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**(2012) 03 PAT CK 0152**

**Patna High Court**

**Case No:** CWJC No. 8654 of 2008

Biresh Prasad

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

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**Date of Decision:** March 19, 2012

**Citation:** (2013) 3 PLJR 274

**Hon'ble Judges:** Mihir Kr. Jha, J

**Bench:** Single Bench

**Advocate:** Dilip Kumar Tewari, for the Appellant;

**Final Decision:** Dismissed

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**Judgement**

@JUDGMENTTAG-ORDER

Mihir Kr. Jha, J.

Heard counsel for the parties. The prayer of the petitioner in this writ application reads as follows:--

(i) For issuance of a writ in the nature of certiorari for quashing of the order contained in Memo No. 166 Go. dated 6.5.2008 (Anx.-6) passed by the respondent No. 3 by which the respondent No. 3 has allowed the Matric untrained scale to the Physical trained teachers and has accordingly directed to recover the excess amount paid to such Physical trained teachers including the petitioner in the scale other than Matric untrained.

(ii) For issuance of an appropriate writ for quashing of the order contained in letter No. 5 dated 6.5.2008 (Anx.-7) passed by the respondent No. 4 by which the respondent No. 4 has stopped payment of salary to the petitioner till fixation of pay of the petitioner so that excess amount paid, may be adjusted.

(iii) For issuance of an appropriate writ, order or direction directing and commanding the respondents to give the petitioner all consequential benefits after quashing the aforesaid orders contained in Memo No. 166 Go. dated 6.5.2008 and

letter No. 05 dated 6.5.2008.

(iv) For issuance of an appropriate writ, order or direction for a declaration that the petitioner is entitled for Matric trained scale with all consequential benefits.

2. Mr. Dilip Kumar Tewari, learned counsel for the petitioner, has submitted that the teachers of the Primary School having qualification of being physically trained would be entitled to grant of pay scale of a Matric trained teacher and the State Government cannot discriminate between physically trained teacher and a teacher having undergone teachers training in Education. In this regard he has also placed reliance on an order of the State Government dated 17.2.1981 (Annexure-2) which according to him would support the case of the petitioner as with regard to grant of Matric trained pay scale even to a teacher of Primary School who has completed training in Physical Education. It has further been submitted that when the petitioner was granted the Matric trained pay scale in terms of the Government decision dated 17.2.1981 (Annexure-2) by a specific order of the District Superintendent of Education dated 24.1.1990, he cannot be now subjected to recovery of alleged excess pay drawn by him as a Matric trained teacher only on the ground that he did not possess the qualification of being teachers training in Education. According to him, the order passed by this Court on 27.3.2009 in C.W.J.C. No. 3175/2004 cannot be made applicable and therefore, the recovery sought to be made from the petitioner must be held to be bad both on fact and in law.

3. On the other hand, learned counsel for the State in the light of the averments made in the counter affidavit has submitted that there is no dispute that the State Government right from the beginning so far it relates to Primary School has maintained that the teachers having regular teachers training in Education alone would be entitled for payment of salary in the Matric trained pay scale, whereas the teachers having either undergone not such training or even completed training in Physical Education would be paid their salary in Matric untrained pay scale, in this regard he has referred to a judgment of this Court in the case of [Binod Kumar Singh and Others Vs. The State of Bihar and Others](#), which according to him has also been affirmed in appeal by the Division Bench by an order dated 20.1.2003 in L.P.A. No. 703/1995. He has also submitted that the recovery from the petitioner in fact has been made in view of the order passed by this Court in the order dated 13.5.2008 in C.W.J.C. No. 3175/2004 wherein a direction was given to stop payment of salary to any Physically Trained Teacher in Matric trained pay scale and also make recovery from them.

4. Mr. Tewari in reply has not only reiterated his earlier submissions but has sought to distinguish the judgment of this Court in the case of Binod Kumar Singh (supra) but has also placed reliance on an unreported judgment of this Court dated 22.1.1991 in C.W.J.C. No. 2180/1984 (Rahmatulla Mian vs. The State of Bihar & Ors.).

5. In the considered opinion of this Court the only question, therefore, involved in this writ application is as to whether a teacher having not completed the teachers training course in Education is entitled to get salary of the post of Matric trained teacher in a Government Primary School. It is not in dispute that the petitioner did/does not possess the requisite qualification of being a trained teacher which is compulsory for grant of pay scale of a Matric trained teacher, in fact this issue was gone at length by this Court in the case of Binod Kumar Singh (supra), wherein it was held as follows:--

8. From the above narration of facts it is clear that the secondary schools and the elementary schools do not stand at par. As institutions imparting education they are distinct from each other. The method of teaching is different and so is the staffing pattern. At the primary level, a teacher is supposed to teach all subjects and, therefore, there is no subject-wise appointment. At the secondary level teaching is more of specialisation and therefore, appointments of teachers are made subject-wise. In secondary schools there are sanctioned posts of teachers in physical education and the prescribed qualification for appointment to that post is diploma or degree in physical education. In elementary schools there is no such sanctioned post.

9. Counsel for the petitioners was not in a position to counter the stand of the respondents that the circulars issued with respect to secondary schools are not applicable to elementary schools. The circulars/letters relied upon by the counsel for the petitioners except letter No. 885 dated 29.11.90 relate to secondary schools. Letter No. 885 dated 29.11.80 does mention that teachers in physical education in elementary schools will also get the scale of trained teachers but as was rightly pointed out by the counsel for the respondents, the letter merely incorporates the minutes of the proceeding of a Committee. The Government decision in this regard is contained in Circular No. 197 dated 17.2.81 paragraph 7 of which categorically states that graduate teachers in physical education will be reckoned but they will not be entitled to the benefits of Matric trained scale until they acquire the requisite qualification, namely Bachelor of Education.

10. The above policy is being followed since the very beginning Circular No. 690 dated 17.2.66 which is perhaps the earliest circular on the point with respect to elementary schools, also contained similar provision. It noted the importance of physical education as a part of elementary schools curriculum and the fact that the physical trained teachers were not being appointed as they were not trained. The State Government after considering the matter took a decision to appoint such persons who had done 9 months' course in physical education as teachers in elementary but they would be entitled to the scale of "trained" teacher only after successfully completing the training course in a primary teachers' training school. The 1985 circular bearing No. 307 dated 19.2.85 also provided for two scales; matric untrained scale (Rs. 535-765) to ordinary physical trained teachers and the Matric

trained scale (Rs. 580-860) to ordinary physical trained teachers and the Matric trained teachers who have done two years teachers training course in elementary school.

11. The term "training" in the context connotes qualification of Degree or Diploma in Education, called teachers/training and the term "trained" means a person who has successfully completed the teacher's training course and has got the certificate (B.T./T.T. granted by the Bihar School Examination Board at the primary level) or Diploma/Degree (Dip. in Ed./B.Ed./M.Ed.) granted by the University. Some confusion appears to have arisen as physical training (a loose expression for physical education) is some times understood as akin to teachers training, which is not correct. Physical Education and Education are two different subjects. Teachers' Training is a specialised professional course with emphasis on methodological aspects of teaching.

12. It is permissible to link pay with the qualifications (see AIR 1988 S.C. 349) and, therefore, granting higher scale to "trained" teachers can in no way be said to be arbitrary. The circulars of the State Government are clear and leave no room for doubt that teachers in physical education or "physical trained" teachers not possessing the requisite qualification in teachers' training are not entitled to the "trained scale.

13. Recently, a Division Bench of this Court in cases, relating to Project Schools CWJC No. 10397 of 1992 and analogous cases [Kumud Kumari Srivastava and Others Vs. The State of Bihar and Others](#), dealing with similar claim has observed:--

The petitioner has a certificate/degree in physical training and on that basis tries to present herself as possessing the minimum qualification of "trained graduate". The contention is wholly untenable. In the light of what has been stated above, Education is altogether a different subject than physical training and what is required by way of minimum qualification is a degree of Bachelor of Education and any certificate or degree in physical training. Hence any one possessing any certificate or degree in physical training cannot claim to fulfill the minimum qualification.

14. The judgment in 1979 BBCJ 184 was rendered in the context of a secondary school teacher and so far as the judgment in the case of Jagnandan Singh & Ors. (supra) is concerned, it would appear that no counter affidavit was filed on behalf of the State and the State Counsel conceded before the Court that a physical trained teacher is entitled to the Matric trained scale. The aforementioned aspects of the matter were not brought to the notice of the learned Judge. The judgment was thus passed in ignorance of the relevant provisions and therefore, does not have any binding force as a precedent.

15. For the reasons stated above, the question framed at the outset is answered in the negative and it is held that teachers in physical education not possessing the

requisite certificate, diploma or degree in education, cannot be said to be trained teachers and are not entitled to the scale of trained teachers until they acquire the requisite qualification. The claim of the petitioners is thus not maintainable.

16. The writ petitions are accordingly, dismissed.

6. It has to be noted that the aforesaid view taken by the (learned Single Judge was affirmed by the Division Bench in the order dated 20.1.2003 while dismissing L.P.A. No. 703/1995 filed by Binod Kumar Singh & Ors. wherein it was held as follows:--

The petitioners claim equality with the teachers of secondary school. The petitioners are physical trained teachers in the elementary school. The qualification of a teacher in a secondary school is different from the qualification of a teacher in an elementary school. In a secondary school the basic qualification is a graduate. But this is not so in an elementary school and the petitioners do not possess this qualification.

The petitioners rely on Government order that elementary school physical trained teachers will be considered at par with the secondary school teachers provided they obtain the qualification. The equality rests on fiction that the petitioner will acquire the qualification as teachers in the secondary school.

The petitioners have yet to acquire the qualification.

Thus, comparison is not similar and the learned Judge has committed no error in not granting relief which the petitioners sought.

Dismissed.

7. In view of the aforementioned authoritative pronouncement by the Division Bench affirming the view of the learned Single Judge in the case of Binod Kumar Singh (supra) there would be hardly any scope for further argument that a teacher in the Primary School in order to be paid salary in the Matric trained teachers pay scale must have the prescribed qualification of being teachers training in Physical Education, inasmuch as the teacher having completed training in Physical Education is not entitled for grant of Matric trained pay scale.

8. As a matter of fact in view of the aforementioned authoritative pronouncement in the case of Binod Kumar Singh (supra) both by the learned Single Judge and the Division Bench that this Court in the order dated 13.5.2008 in C.W.J.C. No. 3175/2004 (Bachcha Nath Jha & Ors. vs. The State of Bihar & Ors.) had held that the teachers having trained in Physical Education possession the requisite qualification either Diploma or degree in Teachers training Education cannot be held to be trained Teachers and are not entitled to scale of trained teachers until they acquire requisite qualification. In the case of Bachcha Nath Jha this Court had also found that there were certain teachers in Primary Schools who were not possessing the requisite qualification of teachers training in Education and yet were being paid salary as a

Matric trained teacher. It was in this background that this Court had passed an order not only for taking action against the guilty persons who had granted Matric trained pay scale to the Physically trained teachers but had also given a direction to the Principal Secretary of the Human Resources Development Department to take necessary action in all over the State for maintaining parity as with regard to payment of salary to the Physically Trained Teacher in the pay scale of Matric untrained teacher, the relevant portion of the order "of this Court dated 13.5.2008 in the case of Bachha Nath Jha (supra) reads as follows:--

At this stage, Mr. Ram Suresh Rai, learned Senior Counsel appearing on behalf of the petitioner submits that this Court had found that such practice of illegal payment in the district of East Champaran was going on and the same has led to action against the headmasters of all the districts of East Champaran, but he is of the view that similar malpractice is also going on in other districts of the State also. In other words, he submits that the practice of payment of salary to the teachers of physical education despite being not trained in education in the trained pay scale of teachers is going on all over Bihar.

If that be so, this Court would direct the Principal Secretary of Human Resources Development Department to take remedial steps keeping in view that there is an affidavit on his behalf that such malpractice has been stopped all over Bihar and any teacher being paid such salary though eligible for payment of salary in the pay scale of trained teachers has been also subjected to recovery of the excess amount paid to them. Thus, if in future it is found by this Court that such a stand in the affidavit filed in the present case was false, this Court will have no option but to proceed against the Principal Secretary, Human Resources Development Department. The Principal Secretary of the Human Resources Development Department is thus directed to ensure that no such payment is being made to any of the teachers of physical education in the trained pay scale who are untrained/do not possess the requisite training qualification.

9. The impugned order for recovery against the petitioner in fact has been also by way of follow up measure in the light of the aforesaid direction in the case of Bachcha Nath Jha (supra) for the completion of record it has to be also recorded that the order passed by this Court dated 13.5.2008 in the case of Bachcha Nath Jha (supra) in C.W.J.C. No. 3175/2004 was affirmed by the Division Bench by an order dated 17.9.2008 in L.P.A. No. 726/2008.

10. It would be equally important to note here that subsequently a batch of writ applications involving these very questions was once again decided by the Division Bench by a judgment dated 26.9.2011 in C.W.J.C. No. 6985/1997. (Bindeshwari Singh vs. The State of Bihar & Ors.). The Division Bench in the case of Bindeshwari Singh (supra) had not only approved the earlier view taken by the learned Single Judge in the case of Binod Kumar Singh (supra) but had also held as follows:--

9. The judgment in Jagdanand Singh's case (supra) cannot be said to be a binding precedent on the point raised while the subsequent reported judgments in the case of Binod Kumar Singh's case (supra) has considered every aspect of the matter and finally came to the conclusion that Assistant Teacher having qualification of physical education cannot be treated at par with other teachers having B.Ed, qualification. This judgment has considered all the circulars occupying the field and the same was approved by the Division Bench. Another Division Bench judgment in L.P.A. No. 726 of 2008 has also taken the same view. Hence, we have no option but to hold that judgment in the case of Jagda Nand Singh cannot be followed as a precedent. In support, the following judgment may be referred- [Indian Drugs and Pharmaceuticals Ltd. Vs. Workman, Indian Drugs and Pharmaceuticals Ltd.,](#) .

10. The learned counsel for the petitioners has relied on a new Rules, namely, "Special Elementary Teachers" Appointment Rules, 2010" to show that the State of Bihar by this new Rules has decided to pay the trained scale to the teachers having the certificate of C.P. Ed, or having training of one year of C.P. Ed./D.P.Ed. It will be relevant to state that 2010 Rules will not be applicable to the case of present petitioners. Moreover, the definition clause 2(iv) defines "training" to include Teachers having the certificate of physical education of two years and the training of one year from the Institute recognized by the State of Bihar for limited purpose of requisite qualification for being appointed as teachers, but this provision in Rule 2(iv) or those in Rule 3(iv) do not stipulate that the teachers having qualification of physical training will also be entitled to matric scale. These Rules were framed for a special drive for appointment of teachers in view of directions of Hon"ble Supreme Court in Contempt Petition No. 297/2007 as one time appointment.

11. In view of the facts and circumstances of the case, looking to the consistent views of this Court on the relevant issue and observing principle of stare decisis (abide by the decisions, to stand by decided cases, to uphold precedents, to maintain former adjudications), there is no option but to follow the judgment reported in Binod Singh's case (supra) approved by the Division Bench of this Court. It is, therefore, held that the primary teachers having training only in physical education and not having the qualification of B.Ed. are not entitled to matric trained scale.

11. In view of the aforementioned authoritative pronouncement of three Division Benches in the case of Binod Kumar Singh (supra), Bachcha Nath Jha (supra) and Bindeshwari Singh (supra) nothing will now remain for this Court to take any different view and it has to be held that such of the teachers of Primary Schools who had/have undergone only training in Physical Education and did not possess requisite qualification of teachers training in Education were/are not entitled to get salary in Matric trained pay scale.

12. The reliance placed by Mr. Tewari on 1981 Circular is also wholly misplaced and in fact the circular has already been considered in the case of Binod Kumar Singh

(supra). Additionally, this Court must hold that 1981 circular will not apply to the facts of this case of the petitioner who has been appointed in the year 1988 after enforcement of the statutory rules relating to appointment and payment of salary of teachers of Primary School. As a matter of fact 1981 circular had lost its life in the year 1984 itself wherein it was clarified that a Physically Trained Teacher would get pay scale of untrained Matric, inasmuch as Matric trained pay scale was to be given only to those who has under one regular teachers training course in Education. In view of above, 1981 circular will be also of no help to the petitioner.

13. His further reliance placed on a judgment of the learned Single Judge in the case of Rahmattula Mian (supra) is also wholly misplaced, inasmuch as his appointment was made on 9.4.1980 and in that regard it was also held that the circular dated 17.2.1981 could not have been made applicable to the aforesaid petitioner Rahmattula Mian. This aspect would become clear from paragraphs 3 and 5 of the aforementioned judgment which reads as follows:--

3. It was more than one year after the petitioners had joined pursuant to their appointment letters and were working in their schools when the impugned order was passed on 23.5.1981. The impugned order as stated above, refers to a circular letter No. 197 dated 17.2.1981 issued by the third respondent and addressed to all the District Education Officers. This circular letter emphasizes the need of appointing as teachers in primary schools, persons qualified in physical education and states that 5 per cent of all available posts should be reserved for such trained persons. In the last but one paragraph of this letter, it is stated that persons having Intermediate or Matriculation qualification and having obtained training in Physical Education should be given the Matric Untrained scale till they, like other teachers, completed the Teachers' Training Course.

5. The important fact no note here is that the petitioners were appointed vide appointment letter dated 9.1.1980 and this circular letter was issued on 17.2.1981 and the impugned order was passed on May 28, 1981. That is to say, the circular letter was issued after about eight months of the appointment and the impugned action was taken on that basis after more than one year of the appointment. It is not even alleged that the petitioners were given the scale of Matric Trained Teachers at the time of their appointment wrongly or in contravention of the then existing rules or executive instruction. The instruction contained in this circular letter which was issued on 17.2.1981 can only have prospective operation and can govern appointments made after 17.2.1981. The circular letter, by no stretch of imagination, can be given retrospective effect. The instruction contained therein cannot reach behind in time to adversely modify the terms of concluded contracts of employment. It has not been shown that the instruction was issued in exercise of any statutory provision which permitted the instructions to be clothed with retrospectivity. I, therefore, find and hold that the action of the respondent authorities in putting the petitioners in the lower scale of pay on the basis of the



circular letter which came into being much after their appointment was quite illegal and unsustainable in law.

(underlining for emphasis)

14. In view of above, the case of Rahmattula Mian (supra) is clearly distinguishable on facts and in any event is no longer a good law after three Division Bench judgment of this Court have taken a contrary view of course subsequently, as noted above, in the case of Binod Kumar Singh (supra), Bachcha Nath Jha (supra) and Bindeshwari Singh (supra).

15. The submission of Mr. Tewari that Bihar Vishesh Prarambhik Shikshak Niyukti Niyamawali, 2010 providing for payment of salary to the Physically Trained Teacher in Matric trained scale of pay will also be of no help, inasmuch as this very aspect was gone into by the Division Bench of this Court in the case of Bindeshwari Singh (supra) in paragraph 10, as already quoted above wherein it was held that such provision would be applicable only to the teachers who would be appointed after the year 2010. In that view of the matter, the petitioner, who was appointed in the year 1988, under the relevant Rules cannot claim the benefits falling out of the Rules made in the year 2010.

16. That would bring this Court to the last submission of Mr. Tewari, learned counsel for the petitioner, as with regard to recovery from the petitioner. The submission in this regard of Mr. Tewari is that the petitioner did not commit any fraud or had not even made any misrepresentation and his salary was fixed in the Matric trained pay scale by the order of the District Superintendent of Education and as such, he should not be subjected to recovery. The issue of recovery of an amount which is not payable to an employee and to which he is not entitled in law was gone into at great length by the Full Bench of this Court in the case of [Bihar State Electricity Board and Others Vs. Ram Kumar Bharti @ R.K. Bharti and Others](#) approving the concept of refund/recovery from a serving employee. The Full Bench in fact had made exception only in the case of retired employee, who after retirement cannot be expected to refund of an excess amount paid to him.

17. Even otherwise it has to be held that such recovery of an excess amount drawn by an employee without any authority of law and beyond his entitlement can always be made because law itself implies an obligation on the payee to refund the excess amount drawn by him or else it would actually amount to unjust enrichment from public exchequer which is in reality tax payer's money. In the present case by no stretch of imagination and in fact, in view of both the circulars of the year 1981 and 1984 it can be said that the petitioner was entitled to be paid salary in the Matric trained pay scale and thus, in the year 1990 when such salary was directed to be paid to the petitioner it was in complete contravention of the aforesaid Government decisions. The petitioner is still a serving employee and therefore, he cannot claim protection extended to only a retired employee. Thus, for all these reasons recorded

above, this Court does not find any merit in this application and the same is, accordingly, dismissed with an observation and direction that in case the petitioner is subjected to huge amount of recovery the same should be recovered in easy installment not exceeding a sum of Rs. 3,000/- per month.