

03. 17.02.2022
BD Ct.04

MAT 139 of 2022
CAN 1 of 2022

(Through Video Conference)

Md. Kutubuddin Ahamed

-vs-

State of West Bengal & Ors.

Mr. Bikash Ranjan Bhattacharya

Mr. Shamim Ahmed

Ms. Gulsanwara Pervin

Ms. Ambia Khatun

... for the Appellant.

Mr. Bhaskar Prasad Vaisya

Mr. Pinaki Bhattacharya

... for the respondents D.P.S.C.

Initially we intended not to interfere with the impugned order where substantial relief had been granted by the Single Bench to the appellant but an interesting point was urged by Mr. Bhattacharyya, learned Senior Advocate appearing for the appellant on the interpretation of various provisions of the Rules and the clarificatory notifications issued subsequently. The case proceeds as simple as that the petitioner being Teacher in Primary School has been transferred to another school and the order of transfer is challenged before this Court. Ordinarily the High Court refuses to exercise power enshrined under Article 226 of the Constitution more particularly, in

the matter pertaining to a transfer made in routine manner without imputing any stigma or adverse remark. But such power is not automatically excluded, if the Court finds that the order of transfer is an outcome of *mala fide* intent or with oblique motive or in violation of the statutory Rules framed in this regard.

Admittedly, the West Bengal Primary Education (Transfer of Teachers including Head Teacher) Rules, 2002 is framed in exercise of power conferred under section 106 of the West Bengal Primary Education Act, 1973 containing an exhaustive provisions relating to the power, procedure and conditions of transfer. The interesting points have been raised by Mr. Bhattacharya on the harmonious construction of Rules 4 and 6 of the aforesaid Rules to the extent that the proviso appended to Rule 4, in effect, controls an enabling provision and must be given proper adherence and not to be used as surplusage.

According to Mr. Bhattacharya, the second proviso brought the concept of surplus teachers according to the roll strength required to be

prepared in terms of Rule 3 which has, in fact, abridged and/or created a bind in a routine transfer in the guise of the administrative fiat. According to him, the surplus teacher shall be transferred either *suo motu* or on an application of the concerned teacher without maintaining the time limit of service in order to augment rational adjustment of the teachers in the primary school to meet out the deficit. Since the surplus teacher has not been defined in the said Rules, a clarificatory notification was issued on 13.09.2013 indicating how the Manual Register pertaining to a surplus teacher shall be maintained. The aforesaid clarificatory notification clearly envisages that the teacher who crossed the age of 55 years as on 1.1.2014 shall be kept outside the ambit of the surplus teacher. The emphasis is thus made on such clarificatory notification in juxtaposition with the relevant Rules in order to impinge the decision of transfer being violative of the statutory provisions.

According to Mr. Vaisya, learned advocate, appearing for the West Bengal Board of District Primary School Council, North 24 Parganas, the Court should refrain from exercising the power

under Article 226 of the Constitution, more particularly, when there is an exhaustive remedy provided by way of an appeal in the Rule itself. Our attention is drawn to Rule 10 of the said Rules providing the remedy by way of an appeal.

It admits no ambiguity that the High Court exercising powers under Article 226 of the Constitution should be slow in interfering with the order of the original authority when an efficacious alternative remedy by way of an appeal is provided in the statute or the Rule itself. However, there is no absolute bar in exercising the power of judicial review enshrined under Article 226 of the Constitution, even there appears to be an alternative remedy if the Court finds that the order is palpably illegal, smacked of malice and shocked to the conscience of a Court. We do not want to elaborate the grounds on which the power of judicial review shall be exercised and, therefore, we do not intend to dilute or expand the other conceivable grounds in the instant matter.

The fact remains that the aforesaid plea was not taken before the Single Bench that because of the efficacious alternative remedy, the power of judicial review should not be exercised rather the

respondents invited the Court's attention to various provisions and the decision on merit. Even the impugned order has not been challenged by the respondents and therefore it is too late in a day to contend that because of the existence of alternative remedy by way of an appeal, the Writ Court should not interfere.

Be that as it may, the law is somewhat settled in the field of the service jurisprudence pertaining to transfer that the order of transfer can be interfered by the Court in exercising the power of judicial review if the same is an outcome of *mala fide* exercise of power or violative of any statutory provisions or passed by an authority not competent to do so (see (2004) 11 Supreme Court Cases 402 in the case of **State of U.P. & Ors. –vs- Gobardhan Lal**).

However, the respondents placed reliance upon the judgment of the Supreme Court in the case of Government of **Andhra Pradesh –vs- G. Venkata Ratnam** reported in **(2008) 9 Supreme Court Cases 345** wherein High Court interfered with the order of transfer on an extraneous factors in pursuit of discharging of the judicial duties and castigate the respondent authorities in acting in a

lopsided manner which would not augment the interest of the public. The Apex Court held;

“We are surprised to see the High Court castigating the respondent’s transfer order as lacking in bona fides on such flimsy and fanciful pleas advanced by the respondent. We are more than satisfied that the High Court’s finding regarding lack of bona fides in the matter on the part of the State Government is completely unfounded and untenable. The legal position regarding interference by courts in the matter of transfer is too well established to be repeated here. The respondent’s transfer neither suffers from violation of any statutory rules nor can it be described as mala fide by any stretch of imagination. We are, accordingly, unable to sustain the High Court’s order. In the result this appeal is allowed, the order coming under challenge is set aside and the writ petition filed by the respondent in the High Court is dismissed.”

We would have ventured to go in deciding the issue but the impugned order would reveal that the Single Bench was alive of such facts and the points agitated before it and directed the authority i.e. the Chairman of the Council to consider the application/representation raising all such issues and take a decision thereupon within the stipulated time. The Single Bench also took into consideration the relevancy of the aforesaid provisions pertaining to the transfer Rules and stayed hands of the

respondent authorities for a period of thirty days for obvious reasons that the Chairman of the Council would take a decision within the said time. We, thus, do not intend to substitute our findings in answering all the aforesaid provisions, as it would have larger impact or a persuasive effect on the Chairman of the Council in taking an independent and impartial decision in accordance with law. Since the matter has consumed considerable time and in the meantime the period of stay granted by the Single Bench has expired, we, therefore, extend the period by six weeks from date.

The Chairman of the Council is directed to comply with the direction of the Single Bench and shall see that the decision is taken in terms thereof within four weeks from date.

It goes without saying that all the points agitated by the appellant either before the Single Bench or before us are kept open and if taken the said Chairman would take a decision thereupon.

We have been informed that since the appeal was filed before this Court the appellant could not make a representation in terms of the leave granted by the Single Bench. We extend the

time and permit the appellant to file representation within a week from date.

The appeal being **MAT 139 of 2022** and the application being **CAN 1 of 2022** are, accordingly **disposed of**.

(Harish Tandon, J.)

(Rabindranath Samanta, J.)