

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

Present:

The Hon'ble Justice Rai Chattopadhyay

W.P.A No. 30622 of 2017

**Md. Mostafa Kamal
Vs.
State of West Bengal & Ors.**

For the Petitioner

: Mr. Biswarup Biswas,
: Md. Md. M. Sk.

For the State

: Mr. Tapan Mukherjee, Sr. Adv.
: Mr. Supriyo Chattopadhyay,
: Mr. Arindam Ghosh.

Heard on: 09/04/2024

Judgment on: 09/04/2024

Rai Chattopadhyay, J.

1. The crux of the grievance of the writ petitioner is that in spite of grant of higher grade of pay scale on the basis of his higher qualification, that is, M.A. in Bengali, with effect from 1st April, 1999, the same has been curtailed subsequently, upon his joining at the transferee school on 6th December, 2014, on transfer. He seeks reversal of the same by dint of this Court's order in this case.
2. Mr. Biswas has appeared on behalf of the writ petitioner. He has not failed in his duty to show to Court the date of appointment of his client, that is, vide letter dated 27th July, 1995. The respondent District Inspector of Schools, Secondary Education, Murshidabad, had approved petitioner's service vide letter dated 13th November, 1995. The petitioner

was allowed Honours' graduate scale of pay, with effect from 1st May, 1997 and post graduate scale, with effect from 1st April, 1999.

3. Mr. Biswas informs on the basis of the records that in 2014 his client applied for "General Transfer", before School Service Commission. In turn the School Service Commission/respondent no. 9 recommended "General Transfer" of the writ petitioner vide memo dated 24th November, 2014. It has been however pointed out that in the said memo dated 24.11.2014, the respondent School Service Commission has erroneously mentioned the qualification of the writ petitioner as "ARABIC (Pass)". Mr. Biswas expresses grievance of the writ petitioner that inspite of having full knowledge of the fact of the writ petitioner possessing qualification of post graduate degree and previously enjoying the enhanced pay scale pursuant to such qualification, the respondent School Service Commission has committed the error in recommending him as a graduate teacher (ARABIC Pass), which has prejudicially affected the right of his client, he says. According to him, since thereafter the authorities have time and again taken into reckoning the incorrect qualification of the writ petitioner to ultimately deprive him of his rightful claim to the enhanced pay scale on the basis of his enhanced qualification. He has brought into notice of the Court the order of the respondent District Inspector of Schools, Secondary Education, Murshidabad, dated 20th December, 2014, thereby approving service of the writ petitioner in the transferee school.
4. The transfer application form submitted by the writ petitioner, has been relied on by the respondent, in its affidavit-in-opposition. The same would show academic qualification of the petitioner, to have been written as "B.A.". However, according to Mr. Biswas, the respondent authority should have taken into consideration the pay scale declared therein, by his client, as well as the subject taught by him, which are post graduate

scale and two subjects, i.e, Arabic and Bengali, respectively. He says, that would have prevented commission of any error, in recommending petitioner's name for transfer by the concerned respondent authority, so far as his qualification and pay scale are concerned.

5. On the facts and circumstances as above Mr. Biswas on behalf of the writ petitioner has put forth challenge as to the legality and propriety of the order of the Deputy Director of School Education (Grant in Aid)/respondent no. 3 dated 26th October, 2017, by dint of which the said respondent has rejected the claim of the writ petitioner for enhanced scale of pay on the basis of his improved qualification.
6. Mr. Biswas is also relying on a document which has been received by him in response to a query under the provisions of the Right to Information Act, 2005. By dint of the same, Mr. Biswas submits that, the West Bengal School Service Commission/respondent no. 9 has acknowledged an error having been committed in recommendation dated 24th November, 2014, for transfer of the petitioner. By referring to the said documents it is submitted that the error committed earlier, as mentioned above, has been corrected subsequently by incorporating the 'M.A.' and 'B.A.' Degrees of the writ petitioner in his 'Application For General Transfer'. Since this document has not been in possession of the writ petitioner at the time of the filing of the present case, now Mr. Biswas seeks leave to rely on the same, along with other annexed documents in the writ petition.
7. On behalf of the petitioner the amended provision of 'General Transfer' pursuant to Section 10B of the West Bengal School Service Commission (Amendment) Act, 2013 and rules thereof have been relied on. It has been submitted pursuant to the statutory provision as above that the

writ petitioner is entitled to be transferred along with the applicable salary and benefits as he was receiving earlier in the original school.

8. A judgment of the Co-ordinate Bench of this Court is also referred to, that is, ***Trilachan Jana vs. State of West Bengal*** reported in **(2008) 2 WBLR 913**, It is submitted by referring to the same that facts done prior to coming into force of the West Bengal Schools (Control of Expenditure) Act, 2005, have been saved by operation of law as promulgated under Section 20 of the said Act. On behalf of the writ petitioner it has been prayed that writ petition may be allowed and the benefit of higher pay scale may be allowed to the writ petitioner at the transferee school.
9. Mr. Mukherjee is representing the State respondents, that is, the respondent nos. 1 to 4. The State has filed an affidavit-in-opposition, the State authority though are not disputing the fact that previous to the application of transfer in 2014 the writ petitioner was granted the post graduate category scale of pay, however declines to admit the same from the date of his transfer, particularly in view of the fact that the recommendation of transfer of the writ petitioner did not mention his enhanced qualification of M.A. Degree. Mr. Mukherjee has not failed to point out to the Court regarding the writ petitioner having not mentioned about his M.A. Degree in his application for transfer. Further he says that the order of approval of service issued by the District Inspector of Schools, Secondary Education, Murshidabad dated 30th December, 2014, mentions qualification of the writ petitioner as Bachelor Degree (pass).
10. Mr. Mukherjee's further submission is that the said approval order dated 30th December, 2014, is not challenged in the present writ petition. Accordingly, the information declared therein like the educational qualification of the writ petitioner as above, cannot be challenged at this stage to have been erroneously endorsed therein. He has further stated

that the column “Date of appointment - 06.12.2014” as mentioned in the said approval letter dated 30th December, 2014, should prompt the Court to read the same as a fresh appointment of the writ petitioner in the transferee school. As a matter of fact, the respondent State had challenged the fact that the writ petitioner has ever been transferred, but emphasises that in the approval letter dated 30th December, 2014, the writ petitioner has been mentioned to have been “appointed” and his “Date of Appointment” has been mentioned therein.

11. Mr. Mukherjee says that the respondent has acted on the information declared in the recommendation for the transfer of the writ petitioner dated 24th November, 2014. So far as the impugned order is concerned, he would submit the same not to be erroneous, as alleged. On the contrary, he would say that the writ petitioner may be dismissed, being devoid of any merit.

12. The School Service Commission (Respondent no.9) has not made appearance in this case. It has not filed any affidavit.

13. After being appointed on 27th July, 1995, the writ petitioner improved his qualification. Thus he was granted post graduate scale of pay with effect from 1st April, 1999. He has enjoyed the same, since thereafter. In 2014, he had sought for transfer, by submission of proforma. Declarations made by the writ petitioner there, which are relevant for the purpose of this case, are extracted, as herein below:

2.	(ii) Scale of pay	:	9000-40500
4.	(iii) Academic qualifications as considered by RSSC	:	B.A.
6.	Subject taught at present (in case of Assistant Teachers)	:	Arabic, Bengali.

- 14.** The petitioner's application for transfer, as above, has been recommended to be acted upon by the Central School Service Commission/respondent No.5, vide Memo dated 24th November, 2014, thereby transferring the petitioner to another school (Bali Gramin High School). The recommending authority as above has mentioned the qualification (subject) of the recommended, to be "ARABIC (PASS)". A nodus thus was created.
- 15.** The State respondent has put forth a dichotomous stand. It has not disputed or denied the fact that the writ petitioner was granted post graduate pay scale from 1st April, 1999. However, it maintains its stand that in case of transfer, the state respondent can only act upon the recommendation of the appropriate authority, that is the respondent No 5 here/the Central School Service Commission. The recommendation for transfer of the writ petitioner has been as an "ARABIC (PASS)" teacher. Hence, everything else fell in line of the same. That is, the approval dated 30th December, 2014 of the writ petitioner in the transferee school has been made by citing him as an assistant teacher, having qualification "(B.A. with Arabic, B.Ed) (Pass)". He was allowed pay scale of a graduate teacher.
- 16.** May the relevant portion of the impugned order dated 26th October, 2017, be extracted as herein below :

"With reference to the subject mentioned above, the undersigned has to instruct him that no Higher Scale (i.e., P. Scale of pay) can be allowed in favour of Md. Mostafa Kamal, whose sanctioning Memo and D.I. of Schools (S.E.)'s approval and S.S.C's recommendation all are in Arabic Pass subject. It is instructed to allow the Pay Scale, as per earlier Memo of this Directorate's No. 1105-GA dated 24-08-2016, in favour of Md. Mostafa Kamal. He is also instructed to calculate the over drawn amount for the period from 06-12-2014 to till date and instructed to the said teacher to refund the amount to the Government Fund."

17. Memo No 1105-GA dated 24th August, 2016, is on the subject regarding clarification of salary and pay scale of the petitioner, which speaks as follows :

“Sub: Regarding clarification of Salary and Pay Scale of Md. Mostafa Kamal, Asstt. Teacher of Bali Gramin High School, Murshidabad.

Ref: NO. BGHS/048/15 dated 30-3-2015

With reference to the subject mentioned above, the undersigned has to request to inform the concerned Headmaster of the present school that appointment approved by the D.I. of Schools (S.E.) concerned is much more important than L.P.C. issued by the H.M. of the previous school. The H.M. of the previous school may be issued a Show-cause Notice on which ground he issued L.P.C. to the concerned teacher mentioning his M.A. qualification. The teacher concerned can not be allowed any higher scale. Hence his prayer is regretted.”

18. One should have a glance to the laws applicable in this regard. The West Bengal Schools (Control of Expenditure) Act, XIV OF 2005, came into effect to provide for the control of expenditure in the schools in West Bengal. On behalf of the writ petitioner section 16 thereof has been mentioned, to have safeguarded the writ petitioner's rights. Let the same be extracted herein below:

“Protection of teacher and non-teaching staff.

16. Notwithstanding anything contained elsewhere in this Act, the terms and conditions of service of a teacher or a non-teaching staff in the employment of a school, immediately before the commencement of this Act, shall not be varied to his disadvantage in so far as such terms and conditions relate to the appointment of such teachers and non-teaching staff to the posts held by them immediately before the commencement of this Act.”

19. This aspect was considered by this Court in the judgment of **Trilochan Jana (supra)**. While discussing the provision under subsection 3 of section 14 of the Act of 2005, the Court has held:

“10. SUB-SECTION 3 is worded differently and the effect of it is quite distinct from sub sections 1 and 2 of the Section 14. Sub-section 3 equates honours graduate and postgraduate teachers and says that teachers of either category would be entitled to draw the pay of pay of post graduate teachers upon acquiring post graduate degree. Sub-

section 3 of Section 14 does not reflect on the rights conferred under clause 16 (5) of ROPA, 1990 as preserved or modified by clause 12 (5) of ROPA, 1998. Section 16 and Section 20 are the savings and overriding provisions of the Act of 2005. Section 16 preserves the previous rights in the limited manner as specified therein. Section 20 is the omnibus overriding provision: "20. The provisions of this Act or any rules or orders made thereunder shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force or in any contract, custom or usages to the contrary."

20. The writ petitioner there, was denied the benefit of upgraded pay on account of his obtaining 'Doctorate' in Bengali. The Court had discussed the provisions under the *Revision of Pay & Allowances Rules (ROPA) 1990 and 1998* and also the *West Bengal Schools (Control of Expenditure) Act, XIV OF 2005*. The Court had directed for ex post facto sanction and the consequent benefit to be given to the said writ petitioner.

21. The present writ petitioner was granted the benefit of higher scale of pay on account of his Master's Degree qualification with effect from 1st April, 1999. The ROPA 1998 with effect from 1st April, 1997, was in vogue, at that point of time. The writ petitioner was covered under rule 12(3) of ROPA 1998, which is as follows:

"12. Career Advancement Scheme and related issues.

(1)*****

(2) *****

(3) All teachers, including Physical Education Teachers and Librarians of Secondary Schools who have improve their, qualifications who 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 1st January, 1996 or the date of improving qualifications whichever is later."

22. From the date of grant of higher pay scale to the writ petitioner with effect from 1st April 1999, till the date of his transfer to another school vide recommendation dated 24th November, 2014, the present petitioner has been granted the higher scale of pay and as regards the same there

is no dispute. However, he has been recommended by the appropriate authority for transfer, on consideration of his qualification as a 'pass graduate' teacher. Firstly, one can notice without fail, that in the application for transfer the writ petitioner has mentioned his existing pay scale to be that of a post graduate qualified teacher. He has also mentioned about two subjects, Arabic and Bengali, in the said application form, to have been taught by him at that point of time. Thus, recommendation of him for transfer solely on the basis of academic qualification of him written as 'B.A.' has been an erroneous consideration on part of the Central School Service Commission/respondent No.5. The said respondent ought to have considered the pay scale applicable to the writ petitioner, as mentioned in the transfer application form. At this juncture, the Court takes judicial notice of the document received by the writ petitioner from the office of the said respondent, in response to his application under the Right to Information Act, 2005. Since the respondent No. 5 is not represented in this writ petition, the contentions in the said document are not disputed in any way. It appears from the said document that on a subsequent date, necessary corrections have been carried out in the application form of the present writ petitioner regarding his educational qualification and at present the same stands as **"B.A WITH ARABIC, MA (BENG) B.Ed, (CONSIDERED BY MC)"**. Thus, the obstacle that may have arisen from the writ petitioner's purported incorrect entry on the application form regarding his educational background, is likewise addressed in this way and now stands corrected and approved by the concerned respondent.

- 23.** Section 20 of the Act of 2005, may again be resorted to, to find that the statute has saved all previous action/s done under the respective prevalent laws from time to time, prior to coming into force of the said Act, by dint of the said provision. Also, that the benefit once granted to

the petitioner in the form of higher grade of pay scale, could not have been withdrawn, without any justifiable and legally viable reason. Transfer is not an instance of a new appointment, contrary to what is implied. One may resort to Section 10B of the West Bengal Central School Service Commission Act, 1997 (as amended) and Rule 2 (1)(e) of the Rules framed under section 17, read with section 10B (1) & (2) of the said Act, as regards “General Transfer”, as follows:

“10B. General transfer on application (1) Notwithstanding anything contained in any other law for the time being in force or in any contract to the contrary, the Central Commission may, on the basis of application made to it in the prescribed proforma by an eligible Teacher, make recommendation for placing his service from one school to another school having same category of vacant post, on general transfer basis, in such manner, on such condition and within such period, as may be prescribed.

Provided that such general transfer of an eligible teacher shall be made between two posts of same category of vacancies, posts and subjects in schools with same medium of instruction.

(2) Notwithstanding anything contained in any other law for the time being in force or in any contract to the contrary, the Central Commission may, on the basis of application made to it in the prescribed proforma by an eligible non-teaching staff make recommendation for placing his service from one school to another having same category of vacant post, on general transfer basis, in such manner, on such condition and within such period, as may be prescribed:

Provided that such general transfer of an eligible non-teaching staff shall be made between two posts of same category of vacancies and posts in schools with same medium of instruction.

Explanation.--For the purpose of this section, the expression "an eligible Teacher or an eligible non-teaching staff" means a confirmed Teacher, or a confirmed non-teaching staff, who have completed five years of satisfactory service in the post Teacher or non-teaching staff, as the case may be, and does not include a Teacher non-teaching staff who shall avail mutual transfer under section 10A after coming in force of this section."

“ Rule2. Definitions

(1) In these rules, unless the context otherwise requires-

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(e) “General Transfer” means transfer of an employee of a school from his present place of posting in a school to another place in same category of vacancy, subject and post in another school;”

24. For the benefit of discussion, mention may also be made as regards the Larger Bench decision of this Court, reported in **2024 SCC Online Cal 1274 (Utpal Kanti Karan vs. State of West Bengal & Ors.)**. The Court was hearing several appeals together, to adjudicate the points under reference, inter alia that, in view of the right of an individual for acquisition of higher qualification/s during service, can he be forced to stagnate on a lower status perennially and forced to continue in a lower scale of pay not commensurate to his such higher qualification, which has been obtained subsequent to his appointment, that if provision of section 14 and 20 of the Act of 2005 runs counter to the provisions of Article 14 of the Constitution of India, for the reason of creating an unreasonable embargo upon an individual's freedom and right to acquire higher educational qualification/s and on this score if those two sections of the law are ultra vires or not. The Court has held that provisions of 2005 Act would only have prospective application and in that case the provisions of G.O No. 735-SE (S) 2002, dated 3rd June, 2002, ought to be mandatorily applicable, in case the teacher who seeks increment or pay revision, in terms of his improved qualification. In cases, other than this, the rights of the parties should be decided on the basis of the Government Order and circulars existing on the date of application by the incumbent seeking permission for pursuing higher education and recommendation of the managing committee is made, the Court held.

25. Thus, firstly, upon recommendation of transfer, the writ petitioner could not have been considered as a fresh appointee, as suggested. After correction of his application for transfer, there ought not have been any confusion regarding the educational qualification of the writ petitioner, which would be further corroborated from the scale of pay declared

therein, by him. Such a pay scale, which he has been enjoying since 1st April, 1999, is a continuing benefit granted in his favour, commensurate to his qualification and the prevalent law at the relevant point of time. This could not have been curtailed, without legally sustainable reasons and excepting due process of law. His subsequent transfer is only an incident of his service, as per law, as discussed above. The law saves his rights as has already accrued in his favour, even after promulgation of the Act of 2005 as mentioned above and since the Act of 2005 shall have only prospective effect, in case of the present writ petitioner, the provisions of the same shall not have any manner of application. As a matter of fact, it is observed that the writ petitioner's eligibility was noted in the recommendation order dated 24th November, 2014, which is the rationale for reducing the postgraduate pay scale that is now in place for him. The same has eventually been corrected. Hence this Court finds no legal or justifiable reason for not granting the writ petitioner a scale of pay commensurate to his post graduate qualification, since the date of his transfer. Hence the impugned order dated 26th December, 2017 and also the order dated 24th August 2016 are found unreasonable and illegal and the same are liable to be set aside.

26. The present writ petition is allowed and disposed of with the following directions:

- (i) *the impugned order dated 26th December, 2017 and the order dated 24th August, 2016, by the Deputy Director of School Education (Grant-in-Aid)/respondent No.3 – are set aside.*
- (ii) *necessary modification be immediately carried out in the recommendation of transfer of the writ petitioner dated 24th November, 2014, so far as his educational qualification is*

concerned, in terms of his revised application for transfer, as mentioned above;

- (iii) necessary modification be immediately carried out in the approval order dated 30th December, 2014, of the writ petitioner, so far as his qualification (in terms of his revised application for transfer, as mentioned above) and the date of transfer is concerned;*
- (iv) the writ petitioner may be continued uninterruptedly to be paid the post graduate scale of pay, as before, with effect from the date of his transfer;*
- (v) the respondent authority shall take immediate steps for pay fixation of the writ petitioner, within a period of two weeks from the date of service of copy of this order;*
- (vi) arrear salary shall be paid within a period of four week from the date of communication of this order.*

27. 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.)