

**(2012) 06 CAL CK 0001**

**Calcutta High Court**

**Case No:** M.A.T. No. 667 of 2012 with C.A.N. No. 3868 of 2012

Biswanath Sarkar

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

**Date of Decision:** June 27, 2012

**Acts Referred:**

- Constitution of India, 1950 - Article 226
- West Bengal Primary Education Act, 1973 - Section 2(1)(b), 2(xxia), 2(xxiiia), 53(3)

**Citation:** (2012) 4 CALLT 307 : (2012) 5 CHN 702

**Hon'ble Judges:** Tarun Kumar Das, J; Pranab Kumar Chattopadhyay, J

**Bench:** Division Bench

**Advocate:** Subrata Mukhopadhyay, Mr. Samit Sanyal and Ms. Basabi Raichowdhury, for the Appellant; Swapan Kumar Majumdar for the Nadia District Primary School Council Mr. Chandi Charan De and Mr. Soumitra Bandyopadhyay for the State, for the Respondent

**Final Decision:** Allowed

### **Judgement**

Re: C.A.N. 3868 of 2012

1. This application has been filed in connection with the appeal preferred from the judgment and order dated 11th April, 2012 whereby and whereunder a learned Judge of this Court finally disposed of the writ petition on merits. The learned Single Judge by the aforesaid judgment and order under appeal refused to interfere with the transfer order issued to the appellant-petitioner herein by the Chairman, Nadia District Primary School Council. From the records it appears that the petitioner is a physically handicapped teacher and was working as a Head teacher of Anatheswar Pathsala Primary School under Circle: Sadar-Urban.

2. The Chairman, Nadia District Primary School Council by the Memo No. 678 dated 2nd March, 2012 transferred the appellant-petitioner to act as Head teacher under Santipur New Circle. The said transfer order is set out hereunder:

Memo No. 678 Date: 2-3-12

From: The Chairman,

Nadia District Primary School Council

To: Sri Biswanath Sarkar, H.T.,

Anatheswar Pathsala Pry. School,

P.O.: Krishnanagar, Circle: Sadar-Urban

Dist. Nadia

Sub: Temporary Transfer

In reference to the above he is hereby transferred to act as Head Teacher at Bechumiya Pry. School P.O.-Sutragarh (Santipur) under Santipur New Circle.

This order is issued on administrative ground and he is directed to join the School within 7 days from the date of receipt of this letter.

Sd/- Chairman

Nadia District Primary School Council

3. The appellant-petitioner herein has challenged the validity and/or legality of the aforesaid transfer order on the ground that the Chairman, Nadia District Primary School Council has no authority and jurisdiction to issue the said transfer order to the appellant-petitioner herein.

4. Mr. Subrata Mukhopadhyay, learned Counsel representing the appellant-petitioner referred to the West Bengal Primary Education (Transfer of Teacher including Head Teacher) Rules, 2002 and submits that the District Primary School Council may either on its own motion or on an application from a teacher can transfer an approved teacher within its jurisdiction from one primary school to another primary school. Mr. Mukhopadhyay referred to and relied upon Rules 4 and 5 of the said Transfer of Primary Teachers Rules, 2002.

5. The learned Single Judge held that the order has been issued under the signature of the Chairman, Nadia District Primary School Council but the decision was taken by the said Council.

6. Mr. Swapan Kumar Mazumdar, learned Counsel representing the Nadia District Primary School Council, however, took a completely different stand before this Court.

7. Mr. Mazumdar specifically submits before this court that the Nadia District Primary School Council never issued any transfer order to the appellant-petitioner herein and the Chairman being the appointing authority of the appellant-petitioner issued the said transfer order. Mr. Mazumdar referred to and relied on Section

2(1)(b) of the West Bengal Primary Education (Conduct of Service of Teachers of Primary Schools) Rules, 2001 wherein "appointing authority" has been defined as hereunder:

2. Definitions.-(1).....

(a)...

(b) "appointing authority", means, for the purposes of these rules, the Chairman of the respective Primary School Council;"

8. Mr. Mazumdar further submits that the Chairman being the appointing authority issued the letter of appointment to the appellant-petitioner and therefore, has every right to issue the order of transfer in respect of the said appellant-petitioner.

9. Mr. Mazumdar submits that the Chairman is empowered to exercise general supervision and control over the appellant-petitioner who is a teacher under the Council. Mr. Mazumdar further submits that the writ petition is not at all maintainable before this court without exhausting the alternative remedy which is available to the appellant-petitioner under Rule 10 of the Transfer Rules, 2002.

10. Mr. Mazumdar referred to and relied upon the following decisions of the Supreme Court in support of his arguments:

(1) [Kanaiyalal Lalchand Sachdev and Others Vs. State of Maharashtra and Others,](#)

(2) [Transport and Dock Workers Union and Others Vs. Mumbai Port Trust and Another,](#)

(3) [Kalabharati Advertising Vs. Hemant Vimalnath Narichania and Others,](#)

(4) [State of Madhya Pradesh, and Another Vs. S.S. Kourav and Others,](#)

11. Let us first consider whether the writ petition should be dismissed on the ground of alternative remedy.

12. The learned Counsel representing the Nadia District Primary School Council urged before this court that alternative remedy is available to the appellant-petitioner under Rule 10 of the Transfer of Primary Teachers Rules, 2002.

13. We are not inclined to accept the same in view of sub-rule (2) of said Rule 10 whereby an aggrieved teacher before preferring an appeal against an order of transfer is required to comply with the order of transfer.

14. In the aforesaid circumstances, it cannot be said that an aggrieved teacher has an equally efficacious alternative legal remedy under Rule 10. Rule 10 of the Transfer of Primary Teachers Rules, 2002 is set out hereunder:

10. Appeal: (1) A teacher aggrieved by an order of transfer may, within thirty days of the date of receipt of such order, prefer an appeal to the Board.

(2) Such an aggrieved teacher shall, before preferring any appeal against an order of transfer under these rules, be required to comply with the order of transfer.

(3) The board may dismiss the appeal or pass an order directing the Council to modify or reverse the decision, and the Council shall comply with such order.

15. In the present case, however, the appellant-petitioner raised a specific objection challenging the authority and jurisdiction of the Chairman, Nadia District Primary School Council to issue the impugned transfer order.

16. The Supreme Court has repeatedly held that alternative remedy is not an absolute bar specially in a case where the authority against whom the writ is filed had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.

17. In the case of [Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others](#), Supreme Court held:

20. Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.

18. In the case of [Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others](#), Hon'ble Supreme Court held that in an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies. The relevant extracts from the aforesaid judgment are set out hereunder:

7..... In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice: or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See Whirpool Corpn. v. Registrar of Trade Marks.).....

19. The decisions cited by the learned Counsel of the Nadia District Primary School Council in this regard have no manner of application in the facts of the present case. It may also be mentioned herein that accepting the submissions of the respondent-Nadia District Primary School Council, learned Single Judge did not reject the writ petition for non-availing the alternative remedy by the appellant-petitioner.

20. Following the decisions of the Supreme Court in the case of Whirpool Corporation v. Registrar of Trade Marks, Mumbai (*supra*) and Harbanslal Sahnia & Anr., (*supra*), we are of the opinion that in the present case, alternative remedy cannot be a bar when the appellant-petitioner has specifically challenged the jurisdiction and authority of the Chairman, Nadia District Primary School Council to issue the impugned transfer order to the appellant-petitioner herein.

21. The learned Single Judge although held that the decision to transfer must be that of the Council, the learned Advocate representing the Nadia District Primary School Council took a different stand before us and specifically submits that the Chairman being the appointing authority had issued the impugned order of transfer to the appellant-petitioner herein.

22. Let us now examine whether the Chairman, Nadia District Primary School Council is competent to issue the transfer order to the appellant-petitioner herein.

23. There is no doubt that under the West Bengal Primary Education (Conduct of Service of Teachers of Primary Schools) Rules, 2001, appointing authority is the Chairman of the respective Primary School Council. The aforesaid rule has no manner of application in the matter of issuing transfer order to a primary school teacher.

24. The Chairman of the respective Primary School Council is the appointing authority under the Service Conduct Rules, 2001. The aforesaid Rule governs the service conduct of a primary school teacher and specifically provides for suspension and also the procedure for imposing penalties as well as actions to be taken by the Disciplinary Authority.

25. Under the West Bengal Primary School Teachers Recruitment Rules, 2001, District Primary School Council has been defined as the appointing authority of the teacher under Rule 5. The said Rule 5 is set out hereunder:

5. Appointing Authority.-District Primary School Council, Kolkata Primary School Council/Siliguri Primary School Council shall be the Appointing Authority.

26. Therefore, in the case of selection and appointment of primary teachers under the Recruitment Rules, 2001, appointing authority is the District Primary School Council and not the Chairman.

27. However, in the present case, appointing authority has no role to play in the matter of transfer since transfer of an approved teacher including Head teacher of primary school is governed by the specific rule namely, the West Bengal Primary Education (Transfer of Teacher including Head Teacher) Rules, 2002. Rule 4 of the said Rules lays down the conditions for transfer as hereunder:

4. Condition for transfer: A Council may-

(a) on its own motion, or

(b) on an application from a teacher, transfer an approved teacher within its jurisdiction from one primary school to another primary school on the condition that such approved teacher is confirmed and has completed minimum two years of continuous service both in case of mutual or single transfer:

Provided that the Council may, if it considers necessary for proper utilization of service of a primary teacher in the interest of education, transfer an approved teacher without maintaining any time limit of service:

Provided further that where there is a surplus teacher according to roll-strength as stated in rule 3, the Council may, on its own motion, transfer such approved teacher without maintaining any time limit of service by way of rational adjustment of teacher in a primary school having deficit teacher in the following order of preference:-

(i) a primary school without an approved teacher.

(ii) a primary school have single teacher, and

(iii) other primary school having shortage of teacher.

28. In terms of Rule 4, the Council may on its own motion transfer an approved teacher within its jurisdiction.

29. Therefore, the power of transfer has been specifically conferred upon the Council under the Statute namely, the Transfer of Primary Teachers Rules. 2002, which cannot be usurped by any other authority including the Chairman.

30. In the present case, unfortunately, the Chairman sought to usurp the authority of the Council to transfer an approved teacher, which is not at all permissible.

31. Rule 4 specifically authorises the Council to transfer an approved teacher. In the instant case, undisputedly, the Chairman of the Council issued the transfer order and Nadia District Primary School Council never took any decision in this regard.

32. Therefore, the impugned transfer order cannot be sustained in the eye of law.

33. The learned Counsel representing the Nadia District Primary School Council referred to and relied on Section 53(3) of the West Bengal Primary Education Act. 1973 wherein the duties of the Chairman have been mentioned. The said Section 53(3) is set out hereunder:

53. Duties of the Chairman.-(1).....

(2).....

(3) The Chairman shall-

(a) exercise general supervision and control over the Secretary, the finance Officer and the staff appointed by the Primary School Council and post and transfer the

members of the staff;

(b) sanction all claims of traveling allowances;

(c) take such other action not inconsistent with any decision of the Primary School Council as he considers necessary for the proper functioning of the Primary School Council under the Act.

34. We fail to understand how the aforesaid provision can be of any help to the Chairman. By Section 53(3), Chairman has been authorised to exercise power of general supervision and control over the Secretary, Finance Officer and the staff appointed by the Primary School Council. The appellant-petitioner being the Head teacher of the school should not be regarded as staff appointed by the Primary School Council.

35. The "Staff" has been specifically defined u/s 2(xxiiia) as hereunder:

2(xxiiia). "Staff" means-

(i) in relation to the West Bengal Board of Primary Education, the employees appointed by the Board against posts sanctioned by the State Government, and

(ii) in relation to a Primary School Council, the employees appointed by the Council against posts sanctioned by the State Government.

36. In the said Act, "teacher" has been defined u/s 2(xxia) as hereunder:

2(xxia). "teacher" means a person who holds a teaching post in a primary school or in a Primary Teachers" Training Institute on a regular and whole time basis and is paid wholly from the funds under the control of the State Government in the Education Department.

37. Therefore, section 53(3) has no manner of application in respect of the teacher.

38. For the reasons discussed hereinabove, we hold that the Chairman, Nadia District Primary School Council has no authority or jurisdiction to issue any transfer order to a primary school teacher on administrative ground and it is the Council which can exercise such power.

39. For the aforementioned reasons, we hold that the impugned transfer order issued to the appellant-petitioner herein is illegal and invalid. Therefore, the impugned order of transfer as well as the impugned judgment and order under appeal passed by the learned Single Judge cannot be sustained in the eye of law.

40. Accordingly, the impugned transfer order dated 2nd March, 2012 issued to the appellant-petitioner stands quashed and the judgment and order under appeal passed by the learned Single Judge is set aside.

41. Since the appellant-petitioner herein has already joined the transferred post without prejudice to the rights and contentions, we direct the respondent-Council to

allow the appellant-petitioner to resume his duties at the previous school namely, Anatheswar Pathsala Primary School where he was discharging his duties before issuance of the impugned transfer order dated 2nd March, 2012 without any further delay but positively within a period of three days from the date of communication of this order.

42. Needless to mention that the respondent-Council will ensure regular payment of the admissible salary and allowances to the appellant-petitioner after joining the duties to the post of Head teacher in Anatheswar Pathsala Primary School in terms of this order. With the aforesaid observations and directions, we allow both the application as well as the appeal upon treating the said appeal as on day's list. In the facts of the present case, there will be no order as to costs.

Let urgent xerox certified copy of this order, if applied for, be given to the learned Advocates of the parties on usual undertaking.