

(1963) 04 CAL CK 0019
In the Calcutta High Court
Case No : C.R. No. 209 of 1961

Gokulananda Roy

APPELLANT

Vs

President, District School Board, Burdwan and Others

RESPONDENT

Date of Decision : 09-04-1963

Acts Referred:

Bengal (Rural) Primary Education Act, 1930 — Section 23(1), 66(1)
Bengal (Rural) Primary Education Rules, 1930 — Rule 7
Constitution of India, 1950 — Article 245

Citation : AIR 1964 Cal 568

Hon'ble Judges : D. Basu, J

Bench : Single Bench

Advocate : Arun Kr. Janah, for the Appellant; G.P. Kar and Amiya Kr. Mukherji for Opposite Parties (Nos. 1-3), for the Respondent

Final Decision : Dismissed

Judgement

D. Basu, J.—This application under Article 226 is against an order of transfer of the Petitioner who is a Teacher of a Primary School. The Petitioner alleges that he is serving at the Sankari Primary School for the last 8 years; that about October, 1956, Respondent 1, the President, District School Board, made an order transferring him from that School, whereupon the Petitioner brought an application under Article 226, which was allowed on consent and the order of transfer was cancelled; that in view of the fact that the Petitioner, who is himself a member of the District School Board, took a part against the election. of Respondent 1 at the election held in 1950, Respondent 1 has maliciously made another order on 7-2-61 (Ann. B) transferring the Petitioner to Gerai Primary School without complying with the provisions of the Bengal Primary Education Act, 1930. Petitioner's case is that the impugned order is mala fide, without jurisdiction and violative of the principles of natural justice since the order of transfer has been intended as a punishment and yet no enquiry has been made and no opportunity given to the Petitioner to answer the charges on which the alleged order is purported to have been made.

2. Respondent 2 is the Secretary of the District School Board, while Respondent 3 is the-School Board itself. The counter-affidavit of Respondents 1-3 states that the requirements of the Act were complied with; that upon a complaint being received from the public, an enquiry was held by the Asstt. Inspector of Schools at the instance of Respondent 2 and his report was then placed before respondent 1 and the impugned order was made by Respondent 1; that by a resolution of 1948, the President was authorised by the School Board to approve the appointments and transfers-of Primary School teachers and hence the order of Respondent 1 was not ultra vires; that on 27-2-61, the Appointments and Transfer Committee of the Board has approved the recommendation, made by the Asstt. Inspector of Schools and on 29-3-61, that approval has been ratified by the General Meeting of the District School Board; that the order is not mala fide nor has it been intended as a punishment.

3. The primary question to be determined in this case is whether the impugned order is ultra vires. The sheet-anchor of the Petitioner's case is that the impugned order has been made in contravention of R. 7 of the Rules framed under the Bengal (Rural) Primary Education Act (herein after referred to as the Act), as, published per Notification No. 1943 Ed. 7,25-7-40. Subject to the contention made by Mr. Kar on behalf of the Respondents that this Rule is itself ultra vires the statute it may be observed that if the Petitioner succeeds in showing that the terms of this rule have been contravened, the Petitioner shall be entitled to relief. On behalf of the Respondents it has been urged that a transfer does not violate Any legal right of an employee and, farther, the matter being discretionary, no writ under Article 226 can issue to interfere with such order. But assuming the Rule to be intra vires for the present, it would appear that the order of transfer of a teacher of a Primary School has been subjected to a statutory condition or limitation, so that if such statutory bar is violated, the order of transfer, whether administrative or otherwise, would be ultra vires and liable to be removed by mandamus.

4. It has therefore, to be seen whether the Petitioner's complaint that the Rule has been violated is true. Rule s as follows:

"No appointment or transfer of teachers shall be made by the Board except after considering a report of the District Inspector of Schools."

5. The rule thus imposes a twofold limitation upon the power to transfer a Primary School teacher, namely, that (a) the order must be made by the District School Board and (b) it can be made only after considering a report of the District Inspector of Schools.

(a) In this case, the impugned order of transfer, which is at Ann. B (p. 10), has been passed by Respondent No. 1, the President of the Board and not the District School Board. In para 8 of the counter-affidavit, it has been contended that by a resolution of 1948, the School Board delegated its power to the President. Ann. D is that resolution. It appears that at an Ordinary meeting of the School Board, it

was resolved that

"that President, District School Board, Burdwan, be authorised to approve the appointments and transfers of teachers in Free Primary "Schools....."

It is evident that the power referred to in the Rule was delegated by the Board to the President. Nothing has been shown to me which bars such delegation. Of course, the word "made" appears in the Rule, while the word "approve" appears in the resolution. But that does not appear to be very much material. The order of transfer, according to the Rule, is to be made by the Board, on the report of the District Inspector of Schools. This seems to have been loosely referred to as an "approval" of that report. Be that as it may, the resolution substantially relates to the Rule, and I have no doubt that the power of transfer referred to in the Rule has been properly delegated by the Board to Respondent 1.

Hence; the Petitioner's case must fail on the present ground. It is needless for me to enter into the efficacy of the subsequent ratification of the impugned order by the Board by the resolutions of February 1961, as per Anns. E and F.

(b) The next point is whether the impugned order has been made after considering a report of the District Inspector of Schools. On this point, the Petitioner's case in para 7 of the Application is that there was no report of the District Inspector of Schools and that it was never considered by the Board.

6-8. It appears that complaints (vide Anns. A-B to the counter-affidavit) were received against the Petitioner to the effect that he was not minding his business as a teacher and that the Asstt. Inspector thereupon made an enquiry and submitted the report in Ann. C, recommending that the Petitioner be transferred by the Board to Gerai Primary School. This report was endorsed by Respondent 2, K.R. Banerjee, who happens to be the District Inspector of Schools and also the Secretary of the Board. In para 8 of the counter-affidavit it is said that the inquiry was held by the Asstt. Inspector under the guidance of Respondent 2 and that the report of the former was "considered" and accepted by Respondent 2. The Rule does not say that the inquiry, if any must be held by the District Inspector personally. It only requires that the District Inspector must make a report to the Board. Ann. C may be held to be a substantial compliance with this requirement and it is possible, to treat Ann. C as a report of the District Inspector of Schools, though he should have signed in that capacity. What the Rule requires is that the Board must act after considering the report of the District Inspector and not of its own initiative, in transferring a . teacher. The obvious reason behind the requirement is that the District Inspector of Schools being in charge of inspection of these Schools and being the local executive superior (vide Section 2(8) of the Act) it is he who should move in the matter of transfer, after taking into consideration the public interest. In my opinion, Ann. C shows that the President (Respondent 1) did not act on his own initiative and that Respondent 2, the District Inspector, had recommended the transfer. This is also supported by the counter-affidavit of Respondent 2 and hence, I there has

been a substantial compliance with the Rule.

9. This point must also be determined against; the Petitioner.

10. At the hearing, Mr. Kar has advanced an alternative argument that R. 7 is itself ultra vires. Though my preceding finding has been in his favour, I would say a few words on this alternative argument. It has firstly been urged that there is no provision in the statute itself which gives the Board a power to transfer teachers, so that Rules might be framed to prescribe the manner in which such power has to be exercised. According to Mr. Kar, it is an administrative power inherent in the Board or the other superior authorities of the Schools to make such transfers as a part of the day-to-day administration and that, accordingly no statutory conditions as prescribed by the Rules are envisaged by the Act. According to Mr. Janah, the Rule has been made either under Article 23(i)(g) or under the general power to make rules conferred by sub-section (i) of Section 66. Now, Section 23(1)(g) confers upon the Board the power

"to appoint and fix and pay the salaries of teachers in primary schools."

11. It requires little logic to hold that "transfer" is not a matter comprised in either of the things referred to in the above Clause.

12. But Section 66(1) gives a residuary and general power to the Government to make rules "for carrying out the purposes of the Act."

13. In my opinion, it is possible to hold that the transfer of primary teachers comes within the purposes of the Act. The Preamble of the Act makes it clear that the object of the Act is the better "management and control of primary education" in the State. It is needless to say that in proper circumstances the transfer of a teacher from one school to another may be conducive to a better management of the system of education through particular institutions and sometimes it may be even necessary. Whether there was any such ground or not in the present case is a separate question. Now, as regards teachers, the statute itself makes provisions, relating to their appointment, salary in Section 23(i)(g) and Section 66(2)(p), read with the opening words of Section 23(i)(g) gives power to the Government to make rules prescribing the conditions subject to which such appointment and fixation of pay shall take place.

14. The question is whether by such specific enumeration, the residuary power conferred by subsection (i) of Section 66 is in any way curtailed. The answer, as provided by the authorities, is in the negative. It is to be noted that the Rules of which R. 7 is a part, purport to have been framed under "Sections 66(1) and 66(2)(p)." Thus, the residuary power is also relied upon. It has been held by the highest authorities in England as well as in India (vide *Ross v. Clunjs* v. *Papadopoulos* (1958) 1 WLR 546 (559); *R. v. Henderson* (1898) AC 720 ; AIR 1945 156 (Privy Council) that the enumeration of particular powers does not in any way curtail the general power to make any rules necessary for the purpose of carrying out the purposes of the Act. provided only such rule is not

inconsistent with the provisions of the Act. I have already held that transfers of teachers may be necessary to effectuate the purposes of the Act. It is also evident that any such provision will not be inconsistent with the provisions of the Act. If the Board can make a new appointment which would include the power of dismissal, it would be of little avail to contend that the purposes of the Act would be defeated if the Board gets the power to transfer.

15. The same conclusion may be reached at from another point of view. Even though the power to transfer may not be directly included in the power to appoint, it may be regarded as ancillary. Thus, an appointment involves the question of suitability. If after appointing a teacher to a particular school, the Board finds that he would be more suitable for another institution, can it not be said that the Board should have the power to transfer him to make an effective use of the power to appoint given to it by the statute? As observed in *Attorney-General v. Great Eastern Ry* (1880) 5 AC 473(478), whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised ought not, unless expressly prohibited, to be held, by judicial construction, to be ultra vires. A subordinate legislation should be invalidated only if such reasonable construction in favour of its vires is not possible. In my opinion the power to transfer may be fairly said to be ancillary to the power to appoint and therefore, the rule must be held to be intra vires. In view of this finding, it is not necessary for me to go into the question raised on behalf of the petitioner that the question of ultra vires has been waived by the consent order in the previous proceeding under Article 226.

16. II. The next point raised by the petitioner is that the order is mala fide. On this point, the case of the petitioner is that the impugned order has been made maliciously by Respondent 1 because the petitioner had opposed his election. This, however, cannot be accepted unless it is held that Respondent 2, who is a Government Official of a good rank, has been in collusion with him. But of this, there is no prima facie evidence. The impugned order has also been subsequently ratified at two meetings of the Board (Anns. E), with as many as 8 and 15 members present. On the last occasion, the petitioner himself was also present. Nothing has thus been done surreptitiously. The petitioner strongly relies on the fact that once before, in 1956, there had been an order of transfer, which had been nullified in a proceeding under Article 226 (Ann. A). That proceeding, however, was disposed of on consent, and it was expressly stipulated that "the District School Board.... will be entitled to make any new order of transfer in accordance with law." The consent order thus, gave no right to the Petitioner that he would remain at his present station as an immovable rode, though his service is transferable. Another Circumstance relied upon by the Petitioner is that a number of villagers has since protested against the impugned order (Ann. C), But this Court cannot go into the merits of the order if it is within the jurisdiction of Respondents 1 and 2. There was a complaint and a report of Respondents 2 thereupon. If the statutory conditions have thus been satisfied, as held by me, no inference of mala fides can be made simply from the fact that the

Petitioner has to his support a section of the public opinion.

17. III. Lastly, it has been contended that the impugned order has violated the principles of natural justice because no opportunity of being heard has been given to the Petitioner before making the order. It is now settled that an order cannot be held to be quasi-judicial unless the statute requires a hearing or the nature of the function itself requires a judicial approach (*Radeshym Khare and Another Vs. The State of Madhya Pradesh and Others*, ; *Board of High School v. Ghanshyam*, AIR 1962 SC mo). Now, the Rule referred to, as it has been already seen, does not require a hearing or a notice to the person affected before making the impugned order. It does not bar any confidential inquiry which may be necessitated by the circumstances of a case of this nature.

18. It has been urged on behalf of the Petitioner that the transfer has been awarded as a punishment and, therefore, the quasi-judicial obligation must be attached to it. Of coarse, where pecuniary or proprietary liability ia imposed, the nature of the function may call for a judicial approach (*The Board of Revenue, U.P. and Others Vs. Vidyawati and Another*, . It is also ferae that even outside the sphere of Article 311(2), the judicial approach has been been insisted upon in cases of dismissal from employment. But an order of transfer is not of that nature. It has nothing to do with the termination of employment. The employment of the Petitioner is admittedly transferable. It has been rightly contended that it is a matter resting with the discretion of the School Board, subject of course, to the statutory conditions imposed. Once it is held that the power has been properly exercised by Respondent 1 and in compliance with the statutory requirement no question of the violation of the principles of natural justice would arise and no case for interference with such order necessary for the day-today administration of the school system can be made out.

19. In my opinion, this application must be disallowed. The rule is accordingly discharged. There will be no order as to costs.

20. The operation of this order shall be suspended for a month from this date.