure 7) and the basis on which the list has been prepared, as mentioned in Annexure 6. The main claim of the petitioner is that the respondent No. 5 to 343, who formed a separate group, cannot be reckoned senior to the petitioner and the other teachers of another group to which the petitioner belongs. The case was earlier heard by my learned Brother P.S. Sahay, J., who referred it to a Division Bench as some important questions of law arise in the case.

2. The case made out in the writ application is that the petitioner is a member of the Bihar Subordinate Education Service (Upper Division) in teaching branch and was entitled to be considered for promotion to the post of Principal of the Government High Schools. An ad hoc Scheme described by the petitioner as Higher Secondary Scheme was introduced by way of experiment by the Government order dated the 9th June, 1958 (Annexure-2) under which a number of existing Government schools were converted into Multi Purpose Higher Secondary Schools and the teaching was extended to other subjects besides the existing subjects of study. For this purpose a large number of additional posts were created in the upper division. These posts should have been filled up in

accordance with law by promotion from the rank of the lower division teachers but the State Government deviating from the rule made direct recruitment on a large scale. The new appointees, although appointed to the Bihar Subordinate Education Service, Upper Division (Teaching Branch) thus formed a separate cadre of Higher Secondary teachers. Separate gradation lists were prepared for the general cadre of the Subordinate Education Service to which the petitioner belongs and for this new cadre. The experiment under the Scheme proved a failure and in 1971 the State Government withdrew the Scheme by a resolution dated 29-4-1971 (Annexure-4). A decision, however, was taken to absorb the teachers appointed under the new Scheme and, accordingly, a decision was taken to merge the new cadre in the Subordinate Education Service (Upper Division). Since several anomalies arose as a result of this decision, the matter was examined and the Government formulated certain principles as mentioned in Annexure 6 dated 20-2-1975 and following their decision the letter (Annexure 7) with the gradation list (Annexure 8) was circulated. As a result of Annexures 6, 7 and 8, 348 respondents have come to the petitioner's cadre as senior to the original members of the cadre blocking their prospects of promotion. The original members of the cadre raised a protest, but the State Government, without giving any importance to it, is proceeding on the basis of the impugned annexures and a number of posts of Principals in Bihar Education Service, Class II are going to be filled up on their basis. This will seriously prejudice the teachers of the original Subordinate Education Service (Upper Division). The petitioner in these circumstances filed the present writ application in 1975. He has also prayed for issuing a writ of mandamus directing the authorities not to give effect to the impugned gradation list and to consider the case of the petitioner for promotion to the Bihar Education Service, Class II, in accordance with law. As the number of the respondents in the case is very large, the service of notice of this case took considerable time and the case could not be disposed of expeditiously.

3. It has been contended on behalf of the petitioner that the additional posts were not created by Annexure 2 in the existing Subordinate Education Service (Upper Division Cadre) and the respondents were absorbed in the cadre for the first time in 1975 and they, therefore, must rank junior to the teachers already in the cadre on that date. In any event, the respondents cannot be treated to be senior to the teachers who were already in the cadre in 1971 when a decision was taken to absorb the respondents in the Subordinate Education Service (Upper Division). The gradation list (Annexure 8) in which the respondents have been shown as senior is, therefore, illegal and fit to be quashed.

4. Admittedly, the respondents were directly appointed in the year 1958-59 in the post created by Annexure 2 for working out the Scheme. The petitioner who was a teacher in the lower division of the Subordinate Education Service was promoted in 1960 and the other teachers similarly situated, who are going to be affected by the impugned annexures were promoted in the year 1960-61. According to the case of the contesting respondents, the additional posts were

created in the cadre of Subordinate Education Service (Upper Division) itself and the respondents from their very dates of appointments are members of this cadre and as they were appointed before the petitioner was appointed, they have correctly been shown as senior in the gradation list. The main question in this case, therefore, is as to whether additional posts were created in the existing cadre or not.

5. Mr. Basudeva Prasad, appearing for the petitioner, placed the Government Order (Annexure 2) before us and attempted to interpret it in the light of the petitioner's case. He laid great stress on the following portion of the order which is at page 86 of the records;

the State Government have further been pleased to create (sic) certain additional posts of teachers, clerks and menials and to upgrade certain existing posts of teachers from Lower Division of Subordinate Educational Service to the Upper Division of Subordinate Educational Service as shown in the enclosed statement II on permanent basis, at an immediate recurring cost....

It has been argued that so far as the upgradation of certain existing posts were concerned, they were in the Upper Division of Subordinate Educational Service, but the creation of the additional posts was not made in the Service as is clear from the language. The emphasis is on the absence of the preposition "in" after the word "create". In reply, Mr. Shreenath Singh, appearing for respondents 16, 28, 72 and 216, stated that the Government order has not been set out in Annexure 2 in full. The complete order has been given in Annexure "A" to the affidavit on behalf of the respondents 1 to 4 in rejoinder to the reply to counter affidavit. Annexure "A" begins at page 373 of the records and continues upto page 383 and includes the Statement II, referred therein, in tabular form at pages 281 to 383. The Column 2 of Statement II gives the nature of the posts. The serial Nos. 1 to 8 deal with the teachers. Serial No. 1 refers to teachers in Agriculture in Class II (Junior) of the Agriculture Service and serial No. 7 refers to teachers in Elementary Engineering in Class II of Bihar Engineering Service and serial Nos. 3, 4, 5 and 6 refer to the teachers in Science, Commerce, Arts or Crafts and Home Science in Upper Division of the Subordinate Education Service. Item No. 9 refers to clerks and item No. 10 to inferior staff in 4th grade. The Statement II, which is part of the Government Order gives no room for doubt that the posts of teachers mentioned in serial Nos. 3, 4, 5 and 6 were created in the Upper Division of the Subordinate Education Service. It is not disputed that the respondents who find place in the impugned gradation List (Annexure-8) are all teachers in subjects mentioned in serial Nos. 3, 4, 5 and 6. Since all the newly created posts were not in this cadre, it was not so stated in the above quoted portion of the Government Order. The service in which these posts were created was not mentioned at that stage that information is available from Statement II. It is therefore, not possible to accept the argument addressed on behalf of the petitioner on the interpretation of Annexure 2. The order further indicates that the creation of the posts was on permanent basis and not ad hoc basis, as

asserted by the petitioner. The entire order confirms the view that the Scheme had been introduced not by way experiment but on a permanent basis. The fact that in 1971 the Scheme was abolished cannot by itself lead to the conclusion that the Scheme was uncertain and transitory in nature.

6. Mr. Prasad placed reliance on several documents in support of the petitioner's case that the respondents were not appointed in the Upper Division of the Subordinate Education Service and were, therefore, not treated as such by the authorities in the Education Department. By way of evidence, he drew our attention to the advertisement, Annexure 11, dated 20-6-1958 inviting applications for recruitment to the new posts, which does, not mention that the posts are in the Subordinate Education Service (Upper Division). I do not agree with Mr. Prasad's contention that the omission to mention the cadre leads to the conclusion that the posts were ex-cadre, specially when nothing whatsoever is mentioned on that aspect. On the other hand, the notification dated 6-11-1958 Annexure-B, appointing some teachers in Chemistry in the up-graded Multi Purpose Higher Secondary Schools expressly mentions that the appointments were in the Upper Division of the Subordinate Education Service.

7. Great emphasis was given by Mr. Prasad on Annexure 14, a letter dated 14-9-1959 from the Deputy Director of Education to the Principals of several institutions asking from them the information required in a proforma enclosed with the letter in respect of the teachers appointed in Subordinate Education Service (Upper Division) and outside the grade under the Multipurpose Scheme. The learned Counsel contended that by the expression "outside the grade" the reference is to the respondents. I do not feel persuaded to accept this suggestion in absence of any indication that the expression refers to them. It has to be remembered that the posts were created by Annexure-2 both in this cadre as well as outside. I have pointed out above that the statement 11 indicates that the posts were created in Agriculture and Engineering Service also. If the interpretation of Annexure 2, as suggested on behalf of the respondents is correct as I have found above the expression "outside the grade" in Annexure 14 must be deemed to refer to the teachers in the subjects of Agriculture and Elementary Engineering and not to the respondents who are teachers in other subjects. The petitioner has not given a copy of the proforma enclosure which could have thrown some light on the disputed question. As it is, I think that Annexure 14 is neutral in nature for the purpose of deciding the present controversy.

8. The next document relied upon by Mr. Prasad is Annexure 15 dated 5-11-1964 whereby the Deputy Director of Education required the details in accordance with the proforma attached of the teachers in Upper Division of the Subordinate Education Service to be submitted. I have not been able to understand as to how this document gives any support to the petitioner's claim. On the other hand, the heading of the ninth column of the proforma and page 328 of the records assists the respondents to some extent. It requires the information to be given

whether the post is permanent or temporary or whether it is upgraded post from Lower Division of the Subordinate Education Service. This presumes that all the posts are not necessarily upgraded posts otherwise there would not be any meaning in the enquiry. Some of the posts in the Upper Division of the Subordinate Education Service are assumed not to be upgraded and this assumption cannot be consistent with the petitioner's case. Similar is the position with Annexure 18. The headings of the eighth column at page 343 of the records and of the tenth column at page 344 are respectively as date of the appointment, date of confirmation in I. D. S E. S. and date of appointment which necessarily imply that the date of confirmation in U. D. S. E. S , teachers in the upper division have come by direct recruitment also besides the promoted teachers. Annexure-17 which has also been referred to by Mr. Prasad does not provide any clue to the problem in question.

9. Reference has also been made on behalf of the petitioner to Annexure 10 date 10-5-1973 indicating that separate gradation lists were prepared of the promoted teachers who are claimed by the petitioner to be exclusively holding Upper Division of the Subordinate Education Service and appointed Higher Secondary teachers. Mr. Prasad said that the two lists attached to Annexure 10 have been given in Annexures 1 and 3. A corrected copy of the letter in Annexure 10 has been given by the respondents at Annexure E at page 414 and the authenticity of this document has not been challenged by the petitioner. Mr. Shreenath Singh explained the document and the separate gradation lists by giving several reasons. He said that the subject in the letter is mentioned as gradation lists of the Lower Division of the Subordinate Education Service and of the Upper Division of the Subordinate Education Service and the second category, that is, Upper Division of the Subordinate Education Service is further described as including the teachers appointed under the aforesaid H. S. Scheme, which supports the respondents' case. The argument appears to be well founded. Mr. Singh also attempted to explain the document by saying that separate lists had to be prepared for the purposes of administrative exigency as the respondents were better qualified and had to be dealt with separately subject-wise for the purpose of posting. He referred to the requirement for appointment as a Higher Secondary Teacher to be holding Master's or Honour's Degree. It was also suggested that since additional money for implementing the Scheme came from the separate fund, preparation of separate lists was helpful for the accounts purposes. In the facts and circumstances of the case, I am not inclined to attach great importance to the separate gradation lists prepared in 1973 or to the rival submissions made on behalf of the parties.

10. Mr. Prasad next relied upon the statement in Annexure 5, a letter dated 10-4-1971 sent by the Director, Public Instruction, informing the Regional Deputy Directors of Education that the State Government had taken a decision to terminate and withdraw the Scheme and necessary orders would be issued with a view to remove any mis-apprehension which might arise and the letter was being issued. It was stated, inter alia, that the service of the appointed teachers

would not be treated as terminated and they would be absorbed in other cadres. It was contended on behalf of the petitioner that if these teachers were already in the Upper Division of the Subordinate Education Service, there would not be any question of absorbing them in the service. The letter, therefore, indicates that they were not members of the Subordinate Education Service from before; Explaining this document, Mr. Singh said that the letter Annexure-5 did not contain the order on behalf of the Government. It was merely a letter for a limited purpose to set at rest any mis-apprehension which could arise in the minds of the appointed teachers, written by an individual officer in the Education Department. The Government order is contained in Annexure-4 dated 29-4-1971, that is, about 11 month later. Annexure-5 merely indicated the process of thinking of the effect of a proposal which had not been adopted by them in precise terms. The real decision which was ultimately taken in this regard is mentioned in Annexure-4 and it does not include any term which may help the petitioner's case. The explanation of the situation as attempted on behalf of the respondents appears to be correct. I, therefore, hold that the petitioner cannot rely upon Annexure-5 for the purpose of establishing his case. Although the parties have attached several other documents as annexures in the present case, they were not referred to in course of the argument and I, therefore, do not consider it necessary to deal with them. The documents other than Annexure 1 (full document being Annexure-"A") and Annexure-4 reflect merely the views of the individual officers in the Department and cannot determine the issue in question the officers may be wrong. However, so far as they go, they either support the respondents' case to some extent or do not furnish any assistance to either side.

11. Reference has also been made to the several articles of the Bihar Education Code which admittedly were given statutory force in 1960. However, in the year 1958-59, when the respondents were appointed under the Scheme, the Code merely compiled administrative instructions. The article numbers have changed from edition to edition and although it was the old Code which can have any relevance to present controversy, Mr. Prasad advanced his argument by reference to the new Code, as the articles, in substance, are same or similar. The contention is that only trained graduates could have been appointed to the Subordinate Educational Service as mentioned in Article 802 of the present Code and since the respondents were not trained, they could not have been appointed in the service. Article 802 of the Bihar Education Code, on which reliance has been placed, is in the following terms;

Initial qualifications for appointment to the Subordinate Educational Service, None but trained graduates may be appointed to the Subordinate Educational Service except in posts reserved for classical teachers or other posts requiring special qualifications of a teaching nature and in purely temporary vacancy when it would be impossible to obtain a trained graduate without undue delay. This rule may be relaxed only with the previous sanction of the Director.

It is further said that Articles 816 and 817 simply that the posts in the Upper Division of the Subordinate Education Service would be filled up by promotion from lower division. As the respondents were recruited directly, they could not have entered the cadre according to the petitioner's case. There are several difficulties in accepting this argument. As pointed out above, the provisions in the Code were not statutory when the respondents were appointed and, therefore, could not render the appointment in the upper division as illegal or ineffective. Further, the Article 802, quoted above, itself indicates that the requirement is amenable to relaxation with the sanction of the Director. Mr. Singh on behalf of the respondents drew our attention to the note to Article 17(6) empowering the Director to make appointments in the posts in the Upper Division and Annexure "B" (page 384) whereby the Director appointed some of the teachers on 6-11-1958. The petitioner himself was an untrained graduate at the time of his appointment in the Subordinate Education Service, as has been asserted in the affidavit in rejoinder, paragraph 3, page 359 of the records. Besides, the decision in regard to the direct recruitment to the additional posts was taken by the State Government and must be deemed to have amended any provisions to the contrary in the Code so far as the impugned appointments are concerned. It is, therefore, not possible to accept the point urged on behalf of the petitioner. Even assuming that there was a violation of the rules in making the appointments of the respondents in the cadre, the objection on this count cannot now be entertained after more than 15 years. The interpretation put on Articles 816 and 817 that the appointment to the upper division has to be made exclusively by promotion from lower division also does not appear to be correct. These articles as also Article 802 do not furnish any clue to the correct nature of the respondents' appointments, as they were not made under the Code but under the Scheme.

12. Mr. Prasad in his final reply faintly suggested that from Rule 806, it appears that there are sub groups in the Upper Division of Subordinate Education Service and the respondents may be treated as forming a distinct and separate Sub-division in the cadre of Subordinate Education Service (Upper Division). This point was not taken in the application and was not pressed by the learned Counsel in his main argument to which the respondents were called upon to reply. There does not appear to be any basis for this point in the present case and the petitioner has no objection to the inclusion of the respondents in the common gradation list provided they were placed junior to the petitioner and other teachers like him. The new point, therefore, cannot be entertained.

13. After considering the entire materials placed by the parties before us and the competing arguments, I am of the view that the new posts were created by Annexure "A" in the Upper Division of the Subordinate Education Service and by their appointment the respondents became members of this cadre before the petitioner was promoted from lower division. Accordingly, they have been rightly treated as senior to the petitioner.

14. The only other argument pressed by Mr. Prasad on behalf of the petitioner during the course of his reply was that the order in Annexure "A" was not passed by the State Government in accordance with the requirements of Article 166 of the Constitution and was, therefore, in the eye of law ineffective to create new posts in the cadre. A cadre can be created only by an order passed expressly in the name of the Governor and it must surport to do so in a formal manner. Reliance has been placed on the decision in S.N. Karkhanis and Others Vs. Union of India (UOI) and Others, and M.G. Sharan and Others Vs. State of Bihar and Others, , The relevant Order in the present case has been issued by the Under Secretary to the Government, but it is not expressed in the name of the Governor. It is mentioned therein that the State Government was pleased to sanction the conversion of 20 schools into Multipurpose Higher Secondary Schools with effect from the academic session commencing from the dates mentioned in Statement I to the Order and to cope with the increased volume and higher order of teaching work due to the introduction of the raised academic standard, the State Government was pleased to create additional posts. It was urged that the Order should have said in express and affirmative terms that the additional posts were created hereunder. Clauses 1 and 2 of Article 166 of the Constitution, which are quoted below, were referred to by the learned Counsel.

166. (I)-All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in the manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

15. The extent of the executive power of the State is mentioned in Article 162 of the Constitution, Article 166 of the Constitution relates to the conduct of business of the State Government, it deals with the procedure in this regard. Clause 1 of the article lays down the manner in which the executive action should be expressed and Clause 2 provides for proper mode of authentication of orders and instructions. Once an order is expressed in accordance with the provisions of Clause 2, its validity cannot be questioned on the ground that it is not an order on behalf of the State but if it is not so expressed, the challenge is permitted. The provisions laid down in both the clauses have been held to be directory and not mandatory and mere non-compliance with the provisions does not invalidate the order. In State of Uttar Pradesh Vs. Om Prakash Gupta, , the order of dismissal of Deputy Collector was not made in the name of the Governor, but was signed by the Chief Secretary and was held to be valid. In Dattatreya Moreshwar Pangarkar Vs. The State of Bombay and Others, , the Supreme Court while accepting the contention of the Attorney General of India observed that generally speaking the provisions of the Statute creating public duties are directory and that an omission to make and authenticate an executive decision, in the form

mentioned in the Article, does not make the decision itself illegal.

16. An argument similar to the one pressed before us had also been raised in *R. Chitrallekha and Another Vs. State of Mysore and Others*, which was repelled on the ground that it was settled law that the provisions of Article 166 of the Constitution were directory and if they were not complied with, it could well be established as a fact that the impugned order was issued by the State Government or the Governor. If the conditions laid down in the article had been complied with, the order would have been immune from being questioned on the ground that it was not an order made by the Government, and in absence of the same it was open to such a challenge but no further. The letter in question in the reported case did not conform to the provisions of the article but it *ex-facie* said that the order was that of the Government and in the affidavit filed in the case it was not asserted that no such order was issued. On the other hand it had been averred that the Government had given a direction as mentioned in the letter and this assertion had not been denied by the petitioner in that case. In these circumstances, the Supreme Court held that the questioned order had been, in fact, made by the The State of Bombay *Vs. Purushottam Jog Naik*, , the order under challenge did not say that it had been passed by the Governor. Disagreeing with the view of the Bombay High Court, Mr. Justice Bose, speaking for the Court, said that although laxity of expression could not be encouraged, but when all is said and done, one should look to the substance of Article 166 and of the order. Proceeding further it was observed that the Constitution does not require a magic incantation which can only be exercised in a set formula of words. What the Court has to see is whether the substance of requirement is there in the impugned order. On an examination of the order in question in the case before me, it cannot be held to be void or ineffective and cannot be ignored on the ground that the requirements of 66 of the Constitution have not been strictly complied with. It was issued by the Under Secretary to the Government as mentioned above and has expressed in clear terms the Government decision creating additional posts.

17. In *S.N. Karkhenis v. Union of India*(*supra*), relied upon by the petitioner, a Presidential resolution was made on 12-8-1959 under the proviso to Article 309 of the Constitution, whereby a combined service of Central Excise Service Class I and Indian Custom Service Class I was created with effect from the date of resolution. A letter was issued in 1970 fixing the principles of seniority of the members of service, as if the combined service had come into existence on 1-4-1959 instead of 15-8-1959. This letter was not purported to have been made in the name or with the authority of the President of India nor did it in any way seek to amend the Presidential Resolution of 12-8-1959 nor did it purport to change the date on and from which integration of the two services was given effect to. The Supreme Court, therefore, held that the letter had no legal validity. It was further pointed out that three days after the Presidential resolution was issued, that is, on 15-8-1959, letters had been written to the Associations of the two services informing them that the Presidential resolution had been published

in the Gazette according to which combined service came into effect on 12-8-1959. In the impugned letter of 1970, it was not mentioned that the earlier Resolution or the letters had been superseded. It was a case of two conflicting orders, one formally passed under the proviso to Article 309 and the other issued in an informal manner without purporting to change the date of integration of the two services. If the combined service did not come into existence, even fictionally, with effect from 1-4-1959, there was no scope for giving effect to an order fixing the principles of seniority with reference to that date. The present case is absolutely different. It has neither been asserted nor shown that the Subordinate Education Service (Upper Division) had been originally created by a rule under Article 309 or a Government order under the proviso to the said article. Further, there is no question of a conflict between the order in Annexure "E" and any other order. The learned Counsel for the petitioner has not pointed out any article of the Bihar Education Code which may be said to have created the cadre originally. Besides, the Code itself had no statutory force before 1960. I am, therefore, of the view that the decision in *S.N. Karkhanis v. Union of India* (supra), is of no help to the petitioner and the last argument addressed on behalf of the petitioner also must be rejected.

18. For the reasons mentioned above, the writ application is dismissed, but without costs.

P.S. Sahay, J.

19. I agree.