03.01.2024
Sl Nos.5-13
Court No.8
(gc,sg,ar)

MAT 1107 of 2021
with
I.A No. CAN 1 of 2022

Ms. Shephali Roy
Vs.
The State of West Bengal & Ors.

With

FMA 335 of 2023

Bharati Nandi
Vs.
The State of West Bengal & Ors.

With

FMA 337 of 2023

Ratri Chakraborty & Anr.
Vs.
The State of West Bengal & Ors.

With

FMA 343 of 2023

Provati Mondal & Ors.
Vs.
The State of West Bengal & Ors.

With

FMA 351 of 2023
with
I.A No. CAN 1 of 2023

Sabari Dasgupta & Anr.
Vs.
The State of West Bengal & Ors.

With

FMA 447 of 2023

Nihar Kanti Paul
Vs.
The State of West Bengal & Ors.

With

FMA 456 of 2023

Indrani Majumder
Vs.
The State of West Bengal & Ors.

With

MAT 581 of 2023

Raj Kumari Srivastava & Ors.
Vs.
The State of West Bengal & Ors.

With

MAT 583 of 2023

Ram Narayan Pandey
Vs.
The State of West Bengal & Ors.

Mr. Krishna Das Poddar,
Mr. Amit Kumar Datta,
Mr. Subir Sabud,
… For the Appellant in MAT 1107 of 2021

Mr. Subir Sanyal,
Mr. Saktipada Jana,
Mr. Subhajyoti Das,
… For the Appellants in Item Nos.6 to 13.

Mr. Suman Basu
… For the A.G (A & E), W.B

Mr. Supriyo Chattopadhyay
Mr. Sabyasachi Mondal
… For the State in MAT 1107 of 2021.

Mr. Supriyo Chattopadhyay
Mr. Suman Dey
… For the State in FMA 343 of 2023.

Soumen Sen (Oral):

1. All the appeals involved common question of law and facts are taken up together by consent of the parties and disposed of by this common order along with the applications.

2. However, we must mention that the first appeal being MAT 1107 of 2021 involves an incidental question with regard to the locus of Accountant General to file an application for recalling of an order as the learned Single Judge has allowed the said application thereby recalling its earlier order dated 23.04.2015 by which the benefit of pension was extended to Ms. Shephali Roy.

3. The principal question arises in all these appeals are with regard to the entitlement of all the appellants with regard to the pensionery benefit aided non-government recognized dearness allowance (DA) getting primary schools. All the appellants were teachers of aided, D.A getting, recognized, non-government primary schools. Their claim to the said amount are primarily based on the Memorandum dated 7th December, 2007 issued by the Joint Secretary, School Education Department, Government of West Bengal under the direction of the Governor, by which the teachers of aided, D.A getting, recognized, non-government private schools have been extended with pensionary benefits. In Shephali Roy at the stage of contempt proceeding the Accountant General filed an application for recalling of the order

dated 23rd April, 2015 on the ground that the pension is not admissible to the teachers of non-government D.A getting school in view of a communication dated 17/21.10.2005 being no. 375-SE(B)/1/M-25/05 and the communication from the Joint Secretary of Government of West Bengal, School Education Department dated 17/31st October, 2005 being no. 375-SE(B)/1/M-25/05 addressed to the Accountant General providing certain clarifications which favours a decision taken by the Accountant General realizing such pensionary benefits.

4. In ***Shephali Roy***, Justice Mantha has relied upon a further communication dated 26th June, 2015 and 5th November, 2015 by the Law Branch, School Education Department, Government of West Bengal signed by the Secretary addressed to the office of the Accountant General in which the Assistant Secretary, School Education Department (Elementary Education), Commissioner of Law Branch of the School Education Department, to deny such benefit as the Government authorities were of the view that the D.A getting, non-government, recognized primary schools are not entitled to get pension. The plea of the Accountant General

is that unless the Rules are framed in terms of Sections 14 and 16 of the Pension Act, 1871 by the competent authority thereunder the Circular dated 7^{th} December, 2007 is not legal or enforceable in law. These arguments appear to have been accepted by Justice Mantha to recall the order as the learned Single Judge was of the view that the said Rules have not been framed under Sections 14 and 16 of the Pension Act, 1871 and have no statutory force. The Memorandum dated 7^{th} December, 2007 does not indicate as to whether it has been issued under any statutory rule or authority of law.

5. Justice Mantha has returned a finding that the memo dated 7th December, 2007 appears to be ex facie without jurisdiction and illegal and any benefit given thereunder either under orders of Court or by the State Government and the office of the Accountant General cannot confer any right on the petitioner or any other similarly situated persons. The other appeals arising out of the writ petitions filed by the rest of the appellants giving similar benefits are dismissed by Justice Amrita Sinha on a finding that the petitioners are retired teachers of non-government DA getting

primary schools recognised by the Government. Apart from receiving DA the government does not bear any financial responsibility of the school. The school pays the salary and other allowances of the employees from their own resources. The petitioners are not covered under the DCRB Scheme, 1981. There is no discussion by the Director of School Education in the memorandum dated 7th December, 2007 as to how it was not applicable in respect of the DA getting primary school teachers. Never ever has pension been allowed in respect of any government DA getting primary school. In the absence of a definite Rule, the opinion of the Director of School Education permitting grant of pension in favour of the teachers of DA getting primary school, cannot be accepted, especially because the respondent authorities themselves do not subscribe the opinion expressed by the Director of School Education as possibly they realised thereon that an error in the opinion had resulted had resulted in releasing payment in respect few ineligible teachers. The memo dated 7th December, 2007 does not mention anywhere that the same would be applicable in respect of the teachers of DA getting non-government primary schools. Prior to the teachers who received the benefits in terms of the order passed by this Court none of the other teachers of the other DA getting schools has received pension. The authority all along intended to keep the two sets of schools, the regular primary schools and the DA getting primary schools, distinctly separate from each other. the school curriculum, the duties of the teachers and the entire functioning of the two sets of school may be the same, but that does not necessarily entitle the teachers of one wet of schools to pray for similar financial benefit as applicable to the other, in the absence of a specific rule to that effect. It was on such findings that Justice Sinha was of the opinion that the teachers of non-government DA getting primary schools would not be entitled to receive pension from the government after their retirement. The writ petitioners were dismissed.

6. In the matter of Shephali Roy, Mr. Krishna Das Poddar, learned Counsel submits that the learned Single Judge had clearly erred in exercising its jurisdiction to recall the order earlier passed allowing pension at the instance of the Accountant General when the

competent authority, that is the School Education Department issued a memo dated 7th December, 2007 extending such benefit to the teachers of DA-getting non-Government Primary School. It is submitted that the said memo is applicable in respect of primary school teachers irrespective of the fact that whether the teachers of aided schools or DA-getting non-Government schools, the said memo was issued by the Director of School Education and it has to be presumed that considering all the factors, the Director has issued the said memo.

7. Our attention is drawn to the orders passed by a Coordinate Bench in **MAT 1291 of 2018 with CAN 7108 of 2019 with CAN 6226 of 2019 (Principal Accountant General (A&E) Vs. Anjana Bhattacharjee & Ors.) dated 19th February, 2020** to argue that the Hon'ble Division Bench reprimanded the Principal Accountant General for challenging the order dated 1st December, 2016 passed by the learned Single Judge by which the District Inspector of Schools (PE), Kolkata was directed to process the pension papers of the writ petitioners and to forward the same to the Accountant General. The Accountant General was supposed to issue

the Pension Payment Order in favour of the writ petitioners. The relevant observations in this regard are as follows:-

> *"We, however, regret to observe that the Principal Accountant had also some role to pay (sic.) in the matter. By a letter dated April 21, 2017 he informed the District Inspector of Schools (PE), Kolkata that the benefit of pension to the teaching and non-teaching employees of D.A-getting non-Government recognized primary schools is not covered under the notification of 1971 and the State Government had not taken the responsibility for paying pension to them from the State exchequer. He, therefore, requested the District Inspector of Schools (PE), Kolkata not to forward the pension cases to his office for authorization since the employees of the sort mentioned above were not covered by the notification of 1971.*
>
> *It is not again clear to us how he could consider this exercise to be a part of his duty which, as per the order of the learned single Judge, was merely to disburse the amount to the petitioners after he received the papers from the State respondents. He overstepped his jurisdiction to ask the concerned District Inspector of Schools not to send the papers to his office which was clearly against the order of the learned single Judge. He further requested the concerned District Inspector of Schools to pursue the matter with the School*

Education Department requesting to ……the course of action to be taken in the light of the judgment appeared against.

It is not understood how, if the State had not taken appropriate action against the said order, the Principal Accountant could direct the appropriate authority not to send the papers to his office for authorization which was clearly against the specific direction of the learned single Judge. On the top of everything, the letter dated April 21, 2017 has not been annexed to the application for condonation of delay. This has been annexed by the State in their application for condonation of delay being CAN 9090 of 2019 filed in connection with M.A.T. 1057 of 2019, though a copy was annexed to the application for stay.

Thus, we have to hold that this is an appeal at the instance of an incompetent, disinterested party whose interest has not been affected in any manner by the order impugned."

8. Mr. Poddar has submitted that in deciding the contempt application, the learned Single Judge could not have revisited the order passed by His Lordship on merits merely at the instance of the Accountant General who is only a disbursing authority. Reliance is placed on a communication dated 20th March,, 2013 from the

Secretary, Education Department, Kolkata to the Commissioner of School Education in which the Secretary, Education Department has acknowledged and admitted the eligibility of Shephali to receive the pension. It is submitted that the State has never opposed the prayer of the appellant and did not disclose any document to show that Shephali is not entitled to such pensionary benefits based on the Circular dated 7th December, 2007. It is submitted that when the D.A-getting secondary teachers are receiving pensionary benefits in a privately manning school there could not have been any reason for the State or the A.G. in not extending the said benefits to the petitioners. Mr. Poddar has relied upon the decision of the Hon'ble Supreme Court in ***U.P. Raghavendra Acharya & Ors. Vs. State of Karnataka & Ors.*** reported at ***(2006) 9 SCC 630*** to contend that pension is a deferred salary and it is akin to right of property and the persons similarly situated cannot be discriminated against.

1. Mr. Subir Sanyal, learned Counsel appearing on behalf of the other appellants have given a brief summary of the various legislations relating to the establishment of rural and urban primary education in the State of West Bengal and the procedure

adopted for pensionary benefits to the teaching and non-teaching employees of the West Bengal non-Government aided educational institutions other than D.A-getting educational institutions. Mr. Sanyal has referred to the notification no.2299-EDN(P) dated 12th December, 1972 and submits that the said notification was in favour of primary teachers of rural primary schools of the erstwhile boards (now the present District Primary School Councils) fully aided by the Government and upon promulgation of the West Bengal Primary Teachers Act, 1973 with effect from the month of June, 1990, the notification no. no.2299-EDN(P) dated 12th December, 1972 issued under Section 66(2) of the Bengal Rural Primary Education Act, 1930 stood automatically repealed and hence the reference to the notification by the Commissioner of School Education to deny the reliefs to the appellants was clearly illegal, arbitrary and utterly misconceived.

10. As per Section 1(2) of the Bengal Rural Primary Education Act, 1930, it is applicable to the whole of West Bengal except the Town of Calcutta and any area

of a Municipality constituted under the Municipal Act, 1932. Therefore, all primary school in Urban areas other in rural areas the schools are excluded from the purview of the Act, 1930 and therefore, the Act of 1930 had no application in respect of the petitioners.

11. As per Section 1(2) of the West Bengal Urban Primary Education Act, 1963, it extends to all Municipalities in the West Bengal. The expression "Municipality", as per Section 2(e) of the Act, means any place in which Bengal Municipality Act, 1932 or the Cooch Behar Municipality Act, 1944 including Chandernagore Municipality Act, 1995 was in force.

12. Admittedly, the present school of the petitioners are situated within the area of the Corporation of Calcutta but not under the management of the Corporation of Calcutta. The petitioners' school is recognized by the State Government and was under the control of the District Inspector of School. The school of the petitioners was, thus, not governed by either of the aforesaid two Acts.

13. The West Bengal Primary Education Act, 1973 (hereinafter referred to as "the

Act of 1973") came into force throughout the State of West Bengal with effect from 2nd July, 1990 and the aforesaid two Acts of 1930 and 1963 was repealed in terms of Section 105(1) of the Act of 1973.

14. Section 105(3) makes a deeming provision for recognition of all schools recognized under the Act of 1930 and under the Act of 1963. Therefore, schools recognized under the Act of 1930 and 1963 by virtue of this deeming provision of the Act as well as all other schools including recognized non-Government DA getting Primary Schools under the District Inspector of Schools like the present school became the recognized schools under the Act of 1973.

15. The object of introduction of the Act of 1973 by repealing the Act of 1930 and the Act of 1963 is to make better provision for development, expansion, management and control of primary education to make it universal, free and compulsory. Therefore, the whole object of the Act of 1973 is to bring entire primary education in the State under one umbrella, i.e. under the Act of 1973 as, prior to Act of 1973, there were four channels to govern the primary education in the state namely, (i) Rural

Primary School under the Act of 1930; (ii) Primary Schools within the Municipal area of the Municipal Act; (iii) Schools which were under the area of the Calcutta Municipal Corporation under the Act of 1923, thereafter the Act of 1951 and thereafter the Act of 1980 and (iv) the primary schools run directly under the control of the State Government through the District Inspector of Schools. The present school of the petitioners' school being a recognized D.A. getting Primary School was under the control of District Inspector of Schools and have to follow all Government directions including syllabus, curriculum etc., under the Act of 1973.

16. Mr. Sanyal has referred to the G.O/Memorandum No. 608-SL/(B)-141-137/06 dated 7th December, 2007 and submits that it refers to two Government orders.

17. It is submitted that G.O. No. 1610-EDN(S) dated 18th July, 1968 is the Government Order whereby accord of approval of the Governor to the Recognized Non-Government Secondary Institutions Pension Rules was notified. It would appear form the said circular that the

Recognized Non-Government Secondary Institutions Pension Rules, though titled as Rules, is nothing but a Government Order issued by the Governor. A bare perusal of the said Rules would make it clear that this Rules was not issued under Section 14 or Section 16 of the Pension Act, 1871 and thereafter the same was issued by the Governor in exercise of powers under Article 162 of the Constitution of India. The pension of the teachers of the Recognized Non-Government Secondary School were governed by the said Government order dated 18th July, 1968 and not by any statutory Rules.

18. In referring to GO No. 2299-EDN(P) dated 12th December, 1972, as referred to in the Government Order/Memorandum dated 7th December, 2007 it is submitted that the said circular was issued in exercise of power of Section 66 of the Act of 1930 for pension of the teacher of primary schools managed by the Board with effect from 1st day of April, 1968. Therefore, prior to introduction of the Death-cum-Retirement Benefit Scheme, 1981, both teaching staff of Secondary School Teachers and aided

primary schools managed by the Board, disbursement of pensions were governed by the GO No. 1610- EDN(S) dated 18th July, 1968 and by GO/Notification No. 2299- EDN(P) dated 12th December, 1972, i.e. Rules under the Act of 1930 respectively.

19. The West Bengal recognized Non-Government Educational Institution Employees (Death-cum-Retirement Benefit Scheme), 1981 applies to employees of the State Government sponsored or aided educational institutions (excluding DA getting schools) who were in service on or after 1st April, 1981 and came into effect by virtue of the GO No. 163 - E * dn(B) dated 5th May, 1985 subject to the condition that persons who retired from service prior to 1st April 1981 would not get the benefits under the Scheme of 1981 and their pension would be governed by the aforesaid two Government Orders, however, with further rider that persons who were in service of 1st April, 1981 had to exercise option either to be governed by the existing rules or to come under the Scheme of 1981.

20. Curiously, the Scheme of 1981 and the GO No. 136-EDN(B) dated 15th May, 1985 both are executive orders having not been issued under Any Act. Therefore, both of them were issued by the Governor in exercise of power of the Article 162 of the Constitution of India.

21. Therefore, prior to issuance of the Government Order No. 7th December, 2007, neither recognized DA getting Secondary School Teachers nor Recognized Non-Government DA getting Primary School teachers used to get pension from Government.

22. Government order/Memorandum dated 7th December, 2007 has been issued by the Governor, after coming into force of the 1973 Act, by which the entire primary education is now governed in the State of West Bengal. Therefore, reference to the Government orders prevailing prior to promulgation of the Act of 1973, cannot have any effect or implication in determining the benefit of pension granted under the Government Order/ Memorandum dated 7th December, 2007 and thus such reference to the said Government Orders is thoroughly

irrelevant and not germane to the issue after the coming into force of the 1973 Act.

23. The learned Counsel appearing on behalf of the State respondents has submitted that the State is not questioning the validity or enforceability of the Government Orders/Memorandum dated 7th December, 2007. The limited ground to deny such benefit is that primary teachers of Maheswari Balika Vidyalay and Jagabandhu Institution at Kolkata (Primary Section) is not entitled to the benefit under the Government Orders/Memorandum dated 7th December, 2007 in view of the fact that it is situated at Calcutta and accordingly cannot come within the purview of Bengal Rural Primary Education Act, 1930. Both the schools are D.A-getting non-Government primary school. The State provides Dearness Allowance component of the salary of the teaching and non-teaching employees of such schools. The salary for the approved teaching and non-teaching staffs are borne by the school itself. Both the school is a D.A-getting primary school and G.O. No.136-Edn(B),

dated 15th May, 1985, that is, D.C.R.B Scheme is not applicable for D.A.-getting school. The teaching and non-teaching staffs of D.A.-getting secondary schools so far relates to pension were covered under pension scheme published under G.O. No.1610-Edn(S) dated 17th August, 1968. Pension of teaching and non-teaching staff of D.A. getting primary schools were covered under pension scheme published under G.O. No.2299-Edn(P) dated 1st December, 1972 does not cover all kinds of primary school teachers or non-teaching staff as it was issued in exercise of power conferred by the Bengal (Rural) Primary Education Act, 1930. The said Act has no manner of application to the schools in the town of Calcutta or in any area of a municipality constituted under the Municipal Act, 1932.

24. In view thereof, none of the schools can come within the purview of the Bengal (Rural) Primary Education Act, 1930 and consequently does not come under G.O. No.2299-Edn(P) dated 1st December, 1972. The Government has not made any provision regarding the admissibility of pensionary benefits in respect of all non-

government D.A. getting primary schools and in absence of specific law relating thereto, no pension can be granted in favour of the appellants.

25. Our attention is drawn to the response letter addressed to the office of the Accountant General (A & E), West Bengal on 5th November, 2015 in which it has been categorically stated:-

> *"The benefit of pension to teaching and non-teaching employees of getting Non Government' Recognised Primary School is not covered under the Notification No. 2299-Edn - (P) dated 12. 12. 1972. The State Government provide only D.A component of their salary to the teaching and non-teaching employees of such privately run schools but has not taken the responsibility of providing pension from Government Exchequer. The matter was moved to the Finance Department, Government of West Bengal. However, the said, Department has expressed their inability to allow pension to the teaching and non-teaching employees of DA getting Non-Government Recognised Primary School from the State Exchequer."*

26. Similar view was expressed by the School Education Department in its communication with the Accountant General on 10th December, 2015. It is submitted that none of the

appellants are entitled to claim any pensionary benefits as the very basis of their claim is founded on Memorandum No.608-SE/(B)/IM-137/06 dated 7th December, 2007 which was issued by the Government corresponding to G.O. No.1610-Edn(S) dated 17th August, 1968 and G.O. No.2299-Edn(P) dated 1st December, 1972 issued in exercise of power conferred by the Bengal (Rural) Primary Education Act, 1930.

27. It is further submitted that the appellants are already receiving the pension under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952. Accordingly, they are not entitled to additional pension as there is no rule to that effect as on date. They have also received gratuity under the Payment of Gratuity Act, 1973.

28. By memoranda nos. 72-SE (B)/IM-4/2009 dated 19th May, 2009 and 142-SE (B)/IM-137/06 dated 17th August, 2009 the Government revised the pension payable in favour of the employees of DA getting primary schools. The State Government pays the dearness allowance only in respect of such non-Government recognized primary school and the State Government has no other responsibility in respect of such school where the petitioners worked. Salary was never paid to the

petitioners from the State Exchequer. Hence there is no question of paying pension from the State exchequer in respect of those schools.

29. It is submitted that it is true that some of the teachers are getting pension from the Government but that was only in terms of order passed by the Hon'ble Court in WP 23174(W) of 2016 in the matter of Anjana Bhattacharjee & Ors. Vs. State of West Bengal & Ors. The appeals preferred by the State and the Accountant General were dismissed on the ground of delay. Accordingly, the said judgment cannot be treated as laying down the law on the issue.

30. As regards D.A. getting Secondary school teachers, the memorandum dated 07.12.2007 was issued by the Government corresponding to G.O. No. 1610-Edn (S) dated 17.08.1968 which permits all secondary school teachers to be entitled to pension. But in case of the primary school not all the primary schools were allowed under the law.

31. The learned Counsel appearing on behalf of the Accountant General has fairly submitted that they have sought certain clarification from the State Government with regard to disbursement of the pension as the State has taken divergent views with regard to release of pension benefits to the teachers of primary section of the Aided,

non-recognized private institutions (DA getting). It is submitted that the Accountant General has never questioned the authority or jurisdiction of the Government orders/memo dated 7th December, 2007 and would abide by the instruction that may be issued by the State for release of pensionary benefits to the present appellants. However, in the notes of argument filed on behalf of the Accountant General, it has been stated that the Pension Act, 1871 was a prevailing Act under Article 372 of the Constitution of India and the said Act has not been repealed as yet.

32. Section 14 of the Pension Act, 1871 statutory provides for the framing of rules by the State Government;

33. However Section 16 of the Pension Act, 1871, inter-alia provides for laying also the rules under Section 14 thereof before the each house of the Parliament for its approval, modification or rejection etc.;

34. It refers to a communication bearing dated 17/21.10.2005 being Memo No 0.375 - A C(B) / 1 M - 25/5 which at page 2 clearly records that pension is not admissible to teachers of Non-Governmental D.A. getting schools, primary or secondary.

35. It also refers to a further dated 17/31.10.2005 being Memo No.376- AC(B) / 1 M - 25/5 addressed to the Accountant General by the Joint Secretary of the Government of West Bengal, School Education Department to the same effect. Clarifications communicated to Applicant by the State against question 4 are clear and specific and are annexed to such letter.

36. A further communication dated 26.06.2015 being Memo No.525- SE(EE) / PEN / 1M - 69/11 issued by the Assistant Secretary, School Education Department, Elementary Education to the Commissioner of School Education, Government of West Bengal is also relied upon annexing therewith another communication dated 29.10.2004 once again stating that the D.A. getting Non-Government, Recognized Primary School teachers are not covered under the notification No.2299-EDN(P) dated 12.12.1972.

37. In reply, Mr. Subir Sanyal has submitted that as per the aforesaid Scheme of 1995, the Retired Employees of D.A. getting both Primary and Secondary Schools are getting pension on the basis of their contribution of in the pension fund with the Provident Fund Authorities as envisaged in the said Pension Scheme but the

pension as per the Government Memorandum No. 608-SL(B)/1M-137/06 dated 07.12.2007, is being paid to the D.A. getting Secondary School teachers/ employees while denying to the Appellants/D.A. getting Primary School teachers.

38. The issue before the Court is whether teachers of aided, non-government, non-recognized primary schools would be entitled to pension in terms of the Memo dated 7th December, 2007.

39. We have carefully read the Memorandum. It appears from the recitals of the Memorandum that it was primarily issued to ameliorate the financial loss suffered by retired employees of teaching and non-teaching staff of the institution who have not received any dearness allowance and only allowed occasional ad-hoc increases. The recitals clearly state that the pension of teaching and non-teaching staff of D.A getting institutions has not been revised after the introduction of DCRB Scheme 1981. DCRB Scheme is applicable to employees of the State Government sponsored or aided educational institution (excluding D.A getting schools) as indicated in statement-1. Hence aided educational institution who receives grant-in-aid meaning thereby that the State Government meets all the expenditure of the schools

including the salary would be entitled to the benefit of DCRB Scheme 1981. It therefore, necessarily excludes the non-recognised, non-government D.A getting institutions from the purview of the said scheme. However, the government order No. 2156-Edn.(S)/IE-14/67 dated 20th September, 1967 was issued for extending the terminal benefits to the teaching and non-teaching staff of secondary schools. The said order clearly states in the first paragraph that *"the Governor has now been pleased to decide that the Contributory Provident Fund-cum-Pension Scheme should be sanctioned for all approved permanent whole-time teaching and non-teaching staff of recognised Non-Government secondary schools including Senior Basic Schools and Madrasahs which have come or may come under the Grant-in-aid Scheme. The said Scheme came into force with effect from 1st April 1966."*

40. Paragraph 4 of the said Government order it is stated that a separate communication will follow regarding the procedure to be followed in the matter of sanctioning and payment of pension.

41. Pursuant to the aforesaid Government order the Education Department framed the Recognised Non-Government Secondary Institutions Pension Rules on 18th April, 1968. The said Rules

deemed to have come into force with effect from 1st April, 1966. It defines "Institution" in Rule 3(h) as "Recognised Non-government Secondary Institution" it defines "Private Management" in Rule 3(k) of the said Rules as follows:-

> *(k) "Private Management" means management by an approved Managing Committee or Adhoc Committee or Administrator of an Institution or management by a local authorities or by a Society or a voluntary educational organisation registered under the West Bengal Societies Registration Act, 1961 with the assistance of an approved Managing Committee;*

42. "Recognised Non-government Secondary Institution" has been defined in clause 3 (m). It reads as follow :-

> *(m) "Recognised Non-government Secondary Institution" means Higher Secondary School, Multipurpose School, High School, Junior High School, Senior Basic School, Senior Section of Complete Basic School, Class-XI Madrasah, High Madrasah, and other secondary school under private management which have been duly recognized by the Government of West Bengal for the Director of Public Instruction, West Bengal, or the West Bengal Board of Secondary Education or the West Bengal Board of Madrasah Education, as the case may be; (emphasis supplied)*

43. Mr. Sanyal has laid much emphasis on the phrase "others secondary schools under private

management to buttress that although the word "D.A" was not included and the secondary schools under private management are not receiving grant-in-aid, however, the teachers of the secondary schools under private management have been receiving pensionary benefits and the School Department has failed to provide any satisfactory explanation for not extending such benefit to the teachers of the primary schools.

44. Mr. Sanyal in his submission has categorically stated that there is no independent provision for extending such pensionary benefits to "other secondary school under the private management" and with a view to remove the anomaly and the discrimination between the teachers of the primary schools and secondary schools, the Memorandum dated 7th December, 2007 has been issued to extend the benefits to "various categories of employees of DA getting schools" by obliterating and eliminating the differences and discriminations existed for all these years. In fact, we could not find any satisfactory explanation from the learned Counsel for the State with regard to the extension of pensionary benefits to the secondary school under private management, save and except that the State contended that

the said teachers of the secondary schools under the private management have been receiving pension under the memorandum of 18th July, 1968 and since the schools are not receiving the D.A the said teachers are not brought within the purview of the D.C.R.B Scheme, 1981. We are not convinced with such submission. Their claim to pension in absence grant-in-aid being received by such schools cannot be extended under the memorandum of 18th July, 1968.

45. The Memorandum dated 7th December, 2007 has referred to secondary schools and rural primary institutions. It excludes the primary teachers of schools situated in the city of Calcutta. The teaching and non-teaching employees covered under the said memo is indications of the fact that it covers the teachers of the secondary section and primary teachers under rural primary school. The Rural Primary School is abolished by the West Bengal Primary Education Act, 1973. The said Act has come into force in the year 1990.

46. In para 2 of the memorandum dated 7th December, 2007, it has been clearly mentioned that the State was contemplating improving the pension and existing benefit of dearness allowance referred to the teaching and non-

teaching employees who are covered under GO 1610-Edn(S)/14-67 dated 18th July, 1968 (for secondary teachers) and GO No. 2299-Edn(P) dated 12th December, 1972 (for primary teachers), and ultimately the Governor has been pleased to extend the benefits to these categories of employees of the DA getting schools. However, we could not find any satisfactory reply from the State for not extending the benefit of pension or the similar benefits as contemplated under Memo no. 608-SE(B) IM-137/06 dated 7th December, 2007 to the teachers of the primary education as it is not in dispute that the school curriculum, the duties of the teachers and the entire functioning of two sets of schools namely, regular primary schools and the DA getting primary schools are same. Mr. Sanyal has submitted that by the very expression "various categories" the employees of DA getting schools that these distinction between the teachers in the regular school and the DA getting primary schools have been obliterated and the Director of School Education in deciding the representation of ***Anjana Bhattacharya & Ors***. dated 2nd March, 20098 the present appellants would be entitled to the benefit as envisaged under the aforesaid order. Mr. Sanyal has drawn out attention to the order passed by the Hon'ble Division Bench in ***Anjana Bhattacharya*** (Supra) to show that although the appellant was held to be barred by limitation but in deciding the issues involved, the Hon'ble Division Bench has also considered the matter on merits which would be discernable from the following observations:

> *"The learned Government Pleader has referred to an order dated December 9, 2015 passed by a division bench of this court in MAT 1695 of 2015 in support of the contention that the writ petitioners are not entitled to pension. It is not understood how this order helps the present appellants. That order was passed in the context of permissibility of pension under The Bengal (Rural) Primary Education Act, 1930 ('the Act of 1930, for short) and an amendment effected to it in the year 1972. The division bench categorically observed that the provision for payment of pension contained in the 1930 Act is for the benefit of the teachers imparting education in the rural areas and, therefore, the circular of 1972 was not applicable to the case. In that order it has been recorded that the writ petitioner had failed to show any other law enabling him to get pension.*
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> *In the present case the Director of School Education has passed an order not on the basis of the Act of 1930, but on the basis of a 2007 memorandum.*
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> *It is not understood how after the specific admission made by the learned*

advocate for the State before the learned single judge about the validity of the order of the Director of School Education the appellants are assailing the order on merits as well.

One more very important aspect of the matter cannot be glossed over. If the appellant submit that in terms of the Act the writ petitioners are not entitled to any pension they ought to have assailed the order of the learned single judge by which the matter was referred to the Director of School Education. The writ petitioners in WP 2644(W) of 2009 had based their claim for pension on the memo dated December 7, 2007 and the court by order dated April 1, 2009 had directed the Director of School Education to take a decision in terms of the said memo. That order had been passed by the learned single judge in presence of the learned advocate for the State. It was communicated to the authorities and still the order was not challenged by the State. The Director of School Education has taken a decision in terms of the said memo which he was directed to do. In view of the very specific order of this court the Director of School Education could not travel beyond the terms of reference fixed by the court.

The District Inspector of Schools had recorded that by order dated December 7, 2007 the government had provided for payment of pension to teachers of DA-getting schools through amendment of a Government Order dated December 12, 1972. The order has referred to the cases of teachers of various schools in and around Calcutta where pension has been sanctioned by the concerned authority consequent upon such amendment.

A very important aspect of the matter is that the Commissioner of School Education is one of the appellants. He cannot question the validity and legality of the order passed by the Director of School Education which was the same post before the name was altered.

We have already found that the application does not disclose sufficient explanation for condoning the delay of about two years and seven months. That by itself disentitled the petitioners to have this delay condoned. It is only because of the claim made by the petitioners that they have a meritorious appeal that we had to make the above observations on the merit of the case. We find that neither the application for condonation of delay has any merit nor does the appeal. Over and above the fact that for want of good and valid explanation the application should not be allowed, even if the application had been allowed the appeal had little chance to succeed on merit".

47. The State has not disputed the legality and validity of the memorandum dated 7th December, 2007. Learned counsel for the Accountant General has not questioned before us about the same. In fact, the memorandum dated 7th December, 2007 has been issued in the name of the Governor. It has been presumed to be an order passed under Article 162 of the Constitution of India. Hence it cannot be questioned by the authorities in these appeals. The State Government has not withdrawn the

said memorandum and in fact, has implemented the said memorandum. The Accountant General also based on the instruction received from the State Government has disbursed the amount based on the said memorandum. However, the applicability of the memorandum to the present set of appellants can always be assailed and to that extent we are of the view that the State and the Accountant General are entitled to make submission in order to assist the Court to come to a just and proper finding.

48. We are in agreement with Mr. Sanyal that the order passed in Ms. Shefali Roy declaring that the memorandum dated 7th December, 2007 is without jurisdiction cannot be treated as correct finding of the learned Single Judge nor the appellants would be required to rely upon any Circular or memoranda subsequent to the memorandum dated 7th December, 2007, in the event the appellants are eligible and entitled to seek a remedy based on the said memorandum. As long as the said memorandum is valid in the eye of law and has not been withdrawn by any other memorandum or Circular touching the issue it cannot take away any right that has accrued in favour of the appellants provided they come under the purview of the said memorandum.

49. Justice Sinha denied the relief in absence of any Rule being in place and observed that it may not be possible to extend the benefit of the memorandum dated 7th December, 2007 to the present writ petitioners. The question of the amendment of the Pension Act arose by reason of the fact that both the learned Single Judges were of the view that the appellants cannot claim pension on the basis of the existing memorandum and they can claim benefit under the Pension Act only. In fact, all other teaching and non-teaching staff have been receiving pension on the basis of the Government Circular and DCRB Scheme of 1981 as applicable to them. There cannot be any plausible explanation for not extending the benefit of pension to the teachers of D.A getting recognised non-government primary schools as their counter-part in the rural areas had received such pension and the teachers of Secondary schools under private management have been receiving such pension.

50. It is also relevant to mention that the Director of School Education was of the opinion that the said circular would be applicable to the Recognised DA getting non-government primary schools on the reasoning which persuaded us also to refer the matter for fresh consideration

and formulation of a scheme as we feel that the appellants have been treated unfairly and discriminatorily.

49. The number of teachers also appeared to be small and it is a duty of the State to ensure that no discrimination is caused to two sets of teachers performing similar duties.

50. In view of the fact that it would have financial implication, we dispose of all the appeals by directing the Principal Secretary, Finance to consider the case of the appellants in the light of our observation and to formulate a scheme for pension in respect of the said teachers at such rate as may be found reasonable. We make it clear that the petitioners/appellants cannot seek pension at the rates fixed in respect of the category of teaching and non-teaching staff mentioned in the memorandum dated 7th December, 2007.

51. The impugned orders are set aside.

52. The Principal Secretary, Finance shall decide the issue within a period of twelve weeks from the date of communication of this order by either of the parties.

53. In view of the disposal of the appeals, the connected applications also stand disposed of.

54. However, there shall be no order as to costs.

55. Urgent Photostat certified copy of this order, if applied for, be given to the parties on usual undertaking.

I agree **(Soumen Sen, J.)**

(Uday Kumar, J.)