

[2019] 8 S.C.R. 1180

A STATE OF BIHAR AND ORS.

v.

DILIP KUMAR AND ANR
(Civil Appeal No. 5205 of 2019)

JULY 18, 2019

B [DR. DHANANJAYA Y CHANDRACHUD AND
INDIRA BANERJEE, JJ.]

Bihar Municipal Body Elementary Teachers (Employment and Service Conditions) Rules, 2006: r. 10 – Appointment on compassionate ground – On facts, respondents granted compassionate appointment on the post of Nagar Shikshak in terms of r. 10 – Thereafter, issuance of instructions by the State Government that posts of Panchayat Teachers and Block Teachers not borne on the service of the Government, thus not within the jurisdiction of the Compassionate Appointment Committee to recommend appointments to those posts – Writ petition by respondents seeking mandamus for their appointment on a compassionate basis to posts under the control of the State Government – Allowed by the Single Judge of the High Court – Subsequently, issuance of instructions by the State Government that the Committee could make compassionate appointments to the posts of panchayat teachers/block teachers/town teachers – Division Bench upheld the order of the Single Judge – On appeal, held: High Court erred in directing the State Government to appoint the respondents in its regular service despite the fact that their appointments were made after the 2006 Rules were brought into force – Their case would be governed by the 2006 Rules – Respondents having accepted their appointments as Nagar Shikshaks, it was not open to them to assert, that they should be appointed in the service of the State Government – Also, no executive instruction could have superseded the Rules – Thus, the order of the High Court set aside, however, liberty granted to respondents to approach the State Government for suitable relief.

Allowing the appeal, the Court

HELD: 1.1 With the enforcement of the Bihar Municipal Body Elementary Teachers (Employment and Service Conditions) Rules, 2006, Rule 10 governs the appointment of Nagar

Shikshaks on compassionate grounds. The respondents were appointed on 12 April 2008 and 19 August 2008, after the enforcement of the 2006 Rules. Their appointments were in terms of Rule 10 of the 2006 Rules. The respondents accepted the appointments. The Single Judge, in placing reliance on the instruction dated 17 October 2008, failed to notice the 2006 Rules. The Division Bench was of the view that withdrawal of the instruction dated 17 October 2008 by the subsequent instruction dated 22 June 2009 would not obviate compliance with the *mandamus* issued by the Single Judge on 15 May 2009. The Division Bench ignored the fact that both the respondents were appointed in terms of Rule 10 of the 2006 Rules. Having accepted the appointment, it was not open to them to assert, as they did, that they should be appointed in the service of the Government of Bihar. Moreover, no executive instruction could have superseded the rules. [Para 9] [1186-G-H; 1187-A-B]

1.2 In the instant case the respondents have been appointed after 1 July 2006. Their case would hence be governed by the 2006 Rules. The observations contained in the decision of the Division Bench in Mukesh's case that the appellants who were appointed after 01.07.2006, the date on which the Rules came into the force, are not entitled to claim appointment on regular pay scales will apply to the respondents in the instant case. The High Court was manifestly in error in directing the Government of Bihar to appoint the respondents in its regular service despite the fact that their appointments were made after the 2006 Rules were brought into force. The respondents duly accepted their appointments as *Nagar Shikshaks*. However, liberty is granted to the respondents to approach the State Government for suitable relief in terms of the orders passed in Special Leave Petition (C) No 29655 of 2010 and in the same terms as ordered by this Court in its judgment in Mukesh's case. The judgment and order of the High Court is set aside. [Paras 11, 12] [1189-A-C]

Mukesh v State of Bihar (2017) 5 SCC 383 - relied on.

Vishwanath Pandey v State of Bihar (2013) 10 SCC 545 ; *State of Bihar v Pooja Mishra* SLP(C) No. 029453 of 2015 ; *State of Bihar v Sanjay Kumar* SLP(C) No. 038376 of 2016 – referred to.

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Case Law Reference**(2013) 10 SCC 545****referred to****Para 5****(2017) 5 SCC 383****relied on.****Para 11**

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5205 of 2019.

From the Judgment and Order dated 30.03.2015 of the High Court of Judicature at Patna in Letters Patent Appeal No. 1589 of 2009.

Manish Kumar, Gopal Singh, Advs. for the Appellants.

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Abhijeet Sinha , Advs. for the Respondents.

The Judgment of the Court was delivered by

DR. DHANANJAYA Y CHANDRACHUD, J.

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1. A Division Bench of the High Court of Judicature at Patna by its judgment dated 30 March 2015 affirmed the view of the learned Single Judge, and directed the grant of compassionate appointment to the respondents on a regular scale of pay in the services of the State Government and not on the post of *Nagar Shikshaks* to which they were appointed. This direction was based on an instruction dated 17 October 2008 issued by the Government of Bihar, which has since been withdrawn. Aggrieved by order of the Division Bench, the State of Bihar is in appeal.

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2. The father of the first respondent died in harness on 7 May 2006, while in employment as an Assistant Teacher in a primary school. The mother of the second respondent was also an Assistant Teacher in a primary school when she died in harness on 9 September 2006. On 25 January 2008 and 27 June 2008, the District Compassionate Appointment Committee¹ considered the request of the respondents for compassionate appointment. On 12 April 2008, the first respondent was offered employment on the post of *Nagar Shikshak* under Rule 10 of the Bihar Municipal Body Elementary Teachers (Employment and Service Conditions) Rules, 2006². On 19 August 2008, the second respondent was offered appointment as a *Nagar Shikshak* on the basis of the recommendation of the DCAC. On 17 October 2008, the Personnel and Administrative Reforms Department of the Government of Bihar,

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¹ DCAC

² 2006 Rules

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issued an instruction stating that the posts of Panchayat Teachers and Block Teachers are not borne on the service of the government, hence it is not within the jurisdiction of the DCAC to recommend appointments to those posts. The instruction stated thus: A

“..that it has been clear from the perusal of the minutes of the meeting of few District Compassionate Committees that the recommendation has been made for the appointment against the post of Panchayat Teacher, Block teacher, town teacher on the compassionate ground by the District Compassionate Committee. The post of the Panchayat Teacher, Block Teacher are not the post of the Government and making a recommendation for the appointments on such post on the compassionate ground does not fall under the jurisdiction of the compassionate committee. B C

As per the direction, I have to say that it should be ensured that the recommendation be not made for the appointment against the appointment on post of the Panchayat Teacher, Block Teacher. If any such recommendation has been made then it should be reconsidered by the District Compassionate Committee and recommendation be ensured as per the circular issued by this.” D

3. The respondents instituted writ proceedings under Article 226 before the High Court, seeking a *mandamus* for their appointment on a compassionate basis to posts under the control of the State Government. On 15 May 2009, a learned Single Judge of the High Court accepted the grievance of the respondents that the posts of *Nagar Shikshak* to which they were appointed were not government posts with a regular pay scale but were posts with fixed emoluments. This, in the view of the learned Single Judge, was contrary to the Government Instruction dated 17 October 2008. In consequence, while allowing the writ petition, the learned Single Judge directed that the recommendations of the DCAC be implemented “strictly” in accordance with the instruction dated 17 October 2008. E F

4. Subsequently, on 22 June 2009, the State Government issued a fresh instruction which clarified that it is permissible for the Committee constituted under the Rules to make compassionate appointments to the posts of panchayat teachers/block teachers/town teachers. The relevant part of the instruction is extracted below: G

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A “..the provision has been made as per the Rule 10 of Bihar Panchayat Primary Teacher Employment and Service Conditions Rules, 2006 :-

B “10 Employment/Appointment on the basis of compassionate ground:- Employment/appointment against the vacancy available on the post of Panchayat Teacher/Block Teacher could be made in accordance with the eligibility prescribed on the basis of the compassionate ground in respect of the dependents of the teaching or non-teaching staff, if he gives the consent clearly for this :-

C In view of the terms and conditions prescribed for the appointment, the appointment on the compassionate ground by the aforesaid committee, in view of the Circular of the Personnel & Administrative Department of the Government. It will be compulsory for untrained dependents to obtain the training within a period of six years for the date of appointment”.

D Such provisions has also been made under Bihar Panchayat Primary Teacher Employment and Service Conditions Rules, 2006. In the aforesaid provisions, the meaning of the word committee is with respect to the committee constituted under the Rule. In this way, it is clear that the appointment of the dependent of the teaching and non-teaching employees can be made on the basis of compassionate basis on the post of Panchayat Teacher/Block Teacher/town Teacher on the regular pay by the committee constituted under the aforesaid rules.”

F 5. A Letters Patent Appeal was filed by the state against the decision of the Single Judge. The Division Bench, by its judgment dated 30 March 2015, held that since the death of the employees while in service had taken place before the 2006 Rules were enforced, and the circular/instruction dated 17 October 2008 clarified that compassionate appointments were required to be made to a post in the service of the government, the writ petition had been correctly allowed. The Division Bench held that the instruction dated 22 June 2009, recalling the earlier circular/instruction, would not take away the effect of the *mandamus* issued by the Single Judge. The High Court also observed that in **Vishwanath Pandey v State of Bihar**³ (“**Vishwanath Pandey**”), this Court had affirmed the view of a Single Judge of the High Court that

H ³ (2013) 10 SCC 545

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where the occurrence had taken place prior to the enforcement of the Rules of 2006, the appointment would have to be made as a teacher under the government. A

6. Learned counsel appearing on behalf of the appellants submitted that compassionate appointments are governed by the 2006 Rules. Under Rule 10, *Nagar Shikshaks* are to be appointed on compassionate grounds. Moreover, Rule 20 supersedes all previous rules, resolutions, orders and instructions. In the present case, it was urged that the respondents consented to their appointment and joined the post of *Nagar Shikshak* in terms of Rule 10. Hence, the High Court was not justified in directing that their services to be shifted from the posts of *Nagar Shikshak* to posts under the control of the Government. In the facts of this case, it has been urged that the offers of appointment to the respondents as *Nagar Shikshaks* were made prior to the instruction dated 17 October 2008. Moreover, the appointments as *Nagar Shikshaks* being in accordance with the 2006 Rules, the High Court was not justified in directing the state to take over the services. In this context, reliance has been placed on a judgment rendered by a two Judge Bench of this Court in **Mukesh v State of Bihar**⁴ (“**Mukesh**”) on 3 April 2017, where the decision of this Court in **Vishwanath Pandey** has been considered and distinguished. B C D

7. On the other hand, learned counsel appearing on behalf of the respondents supported the judgment of the High Court for the reasons which weighed in the grant of relief. Learned counsel submitted that Letters Patent Appeals filed by the State against similar decisions of the learned Single Judges of the High Court were dismissed, and this Court dismissed the Special Leave Petitions filed under Article 136 of the Constitution by the State. In this context, reliance has been placed on the orders passed by this Court in: E F

(i) **State of Bihar v Pooja Mishra**⁵ (“**Pooja Mishra**”); and

(ii) **State of Bihar v Sanjay Kumar**⁶ (“**Sanjay Kumar**”).

The above Special Leave Petitions were dismissed on 9 October 2015 and 11 November 2016 respectively. It was urged that this Court should follow the same course of action by dismissing the civil appeal. G

⁴ (2017) 5 SCC 383

⁵ SLP(C) No. 029453 of 2015

⁶ SLP(C) No. 038376 of 2016 H

A 8. The 2006 Rules were notified on 1 July 2006. Rule 3 contains a categorisation of Elementary teachers:

“3. Category of Town Elementary Teachers – There shall be two category of Town Elementary Teachers :-

- B (A) Nagar Shikshak (Trained)
(B) Nagar Shikshak (Untrained)”

Rule 8 provides for conditions of eligibility. Rule 9 provides for the procedure for appointment. Rule 10 contains the following provision:

C “10. Appointment on compassionate ground :- The employment may be made of the dependents of teaching/ non-teaching employees on compassionate ground as per determined qualification on the post of Town Teacher (Trained) and Town Teacher (Un-Trained) against the available vacancies, if he gives manifestly his consent for this. The appointment may be made by
D aforesaid Committee in the light of other conditions concerned with appointment on compassionate ground by the Personnel Department of Government. After the employment, un-trained dependents shall acquire training within maximum 6 years.”

E Rule 20, which contains a repeal and savings provision, is in the following terms:

“20. Repeal & Saving :- (i) From the date of enforcement of this Rules, all the previous Rules, Resolutions, Orders and Instructions regarding the employment of Primary Teachers/ Physical Teachers in urban area shall be deemed repealed.

F (ii) But notwithstanding this repeal no effect shall be made on any earlier Rules, Resolution, Order, Instruction etc. regarding the salary etc. and Service Conditions of the teachers.”

G 9. With the enforcement of the 2006 Rules, Rule 10 governs the appointment of *Nagar Shikshaks* on compassionate grounds. The respondents were appointed on 12 April 2008 and 19 August 2008, after the enforcement of the 2006 Rules. Their appointments were in terms of Rule 10 of the 2006 Rules. The respondents accepted the appointments. The learned Single Judge, in placing reliance on the instruction dated 17 October 2008, failed to notice the 2006 Rules. The Division Bench was of the view that withdrawal of the instruction dated 17 October 2008 by
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the subsequent instruction dated 22 June 2009 would not obviate compliance with the *mandamus* issued by the Single Judge on 15 May 2009. The Division Bench ignored the fact that both the respondents were appointed in terms of Rule 10 of the 2006 Rules. Having accepted the appointment, it was not open to them to assert, as they did, that they should be appointed in the service of the Government of Bihar. Moreover, no executive instruction could have superseded the rules.

10. Learned counsel appearing on behalf of the respondents has placed reliance on the orders of this Court dated 9 October 2015 and 11 November 2016 dismissing the Special Leave Petitions filed under Article 136 by the State in the cases of **Pooja Mishra** and **Sanjay Kumar**. The above orders, by which this Court dismissed the Special Leave Petitions against the decision of the Patna High Court, will not aid the submissions of the respondents. This is for the simple reason that subsequently, a two Judge Bench of this Court in **Mukesh**, in its decision dated 3 April 2017 considered the provisions of the 2006 Rules as well as the precedent on the subject. This Court extracted from the decision in **Vishwanath Pandey** (on which reliance has also been placed by the impugned judgment of the Division Bench of the High Court). In **Mukesh**'s case, this Court held:

“By the impugned judgment, a Division Bench of the High Court correctly held that the Appellants have no legal right to seek appointment on compassionate grounds. Compassionate appointments are not a source of recruitment and they are made to provide succour to the family of an employee who dies in harness. In the State of Bihar compassionate appointments are governed by instructions issued by the Government. Some of the Appellants were recommended for appointment to Class III posts on a regular basis by the District Compassionate Committee. However, they were appointed as Prakhanda Teachers/Panchayat Shikshaks/ Nagar Shikshaks, etc. on a fixed pay. The Appellants could not have been appointed on a fixed pay and they are entitled for appointment to either on Class III or Class IV posts on regular basis or payment of regular pay scale in the posts of as Prakhanda Teachers/Panchayat Shikshaks/Nagar Shikshaks, etc. in which they are working at present. Some of the Appellants who were recommended for appointment to Class III posts but were appointed as Prakhanda Teachers/Panchayat Shikshaks/Nagar

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A Shikshaks, etc. on fixed pay are similarly situated to Vishwanath Pandey and they are entitled to be appointed on a regular pay scale.”

In regard to those of the appellants who were appointed after 1 July 2006 (the date of enforcement of the 2006 Rules), this Court

B observed:

C “The other Appellants who were appointed after 01.07.2006 are not entitled to the relief granted to those who were recommended for appointment to Class III or Class IV posts prior to that date. A Full Bench of the Patna High Court in *State of Bihar and Others v. Rajeev Ran Vijay Kumar*, reported in (2010) 3 PLJR 294 (FB), held that the dependents of deceased Government employees do not have a legal right to be appointed in Government posts. Their appointments on compassionate grounds shall be in accordance with Bihar Panchayat Primary Teacher (Employment and Service Conditions) Rules, 2006 (hereinafter referred to as the ‘Rules’) which came into force w.e.f. 01.07.2006. Rule 10 of the said Rules provides for employment on compassionate grounds to the dependents of teaching/ non-teaching employees against available vacancies of Panchayat Teachers/Block Teachers/Prakhand Teachers, etc. Such appointments can be made only on a fixed pay by the committee constituted under the Rules. **The Appellants who have not been recommended for appointment to Class III or Class IV posts prior to 01.07.2006 are not covered by Vishwanath Pandey’s case (supra).** On the other hand, they are squarely covered by the judgment of Full Bench of the Patna High Court. They are not similarly situated to those who were recommended for appointment to Class III posts prior to 01.07.2006. **The Appellants, who were appointed after 01.07.2006, the date on which the Rules came into force, are not entitled to claim appointment on regular pay scales.** It is relevant to note that the judgment of the Full Bench of the High Court of Patna was challenged before this Court. The said SLP was withdrawn with liberty granted to the petitioners therein to approach the Government for suitable relief.”

(Emphasis supplied)

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11. Admittedly, in the present case as well, the respondents have been appointed after 1 July 2006. Their case would hence be governed by the 2006 Rules. The above observations contained in the decision of the Division Bench in **Mukesh** will apply to the respondents in the present case. The High Court was manifestly in error in directing the Government of Bihar to appoint the respondents in its regular service despite the fact that their appointments were made after the 2006 Rules were brought into force. The respondents duly accepted their appointments as *Nagar Shikshaks*. However, we grant liberty to the respondents to approach the State Government for suitable relief in terms of the orders passed in Special Leave Petition (C) No 29655 of 2010⁷ and in the same terms as ordered by this Court in its judgment dated 3 April 2017 in **Mukesh**.

12. The civil appeal is allowed. The judgment and order of the High Court dated 30 March 2015 is set aside. There shall be no order as to costs.

13. Application for impleadment is disposed of. Pending application(s), if any, are also disposed of.

Nidhi Jain

Appeal allowed.

⁷ Rajiv Ranvijay Kumar v State of Bihar