

(2015) 04 JH CK 0001

Jharkhand High Court

Case No: L.P.A. No. 210 of 2014

State of Jharkhand and
Others

APPELLANT

Vs

Moulishri Priya and
OthersRESPONDENT

Date of Decision: April 23, 2015**Acts Referred:**

- Constitution of India, 1950 - Article 16, 21(A), 254
- Right of Children to Free and Compulsory Education Act, 2009 - Section 2(n), 23, 23(1), 39

Citation: (2015) 2 AJR 754 : (2015) 3 JLJR 215 : (2015) LabIC 2765**Hon'ble Judges:** Dhirubhai Naranbhai Patel, J; Ratnaker Bhengra, J**Bench:** Division Bench**Advocate:** Rajesh Kumar, G.P.-V and Abhijeet Kumar Singh, JC to GP-V, for the Appellant;
Anil Kumar Sinha, Adv., Abhishek Sinha and Satish Kumar, Advocates for the Respondent**Final Decision:** Allowed

Judgement

Dhirubhai Naranbhai Patel, J.

This Letters Patent Appeal has been preferred by the original respondent No. 1 of W.P.(S) No. 1897 of 2013. The writ petition was preferred by the original petitioners-respondents herein which was allowed by the learned single Judge vide order dated 26th September, 2013. The respondents (Original petitioners) who were wrongly offered the post of teachers, are now offered the post of clerks, because these respondents had not cleared the Teachers Eligibility Test as required under the notification issued by the National Council of Teachers' Education (hereinafter referred as "N.C.T.E.") under Sub-section (1) of Section 23 of the Right of Children to Free and Compulsory Education Act, 2009. Though this minimum qualification or eligibility was not with the respondents, they were given appointment as teachers in Primary Schools on compassionate basis on account of death of their respective father/mother/husband. In fact, there is no termination of the services of the respondents by the State of Jharkhand.

The respondents who were appointed on compassionate basis as teachers vide appointment letters dated 20th September, 2012 are now offered the post of clerks vide order dated 18th February, 2013 and 7th March, 2013 and the posts of teachers given to them have been withdrawn. In fact, on earlier occasion an error was committed by the State of Jharkhand by giving them appointment as teachers in violation of the provisions of Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred as Act, 2009), to be read with the notification issued Under Section 23(1) thereof by N.C.T.E. and now this mistake has been rectified by the State by offering them the post of clerk which is also Class-III post, on compassionate basis. This order of offering the respondents the post of clerk instead of the posts of teacher was under challenge by original petitioners - respondents herein by way of W.P.(S) No. 1897 of 2013, which was allowed by the learned single Judge vide order dated 26 the September, 2013 and, therefore, the respondent State of Jharkhand and others have preferred this Letters Patent Appeal. Counsel appearing on behalf of State has submitted that father/mother/husband of the respondents have expired during their services with the State of Jharkhand and, therefore, the respondents applied for appointment on compassionate basis.

Counsel for the State further submitted that:

■ Respondents can be appointed on Class-III as well as on Class-IV post, but, as they have not cleared teachers eligibility test (hereinafter referred to as TET for the sake of brevity) they cannot be appointed to the post of teachers in view of the provisions of the Act, 2009, Section 23 thereof prescribes qualification for appointment and terms of services of teachers. This law has been enacted keeping in mind Entry No. 25 of concurrent list List No. - III of 7th Schedule of the Constitution of India and as per Section 23 of the Act, 2009 Central Government has authorized N.C.T.E. who had issued a notification dated 23rd/25th of August, 2010 in exercise of the powers under sub-section (1) of Section 23 of the Act, 2009, whereby for the Primary Teachers it has been mentioned that a candidate must have minimum 50% of the marks in Senior Secondary Examination + two years diploma in education + must have passed teachers eligibility test, can be appointed as teachers.

■ The aforesaid qualification is statutory in nature for which necessary instructions have also been issued from time to time by Principal Secretary, Human Resources Development Department, Government of Jharkhand. One of such instructions is dated 4th June, 2012 (Annexure-6 to the memo of this LPA). Similarly Central Government has also written several letters, one of which is dated 7th May, 2012 which is at Annexure-7 to the memo of this LPA. From these letters it will be more clear that unless and until the minimum qualification is achieved by a candidate, he cannot be appointed as teacher, otherwise there will be violation of the provisions of the Act, 2009.

■ Though the respondents were not qualified to be appointed as teachers in the Primary School because they have not cleared "TET", but, they were appointed as teachers, on

compassionate basis, because of the death of their father/mother/husband. These appointments as teachers have been withdrawn within a couple of months and the original petitioners have been offered the posts of clerk. Both the posts, viz. the post of teachers as well as the post of clerks are Class-III posts and thus, neither there is any loss caused to the respondents nor their services have been terminated. However, as a matter of right they cannot demand particular type of post because, they have been appointed on compassionate basis, which is an exception to the general procedure for appointment prescribed under the Article 16 of the Constitution of India.

■ It is further submitted by counsel for the State of Jharkhand that ordinarily for getting employment in the State, one has to compete with others after Public Advertisement, but, compassionate appointment is an exception to this general rule. In fact, there is no statutory duty vested in the State of Jharkhand to offer the post of teacher to the respondents on compassionate basis. These aspects of the matter have not been properly appreciated by the learned single Judge while allowing the writ petition.

■ In fact there is no need of further clarification by the Government that what the law is. Nonetheless for better quality of the governmental officers a Circular was issued on 13th May, 2013 which has created a problem for the State of Jharkhand and the learned single Judge has wrongly observed that the law as stated hereinabove under the Act, 2009 to be read with notification issued by NCTE dated 23rd/25th of August, 2010, in exercise of the powers under sub-section (1) of Section 23 of the Act, 2009 will be applicable on and from 13th May, 2013. In fact the law has already been declared which has been reiterated on 13th May, 2013 by the State of Jharkhand. Therefore, it is incorrect to say that the respondents were appointed prior to the aforesaid letter of the State of Jharkhand dated 13th May, 2013 and, therefore, they can be allowed to continue as teachers in a primary school, in violation of Section 23 of the Act, 2009 to be read with notification issued by NCTE dated 23rd/25th August, 2010. 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 dated 26th September, 2013 in W.P.(S) No. 1897 of 2013 deserves to be quashed and set-aside.

■ No leniency much less in breach of provisions of the Act, 2009 can be shown to anyone. Leniency beyond the law is a cruelty to others.

■ Respondents were given appointment to the post of teachers on 20th September, 2012 and this appointment has been withdrawn, no sooner wisdom has prevailed in the State, they have been offered the post of clerks vide letter dated 18th February, 2013 and 7th March, 2013 These two orders which are orders of repentants were challenged by the respondents which have been quashed and set aside by the learned single Judge without appreciating the fact that the respondents are in fact, not eligible to be appointed as teachers.

2. Counsel appearing for the respondents (original petitioners) submitted that no error has been committed by the learned single Judge in allowing the writ petition bearing W.P.(S) No. 1897 of 2013 preferred by these respondents.

■ It is further submitted by the learned counsel for the respondents (original petitioners) that the respondents were appointed on 20th September, 2012 (Annexure-1 to the memo of this LPA) whereas the Circular has been issued on 13th May, 2013, no one can be appointed as teachers unless he clears Teachers' Eligibility Test. This Circular is not applicable so far as these respondents are concerned. This aspect of the matter has been properly appreciated by the learned single Judge.

■ It is further submitted by learned counsel for the respondents (original petitioner) that looking to the appointment letters of the respondents it appears that a condition has already been attached with the same to the effect that the respondents have to clear all necessary tests and minimum qualification for appointment of teachers within a stipulated time and the respondents are capable enough to achieve this minimum qualification.

■ It is further submitted that the provisions of the Act, 2009 cannot replace the provisions of another Central Act, namely, National Council for Teachers Education Act, 1993 (hereinafter referred to as the Act, 1993). The Teachers Eligibility Test, as per notification issued by NCTE under sub-section (1) of Section 23 thereof, has never been prescribed under the Act, 1993. Thus, both the central Acts are in conflict with each other and, therefore, the objects and reasons of both the Acts seem to be very close. The Act, 2009 has been enacted in pursuance of Article 21(A) of the Constitution of India because, it is a constitutional right vested in the children of the age group of 6 to 14 years, to get free and compulsory education. In fact, the Act, 2009 has nothing to do with prescription of the minimum qualification/eligibility and for the purpose of qualification and eligibility of the teachers, one more Act has already occupied the field which is the Act, 1993 under which there is no such requirement of clearance of Teachers Eligibility Test. Nonetheless, as stated hereinabove in the appointment letters of the respondents there is a condition that the respondents shall clear all necessary examinations. These aspects of the matter have been properly appreciated by the learned single Judge, while allowing the writ petition preferred by the respondents and, therefore, this Letters Patent Appeal may not be entertained by this Court.

■ Learned counsel for the respondents has further submitted that looking to Section 39 of the Act, 2009 there is a power with the State authorities for removal of the difficulties. In the facts of the present case these respondents who have been appointed on compassionate basis may be allowed to continue as teachers, on a condition that they shall achieve the minimum qualification/eligibility within the stipulated time because, appointment on compassionate basis is an exception to Article 16 of the Constitution of India.

■ Learned counsel for the respondents has also relied upon a judgment rendered by the Hon"ble Supreme Court in a case of [Auditor General of India and others Vs. G. Ananta Rajeswara Rao](#), AIR 1994 SC 1521 : (1994) LabIC 754 : (1994) 2 LLJ 812 : (1994) 1 SCC 192 and also in the case of [Director of Education \(Secondary\) and Another Vs. Pushpendra Kumar and Others](#), (1998) 4 AD 514 : AIR 1998 SC 2230 : (1998) 4 JT 155 : (1998) 3 SCALE 590 : (1998) 5 SCC 192 : (1998) SCC(L&S) 1302 : (1998) 3 SCR 432 : (1999) 1 SLJ 32 : (1998) AIRSCW 2122 : (1998) 5 Supreme 1 . On the basis of aforesaid two decisions it is submitted by learned counsel for the respondents that the qualification/eligibility can be waived/relaxed in favour of the respondents. These aspects of the matter have been properly appreciated by the learned single Judge hence, the instant Letters Patent Appeal may not be entertained by this Court.

FINDINGS

3. Having heard counsel for both sides and looking to the facts and circumstances of the case we hereby quash and set aside the judgment and order delivered by the learned single Judge in writ petition bearing W.P.(S) No. 1897 of 2013 dated 26th September, 2013 mainly for the following facts and reasons:--

(I) That the respondents have been offered the post of teachers on compassionate basis because of the death of their respective father/mother/husband. These respondents were appointed on the post of teachers vide appointment letter dated 20th September, 2012 (Annexure-1 to the memo of this LPA). It is an admitted fact that the respondents have not cleared "Teachers Eligibility Test" which is must, as per notification issued by the NCTE, under sub-section (1) of Section 23 of the Act, 2009.

(II) In pursuance of Sub-Section (1) of Section 23 of the Act, 2009 the Central Government has authorized National Council for Teachers Education, who has published a notification on 23rd/25th August, 2010, prescribing the minimum qualification for appointment of teachers for Class I to VIII, in the schools referred to in Section 2(n) of the Act, 2009.

For ready reference Section 23 and Section 2(n) read as under:

23. Qualifications for appointment and terms and conditions of service of teachers.-

(1) Any person possessing such minimum qualifications, as laid down by an academic authority, authorized by the Central Government, by notification, shall be eligible for appointment as a teacher.

(2) Where a State does not have adequate institutions offering courses or training in teacher education, or teachers possessing minimum qualifications as laid down under sub-section (1) are not available in sufficient numbers, the Central Government may, if it deems necessary, by notification, relax the minimum qualifications required for appointment as a teacher, for such period, not exceeding five years, as may be specified

in that notification:

Provided that a teacher who, at the commencement of this Act, does not possess minimum qualifications as laid down under sub-section (1), shall acquire such minimum qualifications within a period of five years.

(3) The salary and allowances payable to, and the terms and conditions of service of, teacher shall be such as may be prescribed.

Section 2(n)

"(n) "School" means any recognized school imparting elementary education and includes-

(i) a school established, owned or controlled by the appropriate Government or a local authority;

(ii) an aided school receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority;

(iii) A school belonging to specified category; and

(iv) An unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority;"

(Emphasis supplied)

(III) None of the respondents have cleared "TET" and thus, they are not qualified or eligible for appointment on the post of teacher.

(IV) The respondents were appointed on compassionate basis because of the death of their respective father/mother/husband. Their appointments are exception to Article 16 of the Constitution of India. Otherwise there shall be a public advertisement and the respondents will have to compete with other similarly situated qualified persons/candidates, but, this does not mean that the respondents even though not qualified or eligible as per required eligibility criteria for the post of teacher, they can be appointed as teachers. Minimum qualification/eligibility which is prescribed by the law cannot be overlooked nor can it be waived by anyone because the law has been enacted keeping in mind Entry No. 25 of the Concurrent list No. III of 7th Schedule of the Constitution of India to be read with Article 254 of the Constitution of India. If the State Government law/Administrative instruction is in conflict with the Central Enactment, as per Article 254 of the Constitution of India, and if there is a repugnancy between Central resolution and the State Legislation/the State Administrative Instruction, will be void. Thus, no State Government has power, jurisdiction and authority to waive such minimum qualification/eligibility.

(V) The Government has to take work through its employees. Some may be honest, some may be dishonest, some may be enthusiastic, some may be lethargic, some may be well informed and few may be ignorant, some may be well read, but, dishonest. All these type of employees are existing in every State. The State of Jharkhand is not exception to this rule and, therefore, despite the Act, 2009, despite the notification issued by NCTE dated 23rd/25th August, 2010 and despite the letter of Principal Secretary, Human Resources Development Department, Government of Jharkhand dated 4th June, 2012 (Annexure-6 to the memo of this LPA) and despite the Central Government letter written by Secretary, Human Resources Development Department, Union of India dated 7th May, 2012 (Annexure-7 to the memo of this LPA) the respondents were appointed as teachers. The said letter dated 7th May, 2012 reads as under:

"During the recent meeting of the Project Approval Board for considering the annual Work Plan and Budget for SSA, Jharkhand, was learnt that the State Government is undertaking recruitment of contract/para teachers without conducting the Teacher Eligibility test (TET). I am writing to clarify that recruitment of teachers, including contractual/para teachers, who have not qualified the TET would violate the provisions under the Right of Children of Free and Compulsory Education (RTE) Act, 2009.

In pursuance of Section 23 of the RTE Act, the National Council for Teacher Education (NCTE) has laid down the minimum qualifications for persons to be eligible for appointment as a teacher in Class I-VIII, vide its Notification dated 23rd August, 2010. These qualifications apply to all categories of schools imparting elementary education. One of the essential qualifications specified in the Notification is that a person has to pass the Teacher Eligibility Test (TET) to be conducted by the appropriate Government in accordance with the Guidelines framed by the NCTE. The Guidelines for conducting the TET were circulated to the States on 11th February, 2011. I am enclosing a copy for ready reference.

You would appreciate that it is a binding and mandatory requirement under the RTE Act that only those persons who pass the TET may be appointed as teachers for Class I-VIII. Every state is statutorily required to comply with this and violation may not stand the test of law. I would therefore request you to kindly ensure that appropriate steps are taken to ensure that only persons who qualify the TET are resulted as teachers.

(Emphasis supplied)

The respondents were appointed as teachers. These errors have been committed by the State partly due to the negligence and partly due to ignorance about the correct proposition of law which is reiterated in the form of Circulars. No sooner did the error brought on surface the Government of Jharkhand has rectified its error and withdrawn the said appointment of the respondents as teachers and the respondents have been offered Class-in post of clerk. Teacher in Primary School is also a Class-in post. Thus, the respondents who were appointed on compassionate basis, wrongly as teachers are now

offered the post of clerks by the letters of the State of Jharkhand dated 18.2.2013 and 7.3.2013. In fact, this is an "order of repentance". It appears that wisdom has prevailed upon the State and errors have been rectified by the Government of Jharkhand. Law remained intact and as it is. "Erroneous appointments have been replaced" as instead of teacher the post of clerk had been offered. We are clearly therefore of the opinion that no illegality has been committed by the State and on the contrary, now the legality has been followed by the State, by bringing the illegality to an end.

(VI) The "order of repentance" which was under challenge by the respondents by way of writ petition bearing WP. (S) No. 1897 of 2013 has been allowed by the learned single Judge vide order dated 26th September, 2013 mainly for the reason that one more Circular dated 13th May, 2013 (Annexure-10 to the memo of this L.P.A.) has been issued by the State. Learned single Judge in its order has stated that as this Circular has been issued subsequent to the appointment of respondents, the respondents should be continued on the post of the teachers. We disapprove this reason mainly for the ground that Circular issued by the State dated 13th May, 2013 is not a new law propounded by the State of Jharkhand. Law was already in existence since 2009 to be read with the notification issued by NCTE dated 23rd/25th August, 2010 which has been reiterated. In fact, too much reiteration of law, by way of Circulars is sometimes dangerous. There may be a little error also in printing of the Circular and sometimes petitions are being filed because of such type of Circulars. Nobody is ready to read the correct law, but, the circulars will be highlighted with the microscopic effect. This has happened in this case also.

(VII) Learned Counsel for the respondents has submitted that there is repugnancy between the two Circulars which are the Act, 1993 and the Act, 2009 because in the Act, 1993 there is no requirement of clearance of "TET" whereas under the Act, 2009 to be read with notification issued by the NCTE dated 23rd/25th August, 2010 (issued under sub-section (1) of Section 23 of the Act, 2009) clearance of teachers eligibility test is must. This attractive arguments cannot help the respondents mainly for the reason that there is no conflict between the provisions of both the aforesaid acts. Before we go into the fine nicety of law, the meaning of the word "repugnancy" ought to be kept in mind. This word has been used in Article 254 of the Constitution of India. Meaning of "repugnancy" is that, if one law is prescribing certain aspects of the matter and another law is denying the existence of those circumstances, both are contradictory to each other. This is not the fact in this case. The provisions of the Act, 1993 is silent about "teachers" eligibility test" whereas by virtue of the Act, 2009 such clearance of "teachers eligibility test" has been added. If one Act is silent and another is adding the minimum qualification/eligibility it cannot be said that there is conflict between the two Acts. The conflict may come into existence only when one Act is saying e.g. the teachers eligibility test is not required whereas the another Act is making it compulsory. Otherwise, if one Act is silent about "TET" and another Act is making it compulsory, it is not repugnancy. It is not the contradiction between the provisions of the two Acts. On the contrary, both the

Acts are complementary to each other. Thus, by virtue of the Act, 2009 minimum qualification has been added. The "repugnancy" or "contradiction" in the provisions of these two Acts can be said only when both cannot exist at a time. In the facts of the present case as stated hereinabove, clearance of "TET" has been added by virtue of the provisions of the Act, 2009 which was never prescribed under the provisions of the Act, 1993. Thus, we are not in agreement with the arguments canvassed by counsel for the respondents about repugnancy or contradiction.

(VIII) Counsel for the respondents has argued that condition has already been attached with their appointment letters for clearance of necessary examinations as even if they have not cleared "TET" they will clear the same within stipulated time given in their appointment letters and therefore, they should be allowed to continue on the post of teachers of the Primary Schools.

This contention is also not accepted by this Court mainly for the reason that looking to the Provisions of the Act, 2009 to be read with notification issued by N.C.T.E. dated 23rd/25th August, 2010, clearance of "TET" i.e. condition precedent, in no circumstances can be interpreted as condition subsequent. Otherwise, any pedestrian can be appointed as a teacher even though he has not cleared the first standard and he will clear the same after getting the job, within stipulated time. As such, appointment of these type of candidates is absolutely in breach of law as later on they will comply with the eligibility criteria prescribed under the law. Therefore, this contention of the respondent is not accepted by this Court.

(IX) Learned Counsel for the respondents has relied upon two decisions rendered by the Hon"ble Supreme Court in the case of [Auditor General of India and others Vs. G. Ananta Rajeswara Rao](#), AIR 1994 SC 1521 : (1994) LabIC 754 : (1994) 2 LLJ 812 : (1994) 1 SCC 192 and also in the case of [Director of Education \(Secondary\) and Another Vs. Pushpendra Kumar and Others](#), (1998) 4 AD 514 : AIR 1998 SC 2230 : (1998) 4 JT 155 : (1998) 3 SCALE 590 : (1998) 5 SCC 192 : (1998) SCC(L&S) 1302 : (1998) 3 SCR 432 : (1999) 1 SLJ 32 : (1998) AIRSCW 2122 : (1998) 5 Supreme 1 .

In none of the aforesaid two decisions the Hon"ble Supreme Court has propounded the law that even though a candidate is not having minimum eligibility or qualification, he can be appointed on compassionate basis. In the facts of the present case the appellant-State of Jharkhand is not denying the compassionate appointment. What is denied by the State of Jharkhand is appointment of respondents on the post of teachers, without having minimum qualification/eligibility. In fact, the State of Jharkhand vide order dated 18th February, 2012 as well as letter dated 7th March, 2013 has offered the post of clerks which is also a class-III post to the respondents. In fact these two letters are nothing, but, the correction of the error committed by the appellants. Erroneously, the post of teachers were offered to the respondents on compassionate basis. By virtue of the aforesaid two reported decisions no law has been propounded by the Hon"ble Supreme Court that while making compassionate appointment the minimum qualification/eligibility can be

overlooked. Hence, the judgments cited by the learned counsel for the respondents cannot help the present respondents.

(X) Learned counsel for the respondents has also submitted that clearance of "Teachers Eligibility Test" is not mandatory.

This contention is also not accepted by this Court looking to Section 23(1) of 2009 read with notification issued by NCTE dated 23rd/25th August, 2010 to be read with several letters issued by State and Central Government. Few of them are dated 4th June, 2012 (Annexure-6) and 7th May, 2012 issued by the Central Government (Annexure-7). Learned Counsel for the respondents has also referred Section 39 of the Act, 2009 which relates to power vested upon the Central Government to remove the difficulties. It has been submitted by learned counsel for the respondents that as the respondents have already been appointed to the post of teacher and they have to clear every type of necessary examination within stipulated time as stated in their appointment letters as such, by virtue of Section 39 of the Act, 2009 they may be allowed to retain the post of teachers.

This contention is also not accepted by this Court mainly for the reason that these type of Sections are meant for removal of difficulties and also known as "Henri-VIII Clause". The "Henri-VIII clause" cannot be utilized for allowing the continuity of illegality. Henri-VIII clause can be resorted to in an exceptional case where there is some procedural difficulty. Appointment of the respondents as teachers, despite they do not possess the minimum qualification, is illegal and in breach of the provisions of the Act, 2009 and, therefore, Henri-VIII Clause cannot be exercised in the present case.

(XI) It also appears that the rules or regulations stated at Annexure-3 to the memo of this letters patent appeal has been replaced by the regulations dated 5th September, 2012 issued by the Human Resources Development Department, State of Jharkhand which are known as Jharkhand Primary School Teachers Appointment Regulations, 2012 Regulation No. 4 which also prescribes clearance of teachers eligibility test. Admittedly, the respondents have been appointed after these regulations i.e. on 20th September, 2012 and, therefore, also they cannot be appointed as teachers.

4. As a cumulative effects of the aforesaid facts and reasons we hereby quash and set aside the judgment and order dated 26th September, 2013 delivered by the learned single Judge in writ petition bearing W.P.(S) No. 1897 of 2013. This Court has already stayed the impugned judgment vide order dated 29th January, 2015 passed in Interlocutory Application No. 3139 of 2014. Respondents, who are working as clerks may continue to work on the posts of clerk, a class-in post. Instant Letters Patent Appeal stands allowed and disposed of.

I.A. No. 3139 of 2014

Consequent to final disposal of the Letters Patent Appeal No. 210 of 2014, this Interlocutory Application stands disposed of.