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STATE OF BIHAR & ORS.

v.

SHYAMA NANDAN MISHRA

(Civil Appeal No.7364 of 2014)

B

MAY 05, 2022

[K. M. JOSEPH AND HRISHIKESH ROY, JJ.]

C *Bihar Non-Government Secondary Schools (Taking over of Control and Management) Act, 1981 – ss.9, 15 – Bihar Taken over Secondary Schools (Service Conditions) Rules, 1983 – Bihar Government Higher Secondary Schools (Service Conditions) (Amendment) Rules, 2009 – Bihar Education Code – Art. 790 – High Court declared that the +2 lecturers, both in the Government and the nationalized (taken over) secondary schools, appointed pursuant to adv.no.1/87, were always part of the Bihar Subordinate*
D *Education Service(BSES) and are entitled to be merged with the Bihar Education Service Class II (BES) pursuant to the Government decision dated 07.07.2006 – It also interfered with the impugned notification dated 23.06.2009 which provided for the encadrement of the +2 lecturers with the teachers in the nationalized secondary*
E *schools, which was found to be in contravention of Art.790 of the Bihar Education Code and also contrary to the Government’s decision dated 07.07.2006 and the Adv. No. 1/87 – Impugned order dated 06.10.2006 and the notification dated 23.6.2009 were quashed and set aside – Justification of – Held: +2 lecturers’ posts were created in the BSES Cadre – This was represented in the Notification*
F *dated 13.11.1985, and also in the Adv. No. 1/87 – Conduct of the Government in providing pay scale parity with the BSES teachers in the secondary schools, reinforces such conclusion – These relevant and attending circumstances eclipse the implication of the ex-cadre reference in the appointment letters – The encadrement through notification dated 23.06.2009 has frustrated the legitimate*
G *expectations of the respondents and was undertaken with the unfair aim to block the respondents’ promotion to key positions, particularly in the administrative wing of the Education department – Such unfairness in State’s action cannot be countenanced – +2 lecturers are indeed the members of the Subordinate Educational Service –*
H *State Government must treat the +2 lecturers appointed pursuant to*

the Advertisement No. 1/87 as members of the Subordinate Educational Service and all service benefits as the members of the Subordinate Educational Service should be extended to them – No reasons to interfere with the impugned judgment – Service Law. A

Doctrines/Principles – Doctrine of Legitimate Expectation – Discussed. B

Dismissing the appeals, the Court

HELD: 1.1 It is evident from the Notification dated 13.11.1985 that the posts of + 2 lecturers (in the government schools) were created in the cadre of BSES, in the pay scale of Rs. 940-1660/-. The cadre for the +2 lecturers posted in the nationalized schools was not specified therein, though the posts were created in the same pay scale. The subsequent Advertisement No. 1/87 also unequivocally stated that the applications for +2 Lecturers in Government schools were invited in the BSES Cadre in the pay scale of Rs. 940- 1660/-. Those selected were then granted fortuitous appointment in either the government or the nationalized schools. That the posts were constituted in the BSES Cadre is adequately reinforced in the judgment dated 30.09.1997 in the CWJC No. 2445/1994 by Justice S.J Mukhopadhyaya, through which, the artificial distinction in both categories of +2 lecturers (posted in either Government or Taken Over schools) was obliterated. It is a fact that the Bihar Pradesh +2 Lecturers' Association moved Court primarily for redressal of the pay scale anomaly of the +2 lecturers appointed in the Government and taken over schools, out of the common advertisement No. 1/87. It was projected in those proceedings that while accepting the 5th Pay Revision Committee's recommendations, the State Government provided for distinct pay scales to lecturers serving in the Government Secondary Schools and the Nationalized Secondary Schools. The Court noticed the discrimination between both sets of lecturers, performing similar duty with similar nature of job and same qualifications. The +2 lecturers accordingly were held entitled to same scale of pay, i.e., Rs. 2000- 3500/- as fixed for the members of the Subordinate Education Service (Junior Selection Grade). This way, not only the pay difference was eliminated but more significantly for this case, the lecturers serving in Government/ H

- A Nationalized +2 schools were treated as equivalent to members of the BSES cadre by offering the same pay scale attached to the BSES members. Subsequently, in compliance of the judgment, the Finance Department notified the common pay scale of Rs. 2000- 3500/- for the +2 lecturers in the Taken Over schools vide its Resolution dated 10.06.1999, thereby effectively treating them to be at par with the Subordinate Education Service teachers. [Paras 20, 21][1150-B-G]

- 1.2 The above situation would negate the State's contention that the +2 lecturers are outside the BSES cadre, only because the appointment letters stated that their appointment was against ex-cadre posts on temporary basis. Significantly, the pay scale mentioned in the appointment order was Rs. 940-1660/-, which matched the pay scale offered to the lecturers in the Junior Selection Grade of the BSES (as reflected in the notification dated 13.11.1985 and the advertisement No. 1/87). The appointment letter is at variance with all other relevant documents, such as the advertisement; the notification (13.11.1985) creating the posts in BSES; as well as the Finance Department notifications, offering pay scale equivalent to the members of the BSES. The appointment letters, despite suggesting the post to be of ex-cadre category, notably offered the same pay scale attached to Government school lecturers in the BSES Cadre. [Paras 22, 23][1150-H; 1151-A-D]

- 1.3 It is also argued by the State's counsel that the recommendations of the Saran Singh Committee cannot be applied qua the respondents, since the posts of +2 lecturers were not in existence in 1977 and were created only in 1985. On this, it is seen that the government is closemouthed and rather vague on the total posts which existed in 1977; how many posts were created subsequently and the precise number of posts which existed as on 07.07.2006. Therefore, the State cannot be allowed to raise such contentions when they have failed to disclose how many posts existed initially and the stages at which, additional posts were created by the government. Besides, the merger decision (07.07.2006) pertinently omitted to say that only posts in existence in 1977, were intended to be merged. Moreover,

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the Government decision (06.10.2006), through which the +2 A
lecturers were denied the benefit of merger with the BES, was
not founded on the ground that posts of +2 lecturers were not
borne in 1977. The ostensible reason was that the +2 lecturers
were never recognized in the BSES. Such attempt by the
government to supplement reasons, not found in their order, B
cannot legally be permitted. In situation of this kind, the ratio in
Mohinder Singh Gill Vs. Chief Election Commissioner, New Delhi
is worth remembering where the Court so correctly declared that
validity of an order by a statutory functionary must be judged by
the reasons mentioned therein and supplementary reasons in the C
shape of affidavits must be excluded. The State must not be
allowed to bring in additional explanation to justify their actions
when those are conspicuous by their absence, in the government
decision. [Paras 24-26][1151-E-H; 1152-A-B]

Mohinder Singh Gill Vs. Chief Election Commissioner,
New Delhi 1978 (1) SCC 405 : [1978] 2 SCR 272; D
Commr. of Police, Bombay Vs. Gordhandas Bhanji AIR
1952 SC 16 : [1952] SCR 135 – relied on.

1.4 No intelligible differentia could be pointed out by the
state's counsel to sustain arbitrary classification between +2
lecturers and the BSES secondary level teachers, posted in E
government schools. [Para 27][1152-F]

1.5 Significantly, as per Advertisement 1/87, the lower pay
scale of Rs. 850 – 1360/- was offered to the teachers in the
Secondary Schools in the cadre of BSES as compared to the pay
scale offered to the + 2 lecturers. Furthermore, the academic F
qualifications specified therein for + 2 Lecturers was Post
Graduation in 2nd division, whereas for other posts, a bare
graduate would satisfy the prescribed qualification. As such, the
exclusion of the respondents from the BSES cadre and
consequently from BES, despite rendering continuous services G
in the same government secondary schools as teacher members
of the BSES, has led to a discriminatory situation, wherein, the
BSES teachers who are junior (in terms of education qualifications
and pay scale) to the respondents in Government secondary

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A schools, have got the benefit of higher scale of pay and also
avenues of promotion to key controlling positions in the education
department. This would surely infringe the rights of the +2
lecturers, guaranteed under Article 14 and Article 16(1) of the
Constitution. Instead of rectifying the anomalous situation noticed
B above, the Government, in a rather arbitrary fashion and without
any application of mind to the issue, vide notification dated
23.06.2009, surprisingly positioned the +2 lecturers at par with
the teachers of the nationalized secondary schools. The
unacceptable justification given for this is that as a result of the +
C 2 lecturers' placement into the cadre of nationalized school
teachers, the +2 lecturers have been provided the promotional
avenue to academic posts of Head Master, and higher scale has
also been provided for them. However, the +2 lecturers are
conspicuously denied the opportunities for promotion to key
administrative posts which is available to those in the BES Cadre.
D Such arbitrary action of the government in favoring the BES
officers to enable them to exclusively occupy the key
administrative posts, was noticed and was subjected to court's
caustic comments in the previous rounds of litigation⁸. Having
read those and also taking into account the repeated attempts by
the state to inordinately favour those in the BES cadre, we are
E constrained to observe that the state government is not acting
bonafide and is persisting in their iniquitous attempt to deny to
the respondents, what is legitimately due to them. [Paras 28,
29][1152-G; 1153-A-E]

1.6 The following discriminatory action of the State is
F necessary to be noticed to indicate their iniquitous conduct.
Firstly, the Bihar Non-Government Secondary Schools (Taken
over of Control and Management) Act, 1981, does not authorize
determination of the service conditions of the +2 lecturers. The
1981 Act was intended to provide for "taking over" of non-
government secondary schools under the state control, for
G improvement, better organization and development of Secondary
Education in the state of Bihar. The +2 lecturers in government
schools cannot be encadred with teachers of 'Taken Over Schools'
since the definition of 'Teacher' in the 1981 Act shows 'Teacher
in the Taken Over Secondary Schools'. Section 9 enables the

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State Government to determine the service conditions of the Headmaster, Teacher and non-teaching staff of only the Taken Over Secondary Schools (but not of government schools). Neither section 9 nor Section 15 of the 1981 Act empowers the State Government to amend Rules to expand the scope of the Act. As such, the 2009 Rules, introducing the notification (23.06.2009), purported to be framed under section 9 read with section 15 of the 1981 Act, are found to be at variance with the provisions and the purpose of the 1981 Act. The Notification (23.06.2009) is well beyond the ambit of the 1981 Act, and could not therefore have been issued, without the necessary amendments to the 1981 Act. [Para 30][1153-F-H; 1154-A-B]

1.7 The notification (23.06.2009) besides being legally untenable, would also deny the substantive legitimate expectations, the respondents nurtured, as members of the government schools in the BSES cadre. The denial is particularly glaring in the absence of promotional avenues for the respondents to the controlling/supervisory posts in the administrative wing of the education department. The respondents, in course of their service as +2 Lecturers, would reasonably expect to occupy the higher position in the department, depending upon their inter-se seniority in the common seniority list, but the Government action, restricting movement through artificial sub-grouping of +2 Lecturers with teachers of nationalized schools, have unreasonably belied their expectation. This would suggest that the respondents were led up the garden path by the appellants. [Para 31][1154-C-E]

1.8 In the present case, the abuse of power is discernible in the State's disparate decision in encadrating the +2 lecturers with the teachers of nationalized schools, notwithstanding the contrary representation through the 1985 notification which created the +2 lecturer posts and the 1987 advertisement under which, the respondents entered service. Such manifest departure from the projected course smacks of arbitrariness and the government action, to selectively protect the interest of the BES cadre, does not conform to rules of justice and fair play. Where the substantive legitimate expectation is not ultra vires the power of the authority and the court is in a position to protect it, the

- A State cannot be allowed to change course and belie the legitimate expectation of the respondents. As is well known, Regularity, Predictability, Certainty and Fairness are necessary concomitants of Government's action and the Bihar government in our opinion, failed to keep to their commitment by the impugned decision, which we find was rightly interdicted by the High Court. [Paras 33, 34][1154-G-H; 1155-A-D]
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R v. North and East Devon Health Authority Ex p. Coughlan, [2001] QB 213 – referred to.

- 1.9 In the earlier rounds, this court in Bihar State Govt. Secondary School Teachers Assn. Vs. Bihar Education Service Assn. and also in the Contempt proceedings flowing therefrom in Bihar State Govt. Secondary School Teachers Assn. Vs. Ashok Kumar Sinha critically noted the vigorous attempts by the BES Association in obstructing the integration of the BSES with the BES and the unfair conduct of the Bihar government in safeguarding the interests of those in the BES cadre. Those previous challenges to the merger decision were rejected by the Court. As such the BES Association, as the party watching from the wings, cannot be permitted to secure now what they failed to achieve in the previous litigations. In circumstances like this it needs to be said that in an adversarial litigation, the fence sitters cannot be placed at par with the front runners. [Para 36][1156-A-C]
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- 1.10 The +2 lecturers' posts were created in the BSES Cadre. This was represented in the Notification (13.11.1985), and also in the Advertisement No. 1/87. The conduct of the Government in providing pay scale parity with the BSES teachers in the secondary schools, reinforces such conclusion. These relevant and attending circumstances eclipse the implication of the ex-cadre reference in the appointment letters. What is also discernible is that the encadrement through notification dated 23.06.2009 has frustrated the legitimate expectations of the respondents and was undertaken with the unfair aim to block the respondents' promotion to key positions, particularly in the administrative wing of the Education department. Such unfairness in State's action cannot be countenanced by Court. Resultantly
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we record our approval with the reasoning and conclusions in the impugned judgment in favour of the +2 lecturers to the effect that they are indeed the members of the Subordinate Educational Service and the State Government must treat the +2 lecturers appointed pursuant to the Advertisement No. 1/87 as members of the Subordinate Educational Service and all service benefits as the members of the Subordinate Educational Service should therefore be extended to them. [Para 37][1156-C-F]

State of Bihar Vs. Janardan Rai , (2012) 13 SCC 59;
Bihar State Govt. Secondary School Teachers Assn. Vs. Bihar Education Service Assn. (2012) 13 SCC 33 :
 [2012] 11 SCR 50; *Bihar State Government Secondary School Teachers Association Vs. Ashok Kumar Sinha*
 (2014) 7 SCC 416 : [2014] 7 SCR 371 – referred to.

Bihar Education Service Assn. Vs. State of Bihar , (2008) 1 BLJR 431 – referred to.

R. V. Inland Revenue Commissioners, ex parte M.F.K. Underwriting Agents Ltd. [1990] 1 W.L.R 1545 – referred to.

Case Law Reference

[2012] 11 SCR 50	referred to	Para 7	E
[2014] 7 SCR 371	referred to	Para 8	
[1978] 2 SCR 272	relied on	Para 25	
[1952] SCR 135	relied on	Para 26	

CIVIL APPELLATE JURISDICTION : Civil Appeal No.7364 of 2014. F

From the Judgment and Order dated 30.04.2013 of the High Court of Patna at Patna in CWJC No.18793 of 2008.

With

Civil Appeal Nos.7371, 7373, 7365, 7368 And 7374 of 2014. G

P. S. Patwalia, Sr. Adv., Abhinav Mukerji, Ms. Pratishtha Vij, Ms. Bihi Sharma, Advs. for the Appellants.

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A Vijay Hansaria, V. N. Sinha, Vinay Navare, Sr. Advs., Ms. Sharmila Upadhyay, Akhilesh Kumar Pandey, Ms. Shalini Chandra, Shantanu Sagar, Gunjesh Ranjan, Anil Kumar, Satyajeet Kumar, Ms. Gwen Karthika, Ms. Divya Roy, Advs. for the Respondent.

The Judgment of the Court was delivered by

B **HRISHIKESH ROY, J.**

1. Heard Mr. P.S. Patwalia, learned Senior Counsel appearing for the appellants. Also, heard Mr. Vinay Navare and Mr. V.N. Sinha, learned Senior Counsels appearing for the contesting respondents. The Intervener is represented by Mr. Vijay Hansaria, learned Senior Counsel.

C 2. The challenge here is to the judgment and order dated 30.4.2013 in CWJC Case No. 18793 of 2008 and analogous cases whereby the Division Bench of the High Court at Patna, granted relief to the writ petitioners and declared that the +2 lecturers, both in the Government and the nationalized (taken over) secondary schools, appointed pursuant to Advertisement No.1/87, have always been part of the *Bihar Subordinate Education Service* (for short “*BSES*”) and thereby, they are entitled to be merged with the *Bihar Education Service Class II* (for short “*BES*”), pursuant to the Government decision dated 07.07.2006. The Court also interfered with the impugned notification dated 23.6.2009, which provided for the encadrement of the +2 lecturers with the teachers in the nationalized secondary schools, which was found to be in contravention of Article 790 of the Bihar Education Code and also contrary to the Government’s decision dated 07.07.2006 and the Advertisement No. 1/87. Thus, the impugned order dated 6.10.2006 and the notification dated 23.6.2009 were quashed and set aside.

E 3. At the outset, it is imperative to take note of the relevant background and the previous litigation rounds which led to the present proceedings.

BACKGROUND

G 4. The Government of Bihar constituted a committee headed by Shri Saran Singh in 1976, to address the problem of stagnation etc. in Bihar Civil Service and to consider opportunities for promotion. The committee’s recommendations with respect to the Bihar Education Department included the integration of 59 posts in the miscellaneous cadre (comprising of teachers, professors, etc, who held isolated posts with no definite prospects of promotion), into the *Bihar Education Service* Cadre. In line with these recommendations, the Government issued Regulation dated 11.04.1977, upgrading 2465 sanctioned posts of

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teachers of subordinate education service male and female cadre, into A
Bihar Education Service Class II w.e.f01.01.1977.

5. The Association representing the teachers of the BSES filed a writ petition in the Patna High Court claiming merger of their cadre with the BES, pursuant to the resolution dated 11.04.1977. The writ petition was allowed on 02.02.2000 and the subsequent LPA and SLP were dismissed. Since the consequential benefits of the merger were still not forthcoming, another writ petition was filed, which too was allowed and affirmed in the LPA. The civil appeal before this court was dismissed on 19.04.2006¹, deciding the outcome in favor of the writ petitioners, i.e., the members of the BSES. B

6. In compliance of the aforesaid judgment of this Court, a Resolution dated 07.07.2006 was issued, whereby the cadre of BSES (Teaching Branch) (Male and Female Teachers) was merged with the BES, Class-II w.e.f. 01.01.1977. At this stage, members of the BES Association, apprehending adverse impact on their inter-se seniority, filed a writ petition, challenging the merger. A Single Judge of the High Court allowed the WP on 31.10.2007². Immediately after this judgment, the State Government (without waiting for the outcome of the LPA), in compliance of the Single Judge judgment, quashed the merger resolution vide notification dated 19.11.2007, thereby withdrawing the financial benefits flowing therefrom. C
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7. The decision of the Single Judge was affirmed by the Division Bench. The resultant SLP and the appeal therefrom was ultimately allowed by this Court in a detailed judgment dated 23.11.2012³. Consequently, the initial government decision (07.07.2006), by which the cadre of the BSES teachers (teaching branch) was merged with the BES, stood restored and the State was directed to act accordingly. In arriving at the conclusion, the Supreme Court pertinently observed that once the merger decision was already upheld by this court in earlier rounds of litigation and was also acted upon by the State, the High Court should not have reopened the matter at the instance of the BES Association. The fluctuating stand and indecisiveness of the government was also noted with displeasure by the Supreme Court in its judgment. E
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8. The government, however, was dilly-dallying on the aspect of restoration of the earlier position, consequent upon the merger of the

¹*State of Bihar Vs. Janardan Rai*, (2012) 13 SCC 59

²*Bihar Education Service Assn. Vs. State of Bihar*, (2008) 1 BLJR 431

³*Bihar State Govt. Secondary School Teachers Assn. Vs. Bihar Education Service Assn.*, (2012) 13 SCC 33 H

- A two cadres. Ultimately, contempt proceedings were initiated by the disgruntled members of the BSES in *Bihar State Government Secondary School Teachers Association Vs. Ashok Kumar Sinha*⁴, wherein this court had the occasion to observe that the *Bihar Education Service Rules, 2014* were in the teeth of the judgment rendered on 23.11.2012⁵. This was because the Government had introduced four sub-
- B cadres in the BES (merged entity) under *2014 Rules*, conspicuously barring transfer from one sub-cadre into another. Those in the BSES were placed in the teaching sub-cadre, where Principal would be the highest promotional post whereas those in the BES were put in administrative sub-cadre, who would continue to control the school administration as before. The teaching sub-cadre was yet again isolated
- C and also treated as a “dying cadre”. Through this act of the government, those in the BSES were effectively prevented from being transferred and posted in the administrative sub-cadre. Glaringly, *Rule 27* gave option to members of the other sub-cadres for inclusion in a different cadre on fulfillment of prescribed qualifications, but no such option was made
- D available to the teaching sub-cadre.

9. Noticing the above attempt to deny equal benefits to the BSES cadre vis-à-vis the BES cadre, the Supreme Court significantly observed that the promulgation of the *2014 Rules* by the Bihar government, amounted to circuitous contrivance, to maintain the position which existed prior to the merger and to unjustly protect the interest of those in the BES. Accordingly, directions were issued to revive the combined gradation list or in the alternative, to suitably amend *Rule 27* to give effect to the real purpose of the merger.
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PRESENT LITIGATION

10. The facts germane to the present appeal are now to be noted.
- F The Bihar Government in 1979 introduced the 10+2+3 education pattern (*i.e.* 10 years of schooling, 2 years of higher secondary and 3 years of college graduation). At the relevant time, in the absence of sufficient infrastructure, higher secondary education was imparted by colleges. The posts of +2 lecturers were sought to be created to impart +2 level teaching.
- G 11. Pursuant to the above decision, the Bihar Government on 13.11.1985 sanctioned 148 posts of lecturers in *Subordinate Service Selection Grade* for government schools and 264 posts of lecturers in nationalized schools, providing common pay scale of Rs. 940-1660 for

⁴ (2014) 7 SCC 416

H ⁵*Supra*

both categories of lecturers. It may be highlighted that only the posts of the +2 lecturers in the Government schools were specified to be in the BSES Selection Grade. Thereafter, the Bihar School Service Board issued the advertisement No. 1/87, initiating the process of selection. The advertisement, pertinently, reflected the following:-

“Class – I:
Lecturers in the Subordinate Service Grade in the +2 Stream (Inter level) Government Boys/Girls High Schools.

Academic Qualification:
For the Cass – I posts: Second class Post Graduation Degree in the concerned subject from a recognized university.
For the Class -II and III posts of the Subordinate Education Service (Education Branch) for both male and female categories:
Trained graduate in the concerned Subject.” (SIC)

The candidates were to apply for posts of lecturer in the Subordinate service grade and the advertisement prescribed Post Graduation in 2nd division, as necessary qualification for the posts.

12. The selected candidates were then issued the appointment orders, which reflected that the appointments were being made to newly created ex-cadre posts in +2 schools, on ad-hoc and temporary basis. These temporary appointments were continued for succeeding academic years under various government notifications, issued from time to time.

13. The main cause for the present litigation is that while implementing the merger decision (07.07.2006), an exception was carved out by the government on 06.10.2006, whereunder, the benefit of merger into BES was denied to the +2 lecturers in Government schools. The ostensible premise for the deviation was that the +2 lecturers were never treated or recognized as part of the BSES cadre. The +2 lecturers being aggrieved thus, moved the High Court in CWJC 14009/2006 and other connected writ petitions, contending that their posts were created in the BSES. This position was also reflected in the advertisement No. 1/87 through which they were recruited. In effect, the benefits of the merger with the BES were claimed in these matters.

14. During the pendency of the above Writ Petitions in the High Court, the State Government on 23.06.2009, in exercise of powers under Section 9 read with Section 15 of the *Bihar Non-Government*

- A *Secondary Schools (Taking over of Control and Management) Act, 1981*, framed the *Bihar Government Higher Secondary Schools (Service Conditions) (Amendment) Rules, 2009* (for short “2009 Rules”) and notably decided to amend the *Bihar Taken-over Secondary Schools (Service Conditions) Rules, 1983*. Through the 2009 amendment, the lecturer was defined to mean the +2 lecturers who
- B were appointed pursuant to the Advertisement No. 1/87 and they were encadred with the nationalized secondary school teachers.

15. As a result of the above encadrement with the teachers of the nationalized school category, further challenge was generated in the High Court by the +2 lecturers. It was specifically contended that the +2
- C lecturers have always been treated as above the secondary school teachers in nationalized schools and therefore encadrement of the two unequals is unjust.

16. The High Court in the impugned judgment categorically held that the +2 lecturers who were appointed pursuant to Advertisement No. 1/87, were always a part of the BSES. Concomitantly, the artificial
- D grouping of +2 lecturers with the teachers of nationalized schools (vide notification 23.06.2009), was found to be unjustified and interdicted. While concluding thus, the High Court noted that Advertisement No. 1/87 specifically mentioned Subordinate Education Service. Besides the “plus two secondary schools”, where the lecturers were imparting education,
- E were envisaged as part of the BSES as was clearly discernable from Article 790 of the Bihar Education Code. While opining in favour of the present respondents, the Court relied upon the earlier judgment (30.9.1997) of Justice S.J. Mukhopadhyaya in CWJC No. 2445/1994 to say that postings in either the government or nationalized schools at the relevant time were fortuitous and the rights of +2 lecturers would not
- F depend on their chance postings in either of the schools. The Division Bench also gathered that mere reference to ex-cadre posts in the appointment letters and lack of decision by government in assimilating the + 2 lecturers into the cadre of mainstream teacher, will not deprive them of their legitimate rights. The Court took a dim view of the indecisiveness and fluctuating stand of the Bihar government which led
- G to a spate of litigations. Thus, relief was granted to the respondents with the declaration that the +2 lecturers of both schools, who were appointed under the Advertisement no. 1/87, have always been part of the BSES and consequently of the BES.

17. Challenging the impugned judgment, Mr. P.S. Patwalia, learned
- H senior counsel in the appeal arising out of the lead SLP, submits for the

State of Bihar that the appointment letters specifically mention that the +2 Lecturers were appointed in Ex Cadre Posts and the decision with respect to their separate cadre formation was to be taken shortly. Further, the posts of + 2 lecturers were not in existence in 1977, when the policy decision to merge BSES with BES was taken. According to Mr. Patwalia, the encadrement is in conformity with the *Bihar Non-Government Secondary Schools (Taking over of Control and Management) Act, 1981*, since the recruitment of the + 2 lecturers was made by the School Service Board which is a statutory body formed under section 10 of the Act. Appellant's next submission is that in previous rounds of litigation, the respondents sought only pay scale parity with members of the BSES and as such, the Writ Petition in the High Court in the current round is barred by the principles of constructive res judicata besides inordinate delay. The reference to the BSES, Selection Grade in the Advertisement, according to the State's counsel, was made only to identify the grade for the post of lecturers but not for the purpose of their inclusion into the BSES cadre.

18. On the other hand, Mr. Vinay Navare, learned Senior Counsel appearing on behalf of the + 2 lecturers (respondents) would argue that the terms of the policy decision dated 13.11.1985 as well as the Advertisement No. 1/87 are unambiguous and it is clearly set out that the posts of + 2 lecturers in Government schools are created in the Junior Selection Grade of BSES. According to Mr. Navare, the expression *ex-cadre* in the appointment order was incorporated only to allay the anxiety of the Assistant Teachers in the Government Secondary Schools (members of the BSES), who because of merger, apprehended loss of their seniority to the +2 lecturers. The 1981 Act controls taking over of Non-government Secondary Schools and the notification introduced by the 2009 Rules, framed under the 1981 Act, for encadrement of the +2 lecturers of the Government schools with the nationalized schools, without the relevant amendments to the 1981 Act, is argued by Mr. Navare to be neither conclusive nor legally acceptable.

19. In his turn, Mr. Vijay Hansaria, the learned Senior Counsel representing the interveners i.e. the Bihar Education Service Association argues that the members of the BES Association should not lose out on seniority, on account of the merger of the contesting respondents into the BES Cadre, from the initial date of their appointment. This is apart from pointing to the Bihar Education Service Class-I and Bihar Education Service Class-II Rules 1973 and submitting that unless due rules are amended, neither executive action nor court orders can be a way out.

- A He further contended that the matter falls in the realm of state policy. The aspect of the appointments being ex-cadre is stressed.

DISCUSSIONS AND FINDINGS

20. It is evident from the Notification dated 13.11.1985 that the posts of + 2 lecturers (in the government schools) were created in the cadre of BSES, in the pay scale of Rs. 940-1660/-. The cadre for the +2 lecturers posted in the nationalized schools was not specified therein, though the posts were created in the same pay scale. The subsequent Advertisement No. 1/87 also unequivocally stated that the applications for +2 Lecturers in Government schools were invited in the BSES Cadre in the pay scale of Rs. 940- 1660/-. Those selected were then granted fortuitous appointment in either the government or the nationalized schools.

21. That the posts were constituted in the BSES Cadre is adequately reinforced in the judgment dated 30.09.1997 in the CWJC No. 2445/1994 by Justice S.J Mukhopadhaya, through which, the artificial distinction in both categories of +2 lecturers (posted in either Government or Taken Over schools) was obliterated. It is a fact that the *Bihar Pradesh +2 Lecturers' Association* moved Court primarily for redressal of the pay scale anomaly of the +2 lecturers appointed in the Government and taken over schools, out of the common advertisement No. 1/87. It was projected in those proceedings that while accepting the 5th Pay Revision Committee's recommendations, the State Government provided for distinct pay scales to lecturers serving in the Government Secondary Schools and the Nationalized Secondary Schools. The Court noticed the discrimination between both sets of lecturers, performing similar duty with similar nature of job and same qualifications. The +2 lecturers accordingly were held entitled to same scale of pay, i.e., Rs. 2000-3500/- as fixed for the members of the Subordinate Education Service (Junior Selection Grade). This way, not only the pay difference was eliminated but more significantly for this case, the lecturers serving in Government/ Nationalized +2 schools were treated as equivalent to members of the BSES cadre by offering the same pay scale attached to the BSES members. Subsequently, in compliance of the judgment, the Finance Department notified the common pay scale of Rs. 2000- 3500/- for the +2 lecturers in the Taken Over schools vide its Resolution dated 10.06.1999, thereby effectively treating them to be at par with the Subordinate Education Service teachers.

22. The above situation would negate the State's contention that the +2 lecturers are outside the BSES cadre, only because the

appointment letters stated that their appointment was against ex-cadre posts on temporary basis. Significantly, the pay scale mentioned in the appointment order was Rs. 940-1660/-, which matched the pay scale offered to the lecturers in the Junior Selection Grade of the BSES (as reflected in the notification dated 13.11.1985 and the advertisement No. 1/87). A

23. Thenoteworthy take awayfrom above is that the appointment letter is at variance with all other relevant documents, such as the advertisement; the notification (13.11.1985)creating the posts in BSES; as well as the Finance Department notifications, offering pay scale equivalent to the members of the BSES. The appointment letters, despite suggesting the post to be ofex-cadre category, notably offered the same pay scale attached to Government school lecturers in the BSES Cadre. B
The learned counsel for the respondents on this aspectthereforeappears to be correct in his submission that the reference to ex-cadre in the appointment letters was only to allay the anxiety of the Assistant Teachers in the Government Secondary Schools (members of the BSES), who apprehended loss of their seniority. In such circumstances, the ex-cadre reference in the appointment letters must not,in ourview,eclipse all the other contemporaneous documents, supporting the contentions of the respondents. C
D

24. It is also argued by the State's counsel that the recommendations of the Saran Singh Committee cannot be applied qua the respondents, since the posts of +2 lecturers were not in existence in 1977 and were created only in 1985. On this, it is seen that the government is closemouthed and rather vague on the total posts which existed in 1977; how many posts were created subsequently and the precise number of posts which existed as on 07.07.2006. Therefore, the State cannot be allowed to raise such contentions when they have failed to disclose how many posts existed initially and the stages at which, additional posts were created by the government. Besides, the merger decision (07.07.2006)pertinently omitted to say that only posts in existence in 1977, were intended to be merged. E
F

25. Moreover, the Government decision (06.10.2006), through which the +2 lecturers were denied the benefit of merger with the BES, G
was not founded on the ground that posts of +2 lecturers were not borne in 1977. The ostensible reason was that the +2 lecturers were never recognized in the BSES. Such attempt by the government to supplement reasons,not found in their order,cannot legally be permitted. In situation of this kind, the ratio in *Mohinder Singh Gill Vs. Chief Election* H

- A *Commissioner, New Delhi*⁶ is worth remembering where the Court so correctly declared that validity of an order by a statutory functionary must be judged by the reasons mentioned therein and supplementary reasons in the shape of affidavits must be excluded.

- B 26. Staying with the same point, we may also remind ourselves of the telling opinion in *Commr. of Police, Bombay Vs. Gordhandas Bhanji*⁷ where J. Vivian Bose illuminatingly wrote as under:

- C “Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actions and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.”

- D Taking a cue from above, it must be said unequivocally that the State must not be allowed to bring in additional explanation to justify their actions when those are conspicuous by their absence, in the government decision.

- E 27. The appellants’ other contention is that the +2 lecturers have no semblance of similarity with the BSES, to enable assimilation into the BES. Only for this ostensible reason, the +2 lecturers in nationalized and Government schools were amalgamated with the teachers of nationalized schools, vide notification dated 23.06.2009. On this, what is relevant is that no intelligible differentia could be pointed out by the state’s counsel to sustain such arbitrary classification between +2 lecturers and the BSES secondary level teachers, posted in government schools. Therefore, such
- F contention from the appellants’ side, being devoid of any foundation, is considered but rejected.

- G 28. Significantly, as per Advertisement 1/87, the lower pay scale of Rs. 850 – 1360/- was offered to the teachers in the Secondary Schools in the cadre of BSES as compared to the pay scale offered to the + 2 lecturers. Furthermore, the academic qualifications specified therein for + 2 Lecturers was Post Graduation in 2nd division, whereas for other posts, a bare graduate would satisfy the prescribed qualification. As such, the exclusion of the respondents from the BSES cadre and consequently

⁶ 1978 (1) SCC 405

H ⁷ AIR 1952 SC 16

from BES, despite rendering continuous services in the same government secondary schools as teacher members of the BSES, has led to a discriminatory situation, wherein, the BSES teachers who are junior (in terms of education qualifications and pay scale) to the respondents in Government secondary schools, have got the benefit of higher scale of pay and also avenues of promotion to key controlling positions in the education department. This would surely infringe the rights of the +2 lecturers, guaranteed under Article 14 and Article 16(1) of the Constitution.

29. Instead of rectifying the anomalous situation noticed above, the Government, in a rather arbitrary fashion and without any application of mind to the issue, vide notification dated 23.06.2009, surprisingly positioned the +2 lecturers at par with the teachers of the nationalized secondary schools. The unacceptable justification given for this is that as a result of the + 2 lecturers' placement into the cadre of nationalized school teachers, the +2 lecturers have been provided the promotional avenue to academic posts of Head Master, and higher scale has also been provided for them. However, the +2 lecturers are conspicuously denied the opportunities for promotion to key administrative posts which is available to those in the BES Cadre. Such arbitrary action of the government in favoring the BES officers to enable them to exclusively occupy the key administrative posts, was noticed and was subjected to court's caustic comments in the previous rounds of litigation⁸. Having read those and also taking into account the repeated attempts by the state to inordinately favour those in the BES cadre, we are constrained to observe that the state government is not acting bonafide and is persisting in their iniquitous attempt to deny to the respondents, what is legitimately due to them.

30. The following discriminatory action of the State is necessary to be noticed to indicate their iniquitous conduct. Firstly, the *Bihar Non-Government Secondary Schools (Taken over of Control and Management) Act, 1981*, does not authorize determination of the service conditions of the +2 lecturers. The 1981 Act was intended to provide for "taking over" of non-government secondary schools under the state control, for improvement, better organization and development of Secondary Education in the state of Bihar. The +2 lecturers in government schools cannot be encadred with teachers of 'Taken Over Schools' since the definition of 'Teacher' in the 1981 Act shows 'Teacher in the Taken Over Secondary Schools'. Section 9 enables the State

⁸ See discussion *Supra* Note 4

- A Government to determine the service conditions of the Headmaster, Teacher and non-teaching staff of only the Taken Over Secondary Schools (but not of government schools). Neither section 9 nor Section 15 of the 1981 Act empowers the State Government to amend Rules to expand the scope of the Act. As such, the 2009 Rules, introducing the notification (23.06.2009), purported to be framed under section 9 read with section
- B 15 of the 1981 Act, are found to be at variance with the provisions and the purpose of the 1981 Act. The Notification (23.06.2009) is well beyond the ambit of the 1981 Act, and could not therefore have been issued, without the necessary amendments to the 1981 Act.

- C 31. Next, let us test the impugned action of the Government on the anvil of the Doctrine of Legitimate Expectation. The notification (23.06.2009) besides being legally untenable, would also deny the substantive legitimate expectations, the respondents nurtured, as members of the government schools in the BSES cadre. The denial is particularly glaring in the absence of promotional avenues for the respondents to the controlling/supervisory posts in the administrative wing of the education
- D department. The respondents, in course of their service as +2 Lecturers, would reasonably expect to occupy the higher position in the department, depending upon their inter-se seniority in the common seniority list, but the Government action, restricting movement through artificial sub-grouping of +2 Lecturers with teachers of nationalized schools, have unreasonably belied their expectation. This would suggest that the
- E respondents were led up the *garden path* by the appellants.

- F 32. To understand the legal consequences arising therefrom, useful reference can be made to *R. V. Inland Revenue Commissioners, ex parte M.F.K. Underwriting Agents Ltd.*⁹ (1989) where Lord Justice of Appeal, Thomas Bingham, while invoking fairness as a rationale for protecting legitimate expectations, expressed the following :-

- G “If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. ... The doctrine of legitimate expectation is rooted in fairness.”

33. Another facet of denial of legitimate expectations is underscored by the Court of Appeal of England and Wales in the seminal case of *Coughlan*¹⁰, where the Court preferred to use *abuse of power*

⁹ [1990] 1 W.L.R 1545

H ¹⁰ *R v. North and East Devon Health Authority Ex p. Coughlan*, [2001] QB 213

as one of the criteria for testing whether a public body could resile from a prima facie legitimate expectation. In the Court's opinion, if the government authority induced an expectation which was substantive, the upsetting of that expectation, through departure from the expected course of action in the absence of compelling public interest, would be so *unfair*, that it would amount to abuse of power. In the present case, the abuse of power is discernible in the State's disparate decision in encadring the +2 lecturers with the teachers of nationalized schools, notwithstanding the contrary representation through the 1985 notification which created the +2 lecturer posts and the 1987 advertisement under which, the respondents entered service. Such manifest departure from the projected course smacks of arbitrariness and the government action, to selectively protect the interest of the BES cadre, does not conform to rules of justice and fair play.

34. Taking a cue from above, where the substantive legitimate expectation is not *ultra vires* the power of the authority and the court is in a position to protect it, the State cannot be allowed to change course and belie the legitimate expectation of the respondents. As is well known, Regularity, Predictability, Certainty and Fairness are necessary concomitants of Government's action and the Bihar government in our opinion, failed to keep to their commitment by the impugned decision, which we find was rightly interdicted by the High Court.

35. Next thing to consider is the plea of the BES Association as the Intervenor in this proceeding and the submissions made on their behalf by the learned senior counsel Mr. Vijay Hansaria. On this, the first observation to be made is that the rights of an intervener are circumscribed. The BES could have arrayed themselves in the High Court but decided at their own peril, to keep away. The Writ Petition of the respondent was pending for about 6 years in the High Court and those in the BES, who are holding key positions in the education department, could not be oblivious of CWJ Case No. 18793 of 2008 and other connected matters. As such, within the limited scope available to them, the intervenors, who were sitting on the fence all along, cannot now be permitted to plead a new case for the first time before this Court. Moreover, the Counter Affidavit filed by the State before the High Court, do not persuade us to lean in favour of the members of the BES Association.

36. In the earlier rounds, this court in *Bihar State Govt. Secondary School Teachers Assn. Vs. Bihar Education Service Assn.*¹¹ and also

¹¹*Supra*

A in the Contempt proceedings flowing therefrom in *Bihar State Govt. Secondary School Teachers Assn. Vs. Ashok Kumar Sinha*¹² critically noted the vigorous attempts by the BES Association in obstructing the integration of the BSES with the BES and the unfair conduct of the Bihar government in safeguarding the interests of those in the BES cadre. Those previous challenges to the merger decision were rejected by the Court. As such the BES Association, as the party watching from the wings, cannot be permitted to secure now what they failed to achieve in the previous litigations. In circumstances like this it needs to be said that in an adversarial litigation, the *fence sitters* cannot be placed at par with the *front runners*.

C 37. In consequence of the foregoing discussion, our finding is that the +2 lecturers' posts were created in the BSES Cadre. This was represented in the Notification (13.11.1985), and also in the Advertisement No. 1/87. The conduct of the Government in providing pay scale parity with the BSES teachers in the secondary schools, reinforces such conclusion. These relevant and attending circumstances eclipse the implication of the *ex-cadre* reference in the appointment letters. What is also discernible is that the encadrement through notification dated 23.06.2009 has frustrated the legitimate expectations of the respondents and was undertaken with the unfair aim to block the respondents' promotion to key positions, particularly in the administrative wing of the Education department. Such unfairness in State's action cannot be countenanced by Court. Resultantly we record our approval with the reasoning and conclusions in the impugned judgment in favour of the +2 lecturers to the effect that they are indeed the members of the Subordinate Educational Service and the State Government must treat the +2 lecturers appointed pursuant to the Advertisement No. 1/87 as members of the Subordinate Educational Service and all service benefits as the members of the Subordinate Educational Service should therefore be extended to them.

G 38. Accordingly, no good reasons are seen to interfere with the impugned judgment. The appeals stand dismissed without any order on costs. However, since the time stipulated by the High Court has expired, the State is granted 6 months' time to ensure compliance with High Court's direction in letter and spirit.

Divya Pandey
(Assisted by : Roopanshi Virang, LCRA)

Appeals dismissed.

¹²*Supra*