

(2013) 08 CAL CK 0091

In the Calcutta High Court

Case No : M.A.T. 1221, 1222, 1223, 1224, 1225 of 2013 and CAN 8231, 8232, 8234, 8235, 8236 of 2013

Nadia District Primary School Council

APPELLANT

Vs

Rupuk Sengupta and Others
 Nadia District Primary
School Council and Another Vs Kanu Ranjan Ghosal and
Others

RESPONDENT

Date of Decision : 22-08-2013

Acts Referred:

Citation : (2013) 4 CALLT 534 : (2014) 1 CHN 365

Hon'ble Judges : Arun Mishra, C.J.;Joymalya Bagchi, J

Bench : Division Bench

Advocate : Swapan Kumar Majumdar, for the Appellant;Kamalesh Bhattacharyya, Tapan Kumar Mukherjee, Mrs. Bratati Ray Ghosh for the State, Shri Sadananda Ganguly, Shri Debapratim Banerjee for the Respondent Nos. 2, 4, 5 and 6, Shri Subrata Mukhopadhyay, Ms. Basabi Raichowdhury, Shri Samit Sanyal, Shri Soumen Biswas, Ms. Malabika Bhowmic and Shri Tanmoy Mukhopadhyay, for the Respondent

Final Decision : Allowed

Judgement

Arun Mishra, C.J.—The above appeals are taken up together for analogous hearing and for disposal of the same by a common judgment treating the same as on day's list. The intra court appeal has been preferred as against the judgment and order dated 10th July, 2013 passed by the Single Bench quashing the order of transfer. On two grounds, the order of transfer has been quashed by the Single Bench that power of transfer was with the Council not with the Chairman of the Council as per Rule 4 of the West Bengal Primary Education (Transfer of Teacher including Head Teacher) Rules, 2002, hereinafter referred to as the "Rules of 2002" and provisions of section 53 of West Bengal Primary School Education Act, 1973, hereinafter referred to as the "Act of 1973" have also been referred to. The Single Bench has also relied upon decision of this Court in Sudipta Ghosh v. State of West Bengal & Ors. dated 17th October, 2012.

2. The respondents/petitioners were transferred from one school to another within the same circle vide order dated 2nd May, 2012 issued by the Chairman, Nadia District Primary School Council on the administrative ground for the interest of primary education. They were directed to join the schools where they were transferred to act as Head Teachers/Assistant Teachers in the same circle. The District Primary School Council was not functional as it was not constituted at the relevant time when the Chairman had passed the order of transfer. However, the matter was placed before the District Primary School Council after its constitution and in its meeting held on 4.8.2012, vide Annexure P-4, the Council has approved the transfer and they have approved the action of the Chairman exercising power of transfer and other administrative acts. The Single Bench has quashed the order of transfer. Hence, the intra court appeal has been preferred.

3. It was submitted by the learned Counsel appearing for the appellant that in absence of the formation of District Primary School Council, Chairman had the power to function particularly in view of section 53(2) of the Act of 1973. The Chairman could discharge any of the duties of Primary School Council as Council was not constituted. It was a case of administrative exigency in which the power has been exercised by the Chairman. The Chairman was required to report the matter to the Council, which he has reported for consideration of the Council. The Council has approved the order passed by the Chairman. As such, there was no infirmity in the order of transfer. The learned Counsel for the appellant has relied upon the decision of the Division Bench of this Court in Nadia District Primary School Council & Anr. v. Sudipta Ghosh in M.A.T. 1065 of 2013 decided on 26th July, 2013.

4. On the other hand, the learned Counsel appearing for the respondents has submitted that the decision of this Court in Nadia District Primary School Council & Anr. v. Sudipta Ghosh is distinguishable as, in the instant case, the transfer orders were passed on 2.5.2012. He has relied upon the decision of the Division Bench of this Court in Biswanath Sarkar v. State of West Bengal & Ors. in M.A.T. 667 of 2012 passed on 27.6.2012. He has argued at extensive length and time and submitted again and again that the transfer order is violative of the provisions contained in Rule 4 of the Rules, 2002. The Chairman ought to have reported the matter to the Council within one month. It does not appear that the Chairman has reported the matter to the Council within one month as envisaged u/s 53(2) of the Act of 1973. The learned Counsel has further submitted that the approval of the Council has been made after more than one month on 4.8.2012 when the orders of transfer were passed in May, 2012. Thus the orders of transfer stood invalid as it has not been approved by the Council within a period of one month. The learned Counsel has also submitted that the teacher could not be treated as the member of the staff on whom the Chairman has been authorised to exercise power of general supervision and control as provided in section 53(3) of the Act of 1973 which has been considered by a Division Bench of this Court in Biswanath Sarkar v. State of West Bengal (supra). The learned

Counsel further submitted that the respondent/writ petitioner in W.P. No. 11336 (W) of 2012 had been transferred at least 4/5 times for the last 14 years of his service. The learned Counsel further submitted that the teachers who have been transferred could not be treated as surplus considering the teacher-student ratio, which has been prescribed in the subsequent Government Circular of August, 2012. Some of the teachers are not holding posts of Head Teacher. The orders of transfer are against the policy of rationalisation and the teachers could not be treated as surplus teachers. Thus, the transfer orders being bad in law be quashed. The learned Counsel has further submitted that it was improper not to constitute the Council for a long period and ultimately a person of the choice had been appointed as Chairman of the Council who has passed the orders of transfer of the teachers.

5. Thus, the learned Counsel has submitted that the order passed by the Single Bench is appropriate and considering the conflicting decisions rendered by this Court in *Nadia District Primary School Council v. Sudipta Ghosh (supra)* and *Biswa Nath Sarkar (supra)*, matter should be referred to the Larger Bench for consideration of the power of the Chairman in respect of passing of the order of transfer.

6. Firstly, we consider the question of power of the Chairman to pass the order of transfer. It is not in dispute that when the orders were passed in the instant cases, the District Primary School Council was not in existence. It was not constituted for the last several months. Thus, in the case of administrative exigency, in our considered opinion, there was emergency situation, due to Council not being constituted to exercise the power u/s 53(2) of the Act of 1973, to pass the order of transfer. Interest of education can not be stand still for want of constitution of council. Thus, the orders of transfer which have been issued cannot be said to be unauthorised one. Section 53 of the Act of 1973 is as follows;

53. Duties of the Chairman.-

(1) The Chairman shall be responsible for carrying out and giving effect to the decisions of the Primary School Council and of any Committee thereof.

(2) The Chairman may, in any emergency, discharge any of the duties of the Primary School Council, provided, however, that he shall not act contrary to any decision of the Primary School Council, and shall within one month report the Primary School Council the action taken by him together with reasons therefore.

(3) The Chairman shall-

(a) exercise general supervision and control over the Secretary, the finance Officer and the staff appointed by the Primary School Council and post and transfer the members of the staff;

(b) sanction all claims of travelling allowances;

(c) take such other action not inconsistent with any decision of the Primary School Council as he considers necessary for the proper functioning of the Primary School Council under the Act.

7. A bare reading of the section 53(2) makes it clear that the Chairman has right to discharge any of the duties of Primary Council provided, however, he shall not act contrary to the decision of the Primary School Council. It is not the case that the Chairman has acted contrary to any decision of the Primary School Council. There is further duty imposed upon the Chairman to report to the Council the action taken by him with reasons therefore within one month. There is no case set up in the petition that there is violation of the aforesaid provision by the Chairman by not informing the Primary School Council of the action taken by him together with the reasons as provided in section 53(2) of the Act of 1973. Thus, the submissions raised that the Chairman had not informed the Council within one month is not germane as it is not the case set up by the petitioners in the writ petition. It is also not the case set up that council had been constituted within one month. Apart from that as soon as the Council had been constituted, in the first meeting, the Council has approved the action though such approval was not required, only information has to be given as the Chairman has issued the order of transfer in administrative emergency. However, when Council has approved the action taken by the Chairman, there remains no flaw in the orders of transfer.

8. The learned Counsel appearing on behalf of the respondents/petitioners has relied upon the decision of the Division Bench of this Court dated 27.6.2012 in which this Court considered the question of alternative remedy and the petition pertaining to the transfer was not dismissed due to alternative remedy under Rule 10 of the Transfer of Primary Teachers Rules, 2002. This Court also considered the Rule 4 of the Rules of 2002 which confers the power upon the Council to effect the transfer.

9. The Division Bench has also referred to the provisions contained in section 53(3) of the Act of 1973 where the duties of the Chairman with respect to the other staff have been dealt with and the definition of the staff in section 2(xxia) of the Act of 1973 and that of the teachers as defined in section 2(xxia) of the Act of 1973 and it has been held that the Chairman has the power to exercise general supervision and control the staff appointed under the of section 53(3) of the Act of 1973. However, in our considered opinion, the Division Bench decision in Biswa Nath Sarkar is not with respect to the provisions contained in section 53(2) of the Act of 1973. Section 53(3) is an independent provision with respect to the power of the Chairman to deal with the staff. Section 53(3) of the Act of 1973 gives general power of supervision and control over the Secretary, Finance Officer and the staff appointed by the Primary School Council, posting and transfer of the members of the Staff whereas section 53(2) provides that "all the power of the Council" may be exercised by the Chairman in case of emergency. Thus, the decision of the Division Bench in Biswanath Sarkar relying upon the

provisions of section 53(3) of the Act of 1973 cannot be said to be of any value as precedent with respect to the teachers who have been transferred in exercise of the power conferred u/s 53(2) of the Act of 1973. The power has been exercised in instant cases as conferred upon the Chairman u/s 53(2) of the Act of 1973. There was lack of consideration of the provisions contained in section 53(2) of the Act of 1973. Thus, the decision cannot be said to be binding precedent. Thus, there is no necessity to refer the matter to the Larger Bench.

Rule 4 of the Rules of 2002 is as follows:

4. Condition for transfer: A Council may-

(a) on its own motion, or

(b) on an application from a teacher, transfer an approved teacher within its jurisdiction from one primary school to another primary school on the condition that such approved teacher is confirmed and has completed minimum two years of continuous service both in case of mutual or single transfer:

Provided that the Council may, if it considers necessary for proper utilization of service of a primary teacher in the interest of education, transfer an approved teacher without maintaining any time limit of service:

Provided further that where there is a surplus teacher according to roll-strength as stated in Rule 3, the Council may, on its own motion, transfer such approved teacher without maintaining any time limit of service by way of rational adjustment of teacher in a primary school having deficit teacher in the following order of preference:-

(i) a primary school without an approved teacher.

(ii) a primary school have single teacher, and

(iii) other primary school having shortage of teacher.

10. Coming to the Rule 4, no doubt about it that Council has the power to transfer. However, such power can be exercised by the Chairman of the Council in the case of emergency u/s 53(2). As the Council had not been constituted for the last several months, the power could be validly exercised by the Chairman of the Council in case of emergency and on administrative ground. The order of transfer was passed in the interest of public and in the interest of education.

11. Coming to the submissions raised by the learned Counsel for the respondents with respect to the rationalisation and the teacher-student ratio, learned Counsel has prayed for time to collect the materials and to place on record. However, firstly we find that there is no whisper in the petition with respect to teacher-student ratio. What was the ratio in the school even otherwise when we examine tenability of same, we find that teacher-student ratio and violation of the policy of transfer of surplus employees can not be a ground which can be agitated in a judicial review. The learned Counsel has not urged any specific ground with

respect to the mala fide exercise of power by the Chairman. Thus, we find that the ground of violation of policy cannot be examined particularly in matter of transfer in the writ jurisdiction. Transfer is normal incident of the service. Transfer is also from one school to another school within the same District. Thus, we find no ground to make interference in the orders of transfer passed by the Chairman.

12. Coming to the submission that some of the respondents are Head Teacher and they could not have been transferred being Head Teachers. The transfer of head teacher can be ordered. This aspect is pertaining to the policy and purely administrative matter not justiciable in juridical review. We find that there is absolutely no ground to make interference in the order of transfer passed by the Chairman.

13. Thus, we find that the impugned orders passed by Single Bench are not sustainable.

14. Resultantly, the appeals are allowed.

15. The impugned orders passed by Single Bench are set aside.

16. In view of disposal of the appeals, the connected applications are also disposed of. However, the parties to bear their own costs.

The learned Counsel for the respondent has prayed for interim stay for a period of 15 days. We find that no case is made out so as to grant interim stay that too in such of transfer, which is purely administrative one.

The prayer for interim stay is rejected.

Urgent photostat certified copy of this order, if applied for, be given as per rules.

Joymalya Bagchi, J.

I agree.