

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
(APPELLATE SIDE)**

Present:

The Hon'ble Justice Rai Chattopadhyay

W.P.A 18828 of 2019

Paritosh Biswas

Vs.

State of West Bengal & Ors.

For the Petitioner

: Mr. Biswarup Biswas.

For the State

: Mr. Pinaki Dhole,

: Mr. Sayan Datta.

Heard on: 15/01/2024

Judgment on: 15/01/2024

Rai Chattopadhyay, J.

1. The writ petitioner was initially appointed as an Assistant Teacher in Physical Education, in the school namely 'Sankhari Bansberia High School', at Barabhum, Purulia. His appointment letter is dated 24/04/2006 and his date of joining is 05/05/2006. He has been granted approval vide letter of the respondent No. 4 dated 10/08/2006. Petitioner's prayer for grant of higher scale of pay in terms of his post graduate qualification with effect from his date of joining, that is, 05/05/2006, was allowed by the managing committee of the school. Accordingly the respondent No.4 was moved on this by

sending the file to its good office by the school authorities. Allegedly the said respondent did not take any steps, in terms of the recommendation of the school authorities, for grant of higher scale of pay to the petitioner.

2. As a result a writ petition was filed [being WP No.6547 of 2006], in which the following order dated 21/12/2012 was passed :-

“On the basis of the ratio as laid down by this Court, the decision of the District Inspector of Schools in rejecting the claim of the petitioner for higher scale of pay admissible to a master degree holder is not sustainable.

The impugned memo is, therefore, quashed and set aside.

The D.I. of Schools is directed to grant the higher scale of pay to the petitioner for acquiring the master degree and the entire process shall be completed by the said authority within eight weeks from the date of the communications of this order.

The writ petition is thus disposed of.”

3. In compliance with the order in WP No.6547 of 2006, dated 21/12/2012, the petitioner was provisionally granted the benefit of higher scale of pay, vide order dated 06/09/2013 and a corrigendum dated 10/10/2013. Pay fixation in terms of the new scale of pay was also allowed.
4. This was followed by the petitioner's letter dated 02/12/2014, made to the Secretary of the managing committee of the said school/respondent No.10, praying for grant of the benefit as above, permanently, instead of provisionally, as was granted to him earlier. Such prayer was allowed by the managing committee of the school and its recommendation to that effect was forwarded to the respondent No.4, on 15.05.2015. At this juncture the petitioner had made an application for mutual

transfer, on 23/09/2016 from his existing school to 'Kataganj Gokulpur Adarsha Sikshayatan High School (HS)' at Kalyani, Nadia. It is necessary to note that the petitioner had mentioned in his application for mutual transfer the post graduate scale of pay, which he has been receiving pursuant to the order of this Court dated 21/12/2012. After necessary formalities being concluded, the petitioner's prayer for mutual transfer has been approved vide recommendation dated 26/07/2017. The petitioner had joined the new school on mutual transfer, on 24/08/2017. Appointment of the petitioner to the new school on mutual transfer was duly approved by the respondent No.5, vide an order dated 01/11/2017. The petitioner's prayer for regularisation of salary on mutual transfer was forwarded to the District Inspector of Schools (SE) Nadia/respondent No. 5 on 04/01/2018. However, this time, allegedly the petitioner was not granted the postgraduate scale of pay for discharging duty as an Assistant Teacher in 'Kataganj Gokulpur Adarsha Sikshayatan High School (HS)' at Kalyani, Nadia. Hence the petitioner had made a representation before the Secretary, School Education Department, Government of West Bengal/respondent No.1, seeking redress of his grievance. However, the petitioner's prayer as above was declined by the concerned respondent vide an order dated 19/07/2018. Consequently, the petitioner had again made a written representation seeking redress of his grievance to the Commissioner of School Education/respondent No.2, but to no avail. Instead, pursuant to a letter of the Assistant Inspector of Schools (SE) Kalyani/respondent No.7 dated 14/08/2018, the petitioner was granted salary commensurate to the pay scale of an Assistant Teacher, with a qualification of graduation in pass course. The District Inspector of Schools (SE) Nadia has also

reiterated the decision of the respondent No. 7, vide its letter dated 04/09/2018.

5. This was followed by the petitioner's further prayer in this regard before the Commissioner of School Education/respondent No.2, vide letter dated 01/10/2018 and before the Assistant Secretary of the concerned department of the Government of West Bengal dated 29/04/2019, both of which are yet to be decided and disposed of by the concerned authorities.
6. Thus being aggrieved, the petitioner has moved the instant writ petition to pray for the relief *inter alia* that, the respondents No. 5 to 7 be directed to allow continuation of service of the petitioner with effect from 05/05/2006, that is the date of his initial appointment in the previous school and also to grant him the benefit of postgraduate scale of pay as per the last pay certificate drawn from the previous school. The petitioner has further prayed for fixation of pay in accordance with the postgraduate scale by the concerned respondent and issuance of fresh approval as regards his appointment in a new school on mutual transfer. The petitioner has further prayed for necessary order to set aside the impugned order dated 19/07/2018 of the respondent No.1, in which the concerned authority has declined petitioners prayer for grant of postgraduate scale of pay to him on his transfer on mutual consent.
7. Mr. Biswas is appearing for the petitioner and he submits that the petitioner is entitled to a post graduate scale of pay, pursuant to the High Court's order dated 21/12/2012. Therefore his benefit as above cannot be lawfully curtailed by

the respondents, as has been done in the present case. He has submitted further that the respondent authorities have exercised discretion in allowing his mutual transfer application, with appropriate knowledge of the pay scale being enjoyed by the petitioner, that is the post graduate scale of pay, as the petitioner had duly mentioned the same in his application for mutual transfer. According to him the same should prevent the respondent from retracting to grant the same benefit to the petitioner. Further submission has been made on the basis of the judgment of a coordinate bench of this Court, reported in **2018(4) CHN (CAL) 607 [ParthaPratim Biswas versus State of West Bengal]**, in which this Court has held that pay commensurate to the qualification of a candidate cannot be subject to the fact that there is only one category of candidates, that is, pass graduate candidates, who can be eligible and be appointed as teachers for physical education. Court's attention has also been drawn to the verdict of the Division Bench of this Court in a case reported in **2008 2 CLJ 472 [Baishali Banerjee versus State of West Bengal]**, where the Division Bench has concluded that the terms and conditions of service of a teacher shall not be varied to his or her disadvantage. Mr. Biswas has prayed for setting aside of the said impugned order and also necessary directions allowing immediate release of the salary to his client, commensurate to his qualification, along with the arrear benefits.

8. Mr. Dhole is representing the respondents and has vehement objections to offer as regards the contentions and prayers of the writ petitioner. He has specifically relied on Rule 3(a) of the West Bengal School Service Commission (Mutual Transfer) Rules 2012, to say that mutual transfer can only be made

between two teachers who have been appointed against the same category of vacancies, holding the same category of posts and teaching the same subject. This being the statutory provision, the mutual transfer of the present writ petitioner shall also be bound by the same and in no manner otherwise. It is submitted that by accepting mutual transfer, the writ petitioner has waived his claim to the higher scale of pay. It has been submitted further that since the petitioner has voluntarily accepted transfer and posting to a pass graduate category post by way of mutual transfer and in that way has waived his right to the higher scale of pay, the last pay certificate granted to him from the erstwhile school cannot be taken into consideration for fixation of his salary after the mutual transfer has been affected. That, now he would be only entitled to the scale of pay allowable to the said particular post that is pass category scale of pay. It has further been submitted that a mutual transfer, as a policy, should not encumber the employer with the burden of additional expenditure for a candidate. By allowing the postgraduate scale of pay to the writ petitioner the said policy decision of the respondent authorities would be jeopardised. Hence, on this score too the prayer of the writ petitioner is not worth consideration and affirmative nod of this court. Mr. Dhole has prayed for dismissal of the writ petition.

9. Vide notification dated 21/02/2012, the West Bengal School Service Commission (Mutual Transfer) Rules, 2012, has come into effect. Rule 2(i) of the same has defined the word “Mutual Transfer” that, “Mutual Transfer” means replacement of any incumbent with an incumbent of the same category from reciprocal places of their posting. Eligibility for mutual transfer

of a teacher has been provided in rule 3 thereof in the following manner : –

“3. Eligibility for Mutual Transfer of a teacher:-

- (1) An incumbent teacher shall be eligible for transfer under the provision of these rules subject to fulfillment of all the following conditions:-*
- a) mutual Transfer shall be made between two teachers who have been appointed against the same category of vacancies and holding the same category of posts and teaching the same subject;*
 - b) a male incumbent shall not be eligible for mutual transfer with a female incumbent of a girls' school;*
 - c) the service of the incumbents concerned shall be confirmed at their respective places of posting;*
 - d) the Incumbents concerned opting for mutual transfer shall be from the same category of schools, having same medium of instruction i.e. Bengali or English or Hindi or Nepali or Oriya or Santhali or Telegu or Urdu or Bengali- Urdu;*
 - e) mutual transfer shall be made between two teachers against whom no Judicial or Departmental proceeding is pending or is being contemplated.*
- (2) No incumbent shall be allowed to apply for mutual transfer when his/her date of superannuation is within a period of two years from the date of application for mutual transfer.”*

10. Therefore rule 3(1)(a) of the said Rules of 2012, has provided for three conditions. Firstly, that the two teachers should have to be appointed against the same category of vacancies. Secondly that the two teachers should be holding the same category of posts and finally that the two teachers amongst whom the mutual transfer is intended to be effected should be teaching the same subject. The dispute here relates to fulfilment or not of the second condition as provided in the statute, as mentioned above.

- 11.** The writ petitioner has been granted the benefit of postgraduate scale of pay, on account of his postgraduate qualification, pursuant to an order of this Court, as mentioned above. This has not however, prevented or restraint the respondent authorities in any way to allow his application for mutual transfer. And obviously so, in view of the provision as promulgated in ROPA Rules 1998, that all teachers, including Physical Education Teachers and Librarians of Secondary Schools who have improved their qualification or were appointed with higher qualification in the subjects or group relevant to their teaching/appointment shall get higher scale of pay appropriate to their qualification with effect from the stipulated date [No.12 of the Memorandum dated 12/02/1999]. Also that in terms of section 16 of the West Bengal Schools (Control and Expenditure) Act, 2005, the terms and conditions of service of a teacher shall not be varied to his or her disadvantage.
- 12.** In this case there is no challenge to the fact that at the time of applying for mutual transfer, the writ petitioner had disclosed his existing pay scale that is the postgraduate scale of pay. The respondent authorities, with adequate knowledge of the same has allowed the prayer of the writ petitioner for mutual transfer, with a candidate however, who at the relevant point of time was placed at a lower scale of pay of a pass graduate category candidate. Therefore, the respondent authorities cannot approbate and reprobate at the same time by allowing the writ petitioner's application of mutual transfer with sufficient knowledge of his existing pay structure and later on by not allowing him to remain employed at the same pay structure and redirecting him to a lower grade of pay. In the particular facts of

this case, it is needless to say that the scale of pay allowed to the respective candidates is person specific rather than post specific. It is so particularly for the reason that the person who has been transferred in the place of the present writ petitioner, has not been allowed any enhanced scale of pay, and obviously so in view of his educational qualification. However, the respondents have accepted and acted upon the order passed by this court, by granting the writ petitioner the enhanced scale of pay and fixation of his pay to that effect, pursuant to his enhanced qualification. Thus firstly, the enhancement in pay granted pursuant to qualification of the candidate is not relatable and subjected to the fact that generally mutual transfer is to be made amongst the two candidates holding the same category of posts. Also secondly that a financial benefit once advance to the writ petitioner on the basis of his enhanced qualification and also pursuant to the order of this Court, cannot be withheld unilaterally by the respondent authorities or else the same may amount to gross arbitrariness on their part.

- 13.** The argument on behalf of the respondent authority regarding additional financial burden having been imposed upon the respondent due to the writ petitioners joining in the transferred post on mutual transfer, is also found to be unsustainable. It is so for the reason that much prior to the date of transfer of the writ petitioner on mutual ground, he has been allowed and paid the postgraduate scale of pay, which is continued till the time he was engaged with the school in which he was previously working.

14. On the discussions as above, the impugned order dated 19/07/2018, passed by the respondent No.1, appears to be de hors the law, illegal and not maintainable in the eye of law.
15. Accordingly, the impugned order dated 19/07/2018, passed by the respondent No.1 is set aside. The respondent District Inspector of Schools (SE) Nadia/respondent No.5 is directed to make immediate payment of salary to the writ petitioner as per his post graduate scale of pay, in terms of the last pay drawn, in the school in which he was engaged prior to his mutual transfer. The said respondent is further directed to release the arrear differential salary calculated after fixation of his pay as per post graduate scale of pay, with effect from the date of the present petitioner's joining the present school on mutual transfer.
16. The writ petition being WPA No. 18828 (w) of 2019 is allowed.
17. Urgent photostat certified copy of this judgment, if applied for, shall be given to the parties as expeditiously as possible on compliance of all necessary formalities.

(Rai Chattopadhyay, J.)