

(2014) 09 CAL CK 0070

Calcutta High Court

Case No: Writ Petition Nos. 17576(W), 17579(W) of 2011 and 283(W), 284(W), 2491(W) and 2492(W) of 2012

Bidyut Kumar Panja

APPELLANT

Vs

The West Bengal
Board of Primary
Education

RESPONDENT

Date of Decision: Sept. 1, 2014

Acts Referred:

- Constitution of India, 1950 - Article 13(1), 13(2), 21, 243B(1), 243C(2)
- West Bengal Panchayat Act, 1973 - Section 180
- West Bengal Primary Education Act, 1973 - Section 17, 19(1)(k), 19(1)(kk), 3, 37

Citation: (2014) 4 CALLT 103

Hon'ble Judges: Aniruddha Bose, J

Bench: Single Bench

Advocate: S.B. Bhunia, Sr. Adv., Goutam De, S. Nandy, Ashim Roy, Oindrila De and Suchandra Chakraborti, Advocate for the Appellant; Subir Sanyal and Ratul Biswas, Advocate for the Respondent

Judgement

Aniruddha Bose, J.

In these six writ petitions the petitioners question a common order of transfer from their respective posts in the office of the District Primary School Council to the office of a Council of another district. In W.P. No. 17576(W) of 2011, W.P. No. 17579(W) of 2011, W.P. No. 2491(W) of 2012 and W.P. No. 2492(W) of 2012, the petitioners, who were posted as Lower Divisional Assistants in the office of the District Primary School Council, Purba Medinipur have been directed to be transferred to the office of the Council in the district of Bankura. In fact, the writ petitioner in W.P. No. 17576 (W) of 2011 and W.P. No. 2492 (W) of 2012 is the same individual, Bidyut Kumar Panja, whereas, Mojammel Molla is the writ petitioner in W.P. No. 17579 (W) of 2011 and W.P. No. 2491(W) of 2012. These two individuals in their first petitions had

questioned their orders of transfer on the allegations of the breach of certain procedural norms. In their subsequent actions, they have challenged the constitutional validity of the provisions of the Statute and Rules made in that behalf, which empowers the Board to effect inter-council transfer. The said provisions for transfer is contained in section 19(1)(k) and (kk) of the West Bengal Primary Education Act, 1973, (the 1973 Act), which provides:--

"19. Powers and functions of the board.-(1) Subject to any general or special orders of the State Government, the provisions of this Act and any rules made thereunder, the Board shall have generally the power to guide, supervise and control primary education, and in particular the power(.)

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(k) to transfer any teacher on non-teaching staff from one primary school within the jurisdiction of one Primary School Council to a primary school within the jurisdiction of another Primary School Council;

(kk) to transfer any officer or employee, other than the Secretary and the Finance Officer, from one Primary School Council to another Primary School Council or to the Board or from the Board to a Primary School Council;"

The said provision was introduced by way of an amendment of the 1973 Act, upon enactment of the West Bengal Primary Education (Amendment) Act, 1987. It appears that before the said Amendment Act became operational, there was no provision for such inter-council or inter-district transfer. In these proceedings, involving transfer of employees of one Council to another, provisions of 19(1)(kk) of the Act shall be examined, along with certain provisions of the Rules made under the Act. I shall refer to these Rules later in this judgment.

The petitioners in W.P. No. 283 (W) of 2012 and W.P. No. 284(W) of 2012 were posted as Lower Division Assistants in the office of the District Primary School Council, Bankura and they have been directed to be transferred to the similar posts in the office of the Council of Purba Medinipur. All the aforesaid orders of transfer are sought to be given effect to by the West Bengal Board of Primary Education (Board) through a memorandum bearing No. 950/1(11)BPE dated 17 October, 2011. The said memorandum has been issued by the Secretary of the Board in terms of Section 19(1)(kk) of the 1973 Act. The Rules guiding such transfer have been incorporated upon promulgation of the West Bengal Primary Education (Transfer of Officers and Employees of the Board and the Primary School Councils) Rules, 2005 (the 2005 Rules). Clause 3(f) of the said Rules Provides:--

"3(f) "transfer" means the change of posting from one Primary School Council to another Primary School Council or to the Board, or from the Board to a Primary School Council"

2. The manner in which such transfer is going to be effected is contained in Clauses 4, 5 and 6 of the said Rules, which stipulate:--

"4. Conditions for transfer.--The Board may, either on its own motion, or on application made by an officer or employee, or on proposal submitted by a Primary School Council, transfer by making an order in writing, an officer or employee who has completed three years" continuous service at a posing:

Provided that the Board may not transfer an officer or employee who has attained the age of fifty-seven years;

5. Maintaining registers for the purpose of transfer.--The Board shall, for the purpose of transfer of officers and employees, maintain registers, with relevant particulars, of officers and employees of the Board and the Primary School Councils.

6. General Procedure of transfer-

(1) (a) An officer or employee, in case of a Primary School Council, shall submit his application for transfer, with reasons stated therein, to the Primary School Council and the Primary School Council shall forward such application, with its views thereon, to the Board.

(b) An officer or employee, in case of the Board, shall submit his application for transfer, with reasons stated therein, to the Board.

(c) A Primary School Council may, if it considers necessary in the interest of administration that an office or employee of such Primary School Council may be transferred, submit a proposal to that effect, with reasons stated therein, to the Board.

(2) The Board shall, within three months from the date of receipt of the application or, as the case may be, proposal referred to in sub-rule (1), take decision in respect of transfer of an officer or employee and, if the Board decides to transfer the officer or employee, the Board shall make an order, in writing, to that effect and communicate the order to the officer or employee and the concerned Primary School Council.

(3) (a) The concerned Primary School Council shall, on receipt of the order made by the Board under sub-rule (2) or, as the case may be, the communication of the decision under sub-rule (2) or rule 9 modifying the said order, issue as early as practicable, a release order in respect of its officer or employee with a direction upon him to join the new posting.

(b) The Board shall, upon making the order under sub-rule (2) or, as the case may be, modifying the said order under sub-rule (2) or rule 9, issue, as early as practicable, a release order in respect of its officer or employee with a direction upon him to join the new posting.

(4) The officer or employee shall, on receipt of the release order, join the new posting and submit a joining report to the Primary School Council in which he so joins or, as the case may be, to the Board.

(5) In case the officer or employee so transferred joins the posting in a Primary School Council, such Primary School Council shall endorse a copy of the joining report to the Board.

(6) The provisions of sub-rule (2), in so far as they relate to making and communicating the order, and sub-rules (3) to (5) shall apply mutatis mutandis in case of transfer of an officer or employee by the Board on its own motion.

(7) Nothing in this rule shall authorize any Primary School Council to issue the release order in respect of an officer or employee in a manner so as to take away or abridge his right under rule 1f."

3. In these writ petitions the Constitutional validity of section 19(1)(kk) of the said Act and the Amendment Act of 1987 as well as the provisions of sub-clause (f) of Rule 3, Rule 4 and sub-clause (c) of Rule 6 (1) of the 2005 Rules have been challenged. The petitioners have also applied for quashing the memorandum bearing No. 950/1(II) BPE/2011 dated 17 October, 2011. Certain other actions of the Board have also been questioned in these proceedings, but I have been addressed primarily on the above-referred points. The main argument of Mr. S.B. Bhunia, learned Senior Counsel appearing on behalf of the petitioners in these proceedings is that upon enactment of the Constitution (Seventy-third Amendment Act), 1992, the State legislature have lost their competence to enact on a subject covering primary education, and any subsisting State legislations covering that subject also stands invalidated. His further submission on this point is that by virtue of such amendment of the Constitution, which has been brought into effect in exercise of the Constituent power of the Parliament, the said Amendment Act supersedes any subsisting ordinary legislative instruments. On this point, reference has been made by Mr. Bhunia to Part IX and Entry 17 of Eleventh Schedule of the Constitution. In terms of Article 243G of the Constitution of India, the aforesaid Schedule has been introduced in the Constitution. Article 243G of the Constitution provides:--

"243G. Powers, authority and responsibilities of Panchayat.-Subject to the provisions of this Constitution the Legislature of a State may, by law endow the Panchayats such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats, at the appropriate level, subject to such conditions as may be specified therein, with respect to-

- (a) the preparation of plans for economic development and social justice;
- (b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule."

4. Entry 17 to the Eleventh Schedule of the Constitution stipulates:--

"17. Education, including primary and secondary schools."

5. Mr. Bhunia has submitted that the Constitutional mandate on the State for promoting village panchayats stems from Article 40 of the Constitution contained in Part IV, embodying the directive principles of state policy and on this count he relied on the judgments of the Supreme Court in the cases of *Keshavanda Bharati* [(1973)4 SCC 1461], and [Minerva Mills Ltd. and Others Vs. Union of India \(UOI\) and Others,](#) . Referring to these authorities, he has argued that an enactment to give effect to the Directive Principles of State Policy ought to have primacy over other legislations.

6. To contend that an employee of a District Primary School Council can be transferred by the Council only to schools within its territory, Mr. Bhunia brought to my attention the provisions of section 60(k) of the 1973 Act, which provides:--

"60. Duties of the Primary School Council.-(1) It shall be the duty of every Primary School Council-

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(K) subject to the prescribed conditions, to appoint teachers and other staff in primary schools, to transfer any such teacher or other staff from one primary school to another primary school within the jurisdiction of the same Primary School Council and to pay to teachers and other staff salaries and allowances, if any, at such rates as may be fixed by the State Government:"

7. The next limb of submission of Mr. Bhunia is that employment in a particular District Primary School Council constitutes a distinct cadre and there cannot be inter-cadre transfer. Each District Primary School Council is a body corporate as per the provisions of section 37(3) of the 1973 Act and appointment of its staff is made by an individual Council subject to prescribed conditions with prior approval of the State Government. The disciplinary authority for individual staff appointed by a Council is the Council only. Relying on the judgments of the Delhi High Court in the case of *Prem Parven v. Union of India* reported in [1973 (2) S.L.R. 659], and the case of *Prakash R. Borkar v. Union of India & Ors.* [(1983)3 S.L.R. 726] decided by a Division Bench of the Bombay High Court, it was asserted by him that there cannot be inter-cadre transfer. He sought to stress on the importance of the issue, asserting that it was not merely a service matter but a Constitutional issue. In the case of [State of Punjab Vs. Salil Sabhlok and Others,](#) , on the question of appointment to the post of Chairman of the Punjab Public Service Commission, it

was held that a Public Interest Litigation would be maintainable on this ground.

8. Once appointed to a substantive post, argument of the petitioners is, an employee acquires a lien over that post and if he is substantially appointed to another post then his lien against the other post disappears. For this proposition, the judgments relied upon on behalf of the petitioners are [Ramlal Khurana \(Dead\) By Lrs. Vs. State of Punjab and Others](#), and [Triveni Shankar Saxena Vs. State of U.P. and others](#), . This is the broad theme of argument of the petitioners. Learned counsel for the petitioners has relied on certain other authorities in support of their submissions on these counts. I do not consider it necessary to refer to all those decisions in this judgment. I shall, however, deal with the authorities which I find relevant for adjudication of the issues raised in these proceedings, in the subsequent paragraphs.

9. Learned Advocate General appearing on behalf of the State Government defended the constitutionality of the provisions of section 19(1)(kk) of the 1973 Act and the said Rules. His submission is that Article 243G introduced by the Seventy-third Amendment Act does not directly confer any power on the institutions of self-Government envisaged in Part IX of the Constitution of India. His case is that the provisions of Article 243G of the Constitution, which concern us in these proceedings, only empower the legislature of a State to endow the institutions specified therein with such powers and authority as may be necessary to enable them to function as institutions of self-Government. The items or entries specified in the Eleventh Schedule of the Constitution outlines the areas to which the power of the State legislature can be devolved on the Panchayats but the provisions of Article 243G cannot be construed to have already conferred full powers and responsibilities on the Panchayats in respect of all the entries specified in the said schedule.

10. Mr. L.K. Gupta, learned Senior Counsel appeared in this matter on behalf of the District Primary School Councils. His submission is that the field of legislation under the Constitution is contained in 7th Schedule, as per the provisions of Article 246 thereof. List II of the 7th Schedule contains the subjects on which the State Legislature has exclusive power of legislation and conceded that there may be some overlapping entries in List II of the 7th Schedule and the Eleventh Schedule. For instance, he referred to entries 14 and 18 of the State list as also entries 1 and 2 of the Eleventh Schedule. Entries 14 and 18 of the State List specify:-

"14. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases.

18. Land, that is to say, right in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization."

11. So far as Eleventh Schedule of the Constitution is concerned, entries 1 and 2 contained therein stipulate:--

"1. Agriculture, including agricultural extension.

2. Land improvement, implementation of land reforms, land consolidation and soil conservation."

12. He supports the learned Advocate General in respect of his argument that the provisions contained in Article 243G cannot be interpreted to disturb any subsisting State legislation. In addition, Mr. Gupta argues that the provisions of the said Article do not erode the supremacy of the State Legislature while dealing with the questions of devolution of power to the panchayats in relation to subjects on which they have exclusive legislative power and authority. He has taken me through various provisions contained in Part IX of the Constitution and submitted that in cases where the State in exercise of its Constituent power wanted to mandate imperative provisions, the expression "shall" has been used, and the expression "may" has been used in cases where the Parliament, in exercise of their Constituent power, wanted to leave with the legislature discretionary power. On this point he has referred to the provisions of Articles 243B(1), 243C(2), 243C(4) and 243E, where the auxiliary verb "shall" have been specified, whereas in Articles 243G, 243H and 243C(3) the auxiliary verb "may" has been applied. His further submission in this regard is that some inconsistency between existing statutes on panchayats after coming into operation of the Constitution (Seventy-third Amendment) Act, 1992 might be there and it is for this reason Article 243N was introduced, but on the question of devolution of power on the Panchayats, there has been no inconsistency. Article 243N of the Constitution of India lays down:--

"243N. Continuance of existing laws and Panchayats.--Notwithstanding anything in this Part, any provision of any law relating to Panchayats in force in a State immediately before commencement of the Constitution (Seventy-third Amendment) Act, 1992, which is inconsistent with the provisions of this Part, shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until the expiration of one year from such commencement whichever is earlier:

Provided that all the Panchayats existing immediately before such commencement shall continue till the expiration of their duration, unless sooner dissolved by a resolution passed to that effect by the Legislative Assembly of that State or, in the case of a State having Legislative Council, by each House of the Legislature of that State."

13. There have been common arguments in all these writ petitions on these points. In W.P. No. 283 (W) of 2012, the petitioner Siddhartha Samanta has sought to support his case on certain additional points. It has been contended that he is an elected member to the Council in terms of section 37 of the 1973 Act and if he is transferred, that would impact the composition of the Council. On this point he has relied on a judgment of the Supreme of India in the case of [Madan Mohan](#)

[Choudhary Vs. The State of Bihar](#), to contend that one cannot do indirectly what cannot be done directly.

14. It has further been submitted on his behalf that his spouse is working in the Bankura and the son the petitioner is also unwell. In this regard he sought to take shelter of clause 8 of the 2005 Rules, which provides:--

"8. Transfer in certain circumstances.--(1) Where spouse of an officer or employee is working in a Primary School Council or the Board, or is a Government employee, the Board shall, while taking decision in respect of the transfer, make efforts to keep both of them at the same station, as far as practicable, so that they could serve without living separately.

(2) Where in the family of an officer or employee there is a patient suffering from a chronic or serious disease, the Board shall, while taking decision in respect of the transfer the officer or employee to a Station where facilities for treatment of the patient are available; and the normal period of stay of an officer or employee at particular station may also be extended on ground.

Explanation.--For the purposes of this sub-rule, "family", in relation to an officer or employee, shall mean-

(a) spouse;

(b) minor sons;

(c) Unmarried daughter;

(d) widowed daughter, if any, who has not been remarried and is residing with the officer or employees; and

(e) dependent parents, of the officer or employee."

15. I shall first deal with the question as to whether the provisions of section 19(1)(kk) of the West Bengal Primary Education Act 1973 and the provisions of Clauses 3(f), 4 and 6(1)(c) and 6(2) of the 2005 Rules are ultra vires the provisions of Article 243G or any other provision of the Constitution or not. Submission of the petitioners in this regard proceeds on the basis that the expression "may" in Article 243G of the Constitution ought to be construed as "shall", implying that it is the mandate of the Constitution that the entire subject of primary education along with service conditions of the staff engaged for the purpose of imparting primary education shall vest in the zilla parishads, or other panchayat institutions on the strength Entry 17 of Eleventh Schedule to the Constitution. On this premise, case is sought to be made out on behalf of the petitioners that since the aforesaid Amendment of the Constitution has been effected for implementation of the Directive Principles of the State Policy, as contained in Article 40 of the Constitution, the provisions of Part IX of the Constitution would have overriding effect on any ordinary legislation covering the designated field. Upon coming into effect of the

Constitution (Seventythird Amendment) Act, the District Primary School Councils, which are under the overall administrative umbrella of the State Government have been delinked and power and authority of such institutions now vest in the Panchayats. The second limb of submission of the petitioners on the same point is that the said Amendment Act of the Constitution having been legislated in exercise of constituent power of the Parliament, provisions of the Article 243G read with Eleventh Schedule to the Constitution ought to have primacy over the Primary Education Act, under which administrative control over the institutions imparting primary education has been vested on the State Government. In the case of [Sasanka Sekhar Maity and Others Vs. Union of India \(UOI\) and Others](#), a Constitution Bench of the Supreme Court held:--

"35. As regards the submission that Parliament cannot in exercise of its constituent power under Article 368 validate a State law, it seems to us that the entire submission proceeds on a misconception arising from failure to distinguish between a law made in exercise of legislative power and law made in exercise of the constituent power. When Article 31-B was introduced in the Constitution by the Constitution (First Amendment) Act, 1951, it validated retrospectively 13 Acts specified in the Ninth Schedule, which, but for this provision, were liable to be impugned under Article 13(2). Article 31-B conferred constitutional immunity to such laws (all being enactments of State Legislatures) and Parliament alone could have done so by inserting the said Article in the Constitution in exercise of its constituent power under Article 368. In substance and reality it was a constitutional device employed to protect State laws from becoming void under Article 13(2). It will appear clear that the language in Article 31-B is virtually lifted from Articles 13(1) and (2). While Article 13(2) invalidates legislation, which takes away or abridges the rights conferred by Part III, Article 31-B "extends protective umbrella" to such legislation if it is included in the Ninth Schedule except on the ground of want of legislative competence."

16. The importance of the panchayats in the context of socio-political system prevailing in this country cannot be ignored. In the cases of [Dr. K. Krishna Murthy and Others Vs. Union of India \(UOI\) and Another](#), [Shri Girish Vyas and Another Vs. The State of Maharashtra and Others](#), [Ravi Yashwant Bhoir Vs. District Collector, Raigad and Others](#), and [Village Panchayat, Calangute Vs. The Additional Director of Panchayat-II and Others](#), the importance of the institutions and the administrative mechanism contemplated in Parts IX and IXA of the Constitution has been highlighted. In the case of Ravi Yashwant Bhoir (supra), it has been observed:--

"22. Amendment in the constitution by adding Parts IX and IX-A confers upon the local self-government a complete autonomy on the basic democratic unit unshackled from official control. Thus, exercise of any power having effect of destroying the Constitutional institution besides being outrageous is dangerous to the democratic set-up of this country. Therefore, an elected official cannot be

permitted to be removed unceremoniously without following the procedure prescribed by law, in violation of the provisions of Article 21 of the Constitution, by the State by adopting a casual approach and resorting to manipulations to achieve ulterior purpose. The Court being the custodian of law cannot tolerate any attempt to thwart the institution."

17. I accept the submission of Mr. Bhunia that a statute enacted to give effect to the Directive Principles of State policy would have superior legislative strength and Courts ought to give effect to the provisions of such statute leaning in favour of the latter if there is any inconsistency in the provisions of such statute with a law enacted through regular legislative process. Mr. Gupta had argued that the State had legislative competence to enact on the subject of primary education and this legislative power was derived from Entry 25 of List III to the 7th Schedule. He also pointed out that the 1973 Act had obtained assent of the President. The said Entry specifies:--

"[25. Education, including technical education, medical education and universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I; vocational and technical training of labour.]"

18. The question which is required to be decided in these proceedings is as to whether even if such law was enacted through exercise of valid legislative power, such law could remain valid in the event the power of the Panchayats on that subject, as envisaged in Article 243G of the Constitution of India was held to be absolute and items or entries specified in Eleventh Schedule to the Constitution were construed to have been exclusively brought within the domain or jurisdiction of the Panchayats, even in the absence of any specific State Legislation to that effect. If that was the case, then the aforesaid provisions of the 1973 Act and the 2005 Rules would stand invalidated by now by virtue of the provisions contained in Article 243N of the Constitution.

19. The expression used in Article 243G is "may" while specifying the duty or obligation on the part of the State legislature to endow the Panchayats with the power and authority in relation to items listed in the Eleventh Schedule. The aforesaid provision of the Constitution contemplates devolution of power on the Panchayats in three spheres. The first is for endowing them with such power and authority which would be necessary function as institutions of self-government. It is also provided that the law which may be passed by the State Legislature may contain provisions for devolution of powers and responsibilities upon the panchayats at the appropriate levels subject to conditions which might be specified in such law and such law could be with response to the preparation of plans for economic development and social justice and the implementations of schemes for economic development and social justice as may be introduced to them including those in relation to the matters listed in the Eleventh Schedule.

20. Mr. Bhunia has referred to two decisions of the Supreme Court in the cases of [State of Uttar Pradesh Vs. Jogendra Singh](#), and of [Vijay Vs. State of Maharashtra and Others](#), in support of a construction introducing mandatory element in the expression "may" in Article 243G of the Constitution. In the case of Jogendra Singh (supra), dealing with certain provisions of the Uttar Pradesh Disciplinary Proceedings (Administrative Tribunal) Rules, 1947, it has been held:--

"8. Rule 4(2) deals with the class of gazetted government servants and gives them the right to make a request to the Governor that their cases should be" referred to the Tribunal in respect of matters specified in clauses (a) to (d) of sub-rule (1). The question for our decision is whether like the word "may" in rule 4(1) which confers the discretion on the Governor, the word "may" in sub-rule (2) confers discretion on him, or does the word, "may" in sub-rule (2) really mean "shall" or "must"? There is no doubt that the word "may" is capable of meaning "must" or "shall". But it is well settled that the word "may" is capable of meaning "must" or "shall" in the light of the context. It is also clear that where a discretion is conferred upon a public authority coupled with an obligation, the word "may" which denotes discretion should be construed to mean a command. Sometimes, the legislature uses the word "may" out of deference to the high status of the authority on whom the power and the obligation are intended to be conferred and imposed."

21. The other authority, being the decision case of Vijay (supra) deals with the question as to whether a person upon being elected as a member of gram panchayat could continue in that position after being elected as a councillor of the zilla parishad. Holding of two posts of this nature was prohibited under the provisions of Bombay Village Panchayats Act, 1958 by way of an amendment which was introduced with effect from 8th August, 2003. The appellant was elected as a member of gram panchayat in the year 2000 and on the strength of being appointed prior to coming into operation of the Amendment Act, he argued that the prohibition ought to apply prospectively and his case would not attract the disqualification. This stand was not accepted in that judgment. The only point on which this authority may be applicable in this batch of cases is the opinion expressed in this judgment that the legislative policy of a statute brought in terms of the Constitution (seventy-third Amendments) Act was intended for the purpose of bringing democracy at the grass roots.

22. Referring to Article 243N, Mr. Bhunia had argued that it was incumbent upon the State to remove the inconsistencies and bring primary education within the functions of the Panchayat system having regard to Entry 17 of the Eleventh Schedule of the Constitution. He wants this Court to invalidate the subsisting statutes guiding the field applying the principle of beneficial construction, relying on the decision of the Supreme Court in the case of [Union of India and Others Vs. Filip Tiago De Gama of Vedem Vasco De Gama](#), . He referred to the provisions of section 42(1)(a) and section 180 of the West Bengal Panchayats Act 1973 to contend that the

gram panchayats have been provided sufficient funds for carrying out the aforesaid work. In that context it was his submission that the education cess levied in terms of section 78 of the West Bengal Primary Education Act 1973 read with section 70 of the said statute is inconsistent with the provisions of the West Bengal Panchayat Act 1973 in the light of the provision of Article 243N of the Constitution of India. Section 78 of the 1973 Act provides for levy of cess on all immovable properties on which road and public works cesses are assessed according to the provision of the Cess Act 1880 and it appears from the scheme of the 1973 Act that such cess is going to the Primary School Councils and not to the zilla parishads or other institutions of panchayats. Submission on behalf of the respondents on the other hand is that the State Legislature has enacted the 1973 Act in terms of power conferred upon them under Entry 25 of List III of the 7th Schedule and the legislative power of the State Legislature to make such enactment cannot be questioned, such power being supported by this specific entry.

23. The importance of the Panchayat system, in the context of this country, as I have already observed, is undisputed. But the issue which requires to be addressed in these proceedings is whether the degree of importance of such institutions could be used as an interpretative tool for construing the provisions of Article 243G of the Constitution, for holding that there is a positive mandate on the State legislature to make law for endowing the Panchayats with powers and authority in relation to all the subjects covered by the Eleventh Schedule of the Constitution. In my opinion, the aforesaid provision mainly acts as the guiding principle which the State legislature ought to follow for the purpose of giving effect to the mandate contained in Article 40 of the Constitution, read with various provisions of Part IX of the Constitution.

24. It is evident from the aforesaid provision that a legislative exercise is required to be carried out by the State Legislature keeping in mind the overall objective specified in Article 40 and the entries contained in the Eleventh Schedule for the purpose of determining how the Panchayats should be endowed with the power and authorities to function as institutions of self-government. This Constitutional provision also leaves it to the wisdom of the State legislature to determine to what extent such devolution of powers and responsibilities upon the panchayats would be effected and what would be the conditions for devolution of such power. Sub-clause (b) of Article 243G deals with empowering the panchayats with respect to implementation of schemes pertaining to economic development and social justice which might be introduced including those in relation to the matters provided in the Eleventh Schedule. The very fact that the State Legislature is required to undertake a legislative exercise for the purpose of endowing panchayats with power pertaining to implementation of schemes in relation to entries in the Eleventh Schedule, in my opinion, leads to the inference that this exercise is within the legislative domain of the State Legislature and not a specific mandate of the Constitution on the strength of which the State legislature could be compelled to vest or endow the Panchayats

with all matters pertaining to entries prescribed in the Eleventh Schedule. This issue has been left to be decided by the State Legislature. The ratio of the judgment of the case of Jogendra Singh (supra) does not apply in the instant case as in that authority, the expression, "may" has been construed as "shall" as the Supreme Court found that the whole purpose of the Rule which was the subject of controversy before the Court in that case would have been frustrated if the word "may" in the said Rule was not construed as "shall". On the other hand, in my opinion, if the expression "may" is given the meaning of "shall", in the context of the aforesaid provision, and the constitutional mandate is held to be imperative, even then legislative exercise would be required to be undertaken to shift obligations pertaining to primary education to Panchayats from the Council or other statutory bodies which are functioning in this field now. Mr. Gupta had referred to different provisions of Part IX of the Constitution, in which the auxiliary Verbs "may" and "shall" have been employed. In the case of [M/S. Mahaluxmi Rice Mills and Others Vs. State of U.P. and Others,](#), dealing with a statutory provision in which both these expressions had been used, the Supreme Court observed:--

"It is significant to note that the word used for the seller to realize market fee from the purchaser is "may" while the word used for the seller to pay the market fee to the Committee is "shall". Employment of the said two monosyllables of great jurisprudential import in the same clause dealing with two rights regarding the same burden must have two different imports."

I am of the view that the same principle for interpretation ought to apply while dealing with different provisions of the same part of the Constitution.

25. Even if I accept the argument of the petitioners on this count, then also the Panchayats would not be automatically endowed with power and authority over primary education in the absence of appropriate legislation. But I do not accept the petitioners' argument on this count. On a plain reading of Article 243G of the Constitution of India, it appears that it is within the discretion of the State Legislature to confer panchayats power and authority to enable them to function as institutions self-Government. Mr. Bhunia has relied on the judgment of the Supreme Court in the case of State of U.P. v. Jogendra Singh (supra) in support of his submissions. Citing the Constitution Bench judgments of the Supreme Court in the cases of [State of Kerala and Another Vs. N.M. Thomas and Others,](#) and [H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior and Others Vs. Union of India and Another,](#), he wants to give preeminence to the entries in the Eleventh Schedule of the Constitution over entries in 7th Schedule. On the basis of such interpretation, he wanted this Court to construe the word "may" as "shall".

26. Further submission of Mr. Bhunia was that the mere fact of having obtained Presidential assent cannot be an escape route if a legislation is otherwise inconsistent with any provision of the Constitution. On this point he cited two authorities, [Grand Kakatiya Sheraton Hotel and Towers Employees and Workers](#)

[Union Vs. Srinivasa Resorts Ltd. and Others,](#) and [Malpe Vishwanath Acharya and Others Vs. State of Maharashtra and Another,](#) . I accept the legal proposition on which these two judgments have been cited.

27. Learned counsel for the petitioners had primarily relied on two principles of constitutional interpretation on the strength of which he had argued that there is mandatory provision in the constitution after the seventy-third amendment of the Constitution under which all powers and authorities pertaining to entries contained in the Eleventh schedule of the Constitution would vest in the Panchayats. The first principle he referred to was the primacy of a law enacted to give effect to the State policy contained in Part IV of the Constitution. Secondly, he submitted that constituent power of the Parliament is superior to the normal legislative power, and in this case Article 243G of the Constitution along with Eleventh schedule thereof having been introduced by exercise of such constituent power, the aforesaid provisions of the Constitution ought to prevail over the provisions of the 1973 Act. Different authorities were cited in support of these propositions to which I have referred in the preceding paragraphs. I do not consider it necessary to reproduce these decisions or relevant passages from these judgments as I accept the legal principle laid down in these authorities. But to what extent these authorities aid the petitioners?

28. The case run by the petitioners, and sought to be anchored in these authorities is that Part IX of the Constitution read with the entries in the Eleventh Schedule exclusively vests the Panchayats with powers and authorities in relation to subjects covered by that Schedule. Such power and authority, according to Mr. Bhunia, is derived from Article 243G of the Constitution. It is in this context he wants to construe the expression "may" in the aforesaid Article to have imperative implication, to mean "must" or "shall." As of now, there is no statute enacted by the State legislature endowing Panchayats full power and authority over primary education. There is no provision in Part IX or elsewhere in the Constitution under which Panchayats gain direct control or authority over primary education. Provisions of Article 243G also cannot be construed to have denuded the State legislature of its power to legislate on the subject of primary education.

29. Even if it is assumed that the expression "may" in the aforesaid provision is to be interpreted as "shall", then also the petitioners' case on this point would not succeed. In such a situation, the aforesaid provision would carry a mandate on the State legislature to make appropriate enactment. Provisions of Article 243G by itself do not vest the Panchayats with power and control over primary education within their territory. Nor the State legislature loses its legislative competence over that subject under the provisions of Article 243G of the Constitution. I have examined earlier the provisions of the said Article, and in my opinion the manner in which Article 243G has been drafted in exercise of constituent power of the Parliament, the only interpretation would be that the said Article vests the State legislature with

discretion to decide the manner in which, and to what extent Panchayats shall be endowed with power and authority over subjects and institutions covered by the entries in the Eleventh schedule of the Constitution. The legislature of this State has not vested the Panchayats with such power or authority. Moreover, while applying the tool of statutory interpretation in respect of a Constitutional provision to vary its plain meaning on the basis of legislative intent, greater caution is required to be exercised by the Courts, in comparison to construction of regular statutory provisions. There is no judicially enforceable mandate on the State Legislature to endow the Panchayats with full power and authority in respect of primary education, as enumerated in Eleventh Schedule to the Constitution. The Constitution does not vest the High Courts with jurisdiction to require the legislature of a State to make any enactment. Such power and authority is exclusively within the domain of the State legislature.

30. Next part of submission of Mr. Bhunia is on the question of transfer of the petitioners from one District School Council to another by the Board. Appointing authorities of the petitioners are the respective Councils, and each Primary School Council under the 1973 Act is an independent body. Service in such Councils forms distinct cadre. I accept the submissions made on behalf of the petitioners on the status of the Councils and their employees to this extent. What I will examine now is as to whether there is absolute bar on inter-cadre transfer, as has been argued by Mr. Bhunia. In order to explain the status of individual Primary School Councils, the provisions of section 37(1) and (3) of the 1973 Act have been referred to. The aforesaid provisions stipulate:--

"S. 37. District Primary School Councils.--(1) The State Government shall, by notification, establish for each district excluding the areas included in Calcutta and specified municipalities, with effect from such dates as may be specified in the notification, a District Primary School Council bearing the name of the district.

(.)

(.)

(3) A District Primary School Council shall be a body corporate with perpetual succession and common seal, shall be entitled to acquire, hold and dispose of property, to enter into contracts and to do all other things necessary for the purpose of this Act, and shall by its corporate name sue and be sued."

31. Section 56 of the Act specifically relates to the power of a District Primary School Council to appoint the staff like the petitioners, and the aforesaid provision reads:--

"S. 56. Other staff of the Primary School Council-

(1) Subject to the prescribed conditions and with prior approval of the State Government, a Primary School Council may appoint such officers and other staff as may be considered necessary for carrying out the duties under the Act.

(2) The scale of pay and allowances in respect of such officers and other staff and other terms and conditions of their appointment shall be such as may be determined by the State Government from time to time.

(3) Subject to the prescribed conditions, a Primary School Council may award any punishment including dismissal or removal on the members of its staff other than the Secretary and the Finance Officer:

Provided that no punishment other than censure of a teacher or a School Mother of Primary School be awarded except on the recommendation of the Discipline Committee."

32. Similarly the Board has its own origin in Section 3 of the 1973 Act and section 17 of the Act provides the manner in which the staff of the Board shall be engaged. The said provision reads:--

"S. 17. Secretary, Finance Officer and other persons in the service of the Board.-

(1) The Board shall have a Secretary who shall be appointed by the State Government.

(2) The Board may, subject to the prior approval of the State Government, create such posts of officers and employees as it considers necessary for carrying out the purposes of this Act:

(3) The Board may, subject to the prior approval of the State Government, create such posts of officers and employees as it considers necessary for carrying out the purposes of this act:

Provided that no officer or employee shall be appointed to any post carrying a monthly salary of three hundred rupees or more without the prior approval of the State Government.

(4) The terms and conditions of service and the scales of pay and allowances, if any, shall, as respect the Secretary, the Finance Officer, if any, and other officers and employees, be such as may be fixed by the State Government.

(5) The pay and allowances of the Secretary and the Finance Officer, if any, shall be paid out of the fund of the Board.

(6) Subject to the general control and supervision of the President, the Secretary shall be the principal administrative officer of the Board. He shall be entitled to attend and speak at any meeting of the Board, but shall not be entitled to vote.

(7) The Finance officer shall perform such functions and discharge such duties as may be prescribed.

(8) Subject to prescribed conditions, the Board may award any punishment including dismissal or removal of the members of its staff other than the Secretary and the

Finance Officer."

33. What the provisions of section 19(1)(kk) of the 1973 Act has sought to introduce is to confer the Board with additional power to transfer an officer or employee from one Primary School Council to another. The power to transfer any teacher or non-teaching staff from one primary school to another within the district vests in the concerned Primary School Council.

34. Argument of the petitioners on this point is that once a person is born into a cadre under the control of a single appointing and disciplinary authority, there cannot be a question of transferring such person to another cadre. In this regard, the Division Bench judgment of the Bombay High Court in the case of *Prakash R. Borkar v. Union of India & Ors.* (supra) has been relied upon. In this judgment, it has been held:--

"9. The importance of the concept of cadre arises on account of several reasons. A person when appointed to a particular post in a cadre has the future career before him charted in one sense. He knows what is the strength of the cadre in which he has been appointed; he knows the post to which he can reasonably aspire in due course of time and the prospects of the aforesaid vertical promotion on the basis of the list of the seniority prepared from time to time. The rules of appointment to the said cadre will also tell him as to how many people will be entering the cadre from different sources, if appointments from different sources are provided for in the rules. If he is transferred from one department to another in the same cadre he is not deprived of the benefits which he has acquired till such transfer by service in the same cadre. He will also not lose his place in the seniority list which will invariably be prepared on the basis of the cadre. A person cannot be transferred from one cadre to another because such a transfer will necessarily affect the other persons in the seniority list. Such an eventuality will necessarily arise when we bear in mind that seniority lists are necessarily prepared for different cadres.

(..)

(11) The question whether a Government servant who is recruited to a particular cadre can be compelled to serve outside the cadre fell for determination before a single Judge of the Delhi High Court in *Prem Parveen v. Union of India* (1973) 2 Serv LR 659. It was held by the learned single Judge of the Delhi High Court that normally it is to be expected that the Government employees who join a particular cadre would have the range of their transferability determined within that cadre. Therefore it did not stand to reason that a person who is recruited to a particular cadre should be compelled against his wishes to serve outside the cadre even when the permanent post to which he holds a lien exists within that cadre. According to the said judgment all that Fundamental Rule 15 means is that even if a Government employee holds a lien on a particular post he has no vested right to continue to remain in one particular post all the time and could be transferred to another post,

of course within the same cadre, because his lien is only the title to hold substantively a permanent post to which he has been appointed substantively."

35. The other authority relied on by the learned counsel for the petitioners on the same principle of law is the judgment of the Delhi High Court in the case of Prem Parveen v. Union of India & Ors. (supra), which has been discussed by the Division Bench of the Bombay High Court in the case of Prakash R. Borkar (supra) In this judgment it has been held:--

"7. It will thus be seen that in cases where the Government servant is transferred to ex-cadre post he is considered on deputation with the result that he is entitled to deputation allowance as per the various orders of Government of India. If the contention of Mr. Chadha was correct that the Government was entitled under F. Rules 15 to transfer any Government servant from any post to a post even outside the cadre (of course carrying the same pay) it is not understood why such elaborate rules and principles should have been made by the President providing the circumstances and the manner of paying the deputation (duty) allowance upto 20 per cent of the employees basis pay when a Government servant is transferred to an ex-cadre post. It is apparent that the orders by the President were necessitated because F. R. 15 provides only for transfer to a post outside the other post but within the cadre and not to a post outside the other post but within the cadre and not to a transfer to a post outside the cadre."

36. As a proposition of law under the service jurisprudence, it is established that transfer of an employee from a particular cadre to another cadre ordinarily is not permissible. But question arises in these proceedings is as to whether such inter-cadre transfer would be impermissible even if power to effect such transfer is vested on an authority by a specific legislation. So far as power of the Board to transfer an employee from one Council to another is concerned, statute permits such transfer. Under section 19(1)(kk) of the Act, the Board has the power to effect inter-council transfer. In the two judgments cited on behalf of the petitioners, the legality of transfer was examined in the light of the provisions of clause 15 of the Fundamental Rules, which permitted transfer from one post to another only under certain defined circumstances, but no provision was made for inter-cadre transfer.

37. I do not think that there is much support for the proposition of law that an authority other than the appointing authority cannot effect transfer even if law empowers the former to do so. On the point of inter-Council transfer, on behalf of the petitioners it was argued that they had lien over the posts in a particular Council and their lien could not be extinguished by sending them to another Council. Transfer can be challenged on Constitutional ground even if such transfer is sought to be authorized by law, if such transfer is mala fide. But in these cases, what is being sought to be established is some form of vested legal right of an employee to remain in his own cadre. Of course, there can be functional difficulty in shifting an employee from one cadre to another cadre in that if in the new cadre, he is placed

as a fresh appointee, he would lose his seniority. That would constitute arbitrary action on the part of the employer or the transferring authority as seniority has substantial impact on the service of a person in public employment. In these cases, however, Mr. Gupta has submitted that all the employees against whom transfer order has been issued would be placed in the seniority list of the new cadre on the basis of their dates of appointment. If that practice is followed, then the perceived anomaly arising from such transfer would be effaced out.

38. To protect the right of the petitioners to remain in the Council in which they are serving now, it has also been argued that the petitioners have acquired lien on the said posts on their permanent appointment and the petitioners would lose their lien in the event they are transferred in the manner envisaged in the impugned memorandum. On this submission, the decisions relied upon are *Ramlal Khurana v. State of Punjab* (supra) and *Triveni Shankar Saxena v. State of U.P.* (supra).

39. Neither of the two authorities, however, lay down a legal principle in absolute terms that even if legislation permits inter-cadre transfer, on the basis of any vested legal right superseding such legislative act, holder of a post in public employment can resist transfer which would take him to another cadre, or the lien of such employee would be undetachable. This question was not in issue in either of these two authorities. In the case reported in [State of Karnataka and Others Vs. K. Govindappa and Another](#), the subject of controversy was reservation in a single post, and in that case question arose as to whether a single post of lecturer in a particular subject could constitute a cadre. It was in that context distinction was sought to be made in respect of the terms "cadre", "post" and "service". In the case of [J.S. Yadav Vs. State of U.P. and Another](#), under challenge was a notification issued by the State of U.P. in the year 2006 stipulating that to be eligible to be a member of the State Human Rights Commission, one should be a sitting or retired Judge of the High Court, or a District Judge with a minimum seven years' experience in that capacity. When the appellant was appointed as a member of the Commission, the eligibility criteria did not require minimum seven years' experience as a District Judge. One of the contentions in that case was that the time he served as Additional District Judge ought to have been computed to assess the experience stipulations, as the post of District Judge and the Additional District Judge constituted a single cadre. It is in this perspective the Supreme Court examined the implications of the expression "cadre", "post" and "service" referring to the decision of the [State of Karnataka and Others Vs. K. Govindappa and Another](#). The judgments of the Supreme Court in the cases of *K. Govindappa* (supra) and *J.S. Yadav* (supra) explain the factors which would constitute a cadre, but does not deal with the question of inter-cadre transfer.

40. In the judgment of the Bombay High Court and the Delhi High court, the legality of transfer was examined in the light of the provisions of Clause 15 of the Fundamental Rules, which permitted transfer from one post to another only under

certain defined circumstances. In the case of Prem Pravin (supra), the scope of power of the President provided in Clause 15 of the Fundamental Rules read with Clause 14 thereof was examined, and on construction of these Rules, it was observed that the said Rule meant that even if a Government employee held a lien on a particular post, he has no vested right to continue to remain in one particular post. He could be transferred to another post but within the same cadre. The same view has been expressed by the Division Bench of the Bombay High court in the case of Prakash R. Borkar (supra). None of these decisions, however, are authorities for the proposition that right to remain in a cadre is an unbreachable right, and even legislations cannot mandate inter-cadre transfer.

41. The expression "lien" implies the right of an individual in public employment to hold the post substantively to which he is appointed. But no such employee can claim "lien" to a particular post to be inalienable right. Conditions for lien are always subject to legal stipulations. In the case of Ramlal Khurana (supra), it has been held that when a person with a lien against a post is appointed substantively to another post, he would acquire lien in the latter post. In such a situation, his lien against the previous post would disappear. The case of Triveni Shankar Saxena (supra) is an authority for the proposition that unless an employee holds a post in a substantive capacity on permanent basis, such employee cannot claim lien on that post.

42. None of these authorities lay down in clear term the proposition of law the petitioners are seeking to canvass. On the question of loss of lien also, the two decisions cited on behalf of the petitioners do not establish that lien in respect of a particular post or cadre is undetachable. The law on this subject is that once appointed in substantive posts in permanent capacity, an employee would acquire lien thereof. If the employee is transferred to another post in similar capacity, implying substantive engagement in permanent posts, the employee would lose his lien over the original post but shall acquire lien in the post to which he is transferred.

43. The petitioners thus cannot sustain their case that inter-cadre transfer is altogether impermissible, and once they have acquired lien over a post, such lien could continue during the entire length of their engagement in such post. Once appointed in substantive capacity in a permanent post, the petitioners can claim right to remain in posts fulfilling such characteristics, unless of course such right is lost by some penal measures or through voluntary action. In these cases, once the petitioners are transferred, they would acquire lien on such transferred posts on their joining and their lien in the earlier posts shall stand extinguished. But their past service shall have to be given credit.

44. The petitioners in these proceedings have been able to establish that each Council stands as an independent entity under the statute, and each Council is the appointing as also disciplinary authority over their own staff. But there is no support for the legal proposition argued by the petitioners that an authority other than the

appointing or disciplinary authority or an independent body altogether cannot effect transfer, even if law permits such transfer. This is also not a case where such power to effect transfer is being handed over to a body altogether foreign to the" service. The activities of the Board and the Council are guided by the same statute. These bodies or authorities have genetic links and inter-related activities.

45. As regards the additional grounds on which the writ petitioner is seeking to resist transfer in W.P. No. 283(W) of 2012, I do not think these are legally sustainable. Election of the petitioner to the Council by itself does not confer on him any legal right to remain within the particular Council in the absence of any specific legal provision to that effect. If he has to give up his membership in the Council, because of his transfer, then that vacancy would have to be filled up in the regular process. The order of transfer cannot be invalidated on this ground. Under the law, there is no bar on the transferring authority in effecting transfer of a member of the Council. If there was such a bar, then the legal principle that one cannot do something directly cannot be done indirectly would have applied. Otherwise, a case of mala fide on sufficient factual basis would have to be made out to thwart an order of transfer of this nature. No such case has been made out by the petitioner in W.P. No. 283(W) of 2012. As regards his inconvenience on the ground of illness of his children, or his spouse being posted in the same district in which he was appointed, these are factors for consideration of the administration. On these grounds, judicial review of the administrative decision to transfer an employee would not be sustainable.

46. In such circumstances I am of the view that no illegality has been committed by the Board by issuing the impugned memorandum. I also hold that the provisions of section 19(1)(kk) of the 1973 Act as also the aforesaid Rules of 2005 providing for inter-District transfer of the staff of a particular District Primary School Council to another Council to be valid.

47. On transfer, however, the individual candidates shall be placed in the seniority list on the basis of their dates of appointment. Further, considering the fact that these writ petitions were pending, I direct that if the petitioners join their posts on transfer, they shall be permitted to do so within a period of six weeks and no penal step or departmental action shall be taken against them for not joining the respective, posts on transfer earlier.

48. The writ petitions shall stand dismissed, subject to the conditions specified in the preceding paragraph. There shall be no order as to costs.

Urgent certified photocopy of this order be made forthwith available to the parties if applied for, subject to compliance with all necessary requisite formalities.