

(2012) 10 CAL CK 0023

Calcutta High Court

Case No: Writ Petition No. 19396 (W) of 2012

Nandini Sengupta

APPELLANT

Vs

State and Others

RESPONDENT

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**Date of Decision:** Oct. 19, 2012**Acts Referred:**

- Constitution of India, 1950 - Article 226

**Citation:** (2013) 1 CALLT 622**Hon'ble Judges:** Debasish Kar Gupta, J**Bench:** Single Bench

**Advocate:** Tapabrata Chakraborty, Mr. Chittapriya Ghosh and Mr. Ujjal Kr. Sarkar, for the Appellant; Nisith Mukherjee for the State and Mr. Sk. Kamaluddin for the Respondents Nos. 4 and 5, for the Respondent

**Final Decision:** Allowed

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### Judgement

Debasish Kar Gupta, J.

This writ application is filed by the petitioner assailing an order of transfer dated August 7, 2012 passed by the respondent No. 5. By virtue of the order of transfer, the petitioner was transferred from Uttarpara Girls High School (Primary Section) District Hooghly to Monilal Primary School. District Hooghly. The petitioner was a primary school teacher of Uttarpara Girls High School (Primary Section), District Hooghly. By a notice dated February 13, 2012 issued by the respondent No. 4. the petitioner was asked to appear before him in connection with the petition of the Chairman, Village Education Committee and others. On February 16, 2012, the petitioner attended the above meeting. On February 17, 2012 the petitioner submitted a letter of complaint before the Officer-in-Charge, Chinsurah Police Station, District Hooghly alleging pre-planned mental harassment of the petitioner in presence of the respondent No. 4 in the aforesaid meeting. By a communication dated August 14, 2012 the petitioner prayed for supply a copy of the Minutes of meeting under reference to the respondent No. 4. Thereafter, the impugned order

was passed. By a communication dated August 21, 2012 issued by the respondent No. 6, the petitioner was released from the services of Uttarpara Girls High School (Primary Section), Hooghly.

2. It is submitted by Mr. Tapabrata Chakraborty, learned Advocate appearing on behalf of the petitioner that the above order of transfer was passed in violation of Rule 4 of the West Bengal Primary Education (Transfer of teacher including head teacher) Rules, 2002 (hereinafter referred to as the said rules). It is also the case of Mr. Chakraborty that the order of transfer was an outcome of livelihood of bias. According to Mr. Chakraborty, the above order of transfer was passed on the basis of a complaint lodged by Village Education Committee. It is also the case of the petitioner that the above complaint was baseless.

3. Drawing the attention of this Court towards the submissions made in paragraphs 8 and 9 of the affidavit in opposition affirmed by the respondent No. 4, it is submitted by Mr. Chakraborty that it is a desperate attempt to improve the case of the respondent authority by way of filing an affidavit in connection with this proceeding.

4. Mr. Chakraborty relies upon the decisions of Syed Julfikar v. Raghav Chandra Deshmukh & Ors. reported in (2009) 3 CHN 47, [Somesh Tiwari Vs. Union of India \(UOI\) and Others](#), , [National Bank for Agriculture and Rural Development Vs. Sri Dipankar Sen Roy](#), and [Biplab Das Vs. Chairman, Bangiya Gramin Vikash Bank](#), in support of his above submissions.

5. At the very outset, Mr. Kamaluddin, learned Advocate appearing on behalf of the respondent Nos. 4 & 5 raised a preliminary objection with regard to maintainability of this writ application. According to Mr. Kamaluddin, there is an efficacious alternative remedy prescribed in connection with the provisions of Rule 10 of the said rules to prefer an appeal before the Board for redressal of grievance of any person.

6. On the other hand, it is submitted by Mr. Sk. Kamaluddin, that in accordance with the provisions of Rule 4 of the said rules, a primary school teacher can be transferred in the interest of education at the instance of the District Primary School Council. Drawing the attention of this Court towards a resolution dated July 20, 2012 adopted in the meeting of the respondent No. 5, it is submitted by Mr. Kamaluddin that the reason for transfer of the petitioner was the interest of an education. It is also submitted by him that in the event there is violation of an administrative order of transfer was passed on the basis of a complaint lodged against a primary school teacher, a Court sitting in a writ jurisdiction under Article 226 of the Constitution of India cannot interfere with such a dispute.

7. Mr. Kamaluddin relies upon the decisions of [Mrs. Shilpi Bose and others Vs. State of Bihar and others](#), and Mohd. Masood Ahmed v. State of U.P. & Ors. (Unreported judgment of Hon"ble Supreme Court of India).

8. I have heard the learned Counsel appearing for the respective parties at length I have given my anxious consideration to the fact and circumstances of this case. Admittedly, Rule 4 prescribes the condition for transfer of a primary school teacher. For proper adjudication of the issue involved in this case, Rule 4 of the said rules are quoted below:

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 having single teacher, and

(iii) other primary school having shortage or teacher.

9. First proviso to Clause B of Rule 4 of the said rules confers power upon the District Primary School Council to transfer a primary school teacher in the interest of education. It is the case of the petitioner that the purpose of passing the impugned order of transfer is contrary to the above provisions.

10. According to the respondent Nos. 4 & 5, the impugned order of transfer was passed in exercise of power confers on it by the above provisions.

11. In order to exercise the rival claim of the parties", the respondent Nos. 4 & 5 were directed to produce the Minutes Book of its resolution dated July 20, 2012. The same is produced before this Court today. From the above Minutes Book (a copy of the same has already been annexed to page 32 of the affidavit in opposition affirmed on behalf of the respondent No. 4). It appears that a decision was taken by the respondent No. 5 to pass an order of transfer adhering to the teacher-students ratio in accordance with law for surplus adjustment. It was decided in the interest of education of a primary school teacher within the jurisdiction of the respondent No. 5

could be transferred on any point of time. The decision of transfer of the petitioner was also recorded in the minutes of the resolution under reference. After close scrutiny of the above resolution, I find that no reason was taken up for consideration of transferring the petitioner from one school to other. The teacher-students ratio of Uttarpara Girls High School (Primary Section), Hooghly was taken into consideration at the time of adopting the above resolution. The question of surplus adjustment was also not the reason for transfer of the petitioner as appears from the above resolution. Therefore, the consideration of the question of utilization of the service of the petitioner in the interest of education as prescribed in proviso, Clause B of Rule 4 of the said Rules was not complied with. It is the settled principles of law that a natural person has the capacity to do all lawful things unless his capacity has been curtailed by some rule of law. It is equally a fundamental principle that in case of a statutory authority, it is just the other way. The authority has no power to do anything unless those powers are conferred on it by the statutes, which creates it. Reference may be made to the decision of [Asian Leather Limited and Another Vs. Kolkata Municipal Corporation and Others](#), and the relevant portion of the above decision is quoted below:

12. At this juncture, it will be profitable to refer to all the well-known proposition of law that a natural person has the capacity to do all lawful things unless his capacity has been curtailed by some rule of law. It is equally a fundamental principle that in case of a statutory authority, it is just the other way. The Corporation has no power to do anything unless those powers are conferred on it by the statutes, which creates it.

12. I do not find substance in the submissions made on behalf of the petitioner that the reasons are available in paragraphs 7 & 8 of the affidavit in opposition affirmed on behalf of the respondent No. 4. It is the settled principles of law as decided by the Hon"ble Supreme Court of India in the matter of [Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others](#), that an order cannot be allowed to be contemplated or submitted through an affidavit by addition of reason because if such a procedure is allowed, an order may get vested by the time, it gets challenge under a Court of law. The above decision is quoted below:

8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of [Commissioner of Police, Bombay Vs. Gordhandas Bhanji](#),

Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of

what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the action and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. Orders are not like old wine becoming better as they grow older. A Caveat.

13. With regard to question of livelihood of bias, after taking into consideration the bundle of fact leading to an order of transfer as discussed hereinabove, I find that the Chairman asked the petitioner to appear before him on the basis of a complaint lodged by the Village Education Committee concerned. Though the allegation of pre-planned designed mental harassment of the petitioner on the basis of the baseless allegation is a disputed question of fact, this Court cannot be closed keep it eyes in respect of lodging a complaint of the meeting In Chinsurah Police Station alleging those harassment.

14. Admittedly, the petitioner was transferred from one school to another after a period of about six months from the date of the above institution. At the cost of repetition once again that no reason as required under the proviso to Clause B of Rule 4 of the said rules is, available from the resolution dated July 20, 2007 on the basis of such the petitioner was transferred.

15. Justice A.P. Sen, as his Lordship then was observed while delivering a judgment in [Express Newspapers Pvt. Ltd. and Others Vs. Union of India \(UOI\) and Others](#), that even use of power for "alien purpose other than one for which the power conferred is malafide use of that power", the relevant portion.

118. Fraud on power voids the order if it is not exercised bona fide for the end design. There is a distinction between exercise of power in good faith and misuse in bad faith. The former arises when an authority misuses its power in breach of law, say, by taking into account bona fide, and with best of intentions, some extraneous matters or by ignoring relevant matters. That would render the impugned act or order ultra vires. It would be a case of fraud on powers.

16. I do not find that the decision of Shilpi Bose (supra) helps the respondents in any way the issue involved in the above case was violation of administrative order. In the present case, the issue involved is violation of statutory provisions of law. So far as the unreported decision of Md. Masood Ahmed (supra) is concerned, I find that the Hon"ble Supreme Court held that an order of transfer can be passed even on the basis of a complaint lodged against a teacher but In this case the resolution adopted by the respondent No. 5 was not based any consideration whatsoever. Though there was desperate attempt on the part of the respondent No. 4 to improve its case by way of filing an affidavit in opposition in this proceeding. Due to the aforesaid fact and circumstances of the present case, the above decision has no manner of application.

17. Admittedly, the issue involved in this case is alleged violation of a statutory provision amongst others. It is the settled principles of law that an application under Article 226 of the Constitution of India is maintainable for examining an allegation of violation of any statutory provisions. Therefore, this writ application cannot be dismissed in limini without examining the grounds set forth in this writ application. That apart, an entertaining an application under Article 226 of the Constitution of India is depends upon the discretion of the Court in a suitable case. It is open for the Court to exercise its discretion to entertain an application under Article 226 of the Constitution of India. As discussed hereinabove, the preliminary objection raised on behalf of the respondent Nos. 4 & 5 to get rid off this proceeding at the threshold cannot be sustained in law.

18. In view of the discussions and observations made hereinabove, the Impugned order of transfer passed by the respondent No. 5 as also to the release order passed by the respondent No. 6 are quashed and set aside with a direction upon the respondent authority to allow the petitioner to resume her duties of primary school teacher of Uttarpara High School (Primary Section) forthwith.

19. This writ application is thus disposed of. There will be, however, no order as to costs.

Urgent Photostat certified copy of this order, if applied for, be given to the parties on priority basis.