

**(2017) 06 CAL CK 0029**  
**In the Calcutta High Court**  
**Case No : 7979 of 2016**

The Headmaster, Bhotabari Sitanath High School & ors.

APPELLANT

Vs

Mapita Samaddar & ors.

RESPONDENT

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**Date of Decision :** 22-06-2017

**Acts Referred:**

[Constitution of India](#), [Article 226](#) -  
Power of High Courts to Issue certain writs

**Citation :** (2017) 06 CAL CK 0029

**Hon'ble Judges :** Dipankar Datta, Debi Prosad Dey

**Bench :** DIVISION BENCH

**Advocate :** Gopal Chandra Ghosh, Debayan Sinha, Anyasha Das, Amalesh Ray, Mousumi Bhowal, Kishore Datta, B. P. Vaisya, Sutanu Kumar Patra

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## Judgement

1. This writ appeal, at the instance of the Headmaster, Bhotabari Sitanath High School, P.O. Bhotabari, P.S. Mekhliganj, District Cooch Behar (hereafter the said school), its Secretary and the said school itself (hereafter the appellants), registers a challenge to the judgment and order dated July 20, 2016 passed by a learned judge of this Court, whereby a writ petition [W.P.12228(W) of 2016] presented by the respondent no.1 (hereafter the writ petitioner) was allowed.

2. Bearing in mind an objection raised by Mr. Ray, learned advocate for the writ petitioner, to the locus standi of the appellants to carry the judgment and order dated July 20, 2016 in appeal, a brief recital of the facts leading to invocation of the extraordinary writ jurisdiction of this Court by her (as discerned from the writ petition itself) would be in order.

3. Based on the recommendation of the West Bengal School Service Commission (Northern Region) (hereafter the Regional Commission), the writ petitioner was offered appointment as an assistant teacher in Social Science in the said school vide letter dated July 21, 2011 of its Secretary. She joined on July 27, 2011. Soon thereafter, her service was approved by the District Inspector of Schools (S.E.), Cooch Behar (hereafter the DIoS) on September 5, 2011. While

discharging duty as an assistant teacher, the writ petitioner on medical ground applied for leave on March 9, 2012. On April 5, 2012, she applied for maternity leave. Then she applied for grant of extra-ordinary leave without pay. This was followed by an application for special leave in exceptional circumstances before the West Bengal Board of Secondary Education, received by it on September 5, 2014. In between, the writ petitioner addressed identical letters dated July 22, 2014 to the Hon"ble Minister-in- Charge, School Education Department, Government of West Bengal and the Chairman, West Bengal Central School Service Commission (hereafter the Central Commission) seeking transfer to any school in the district of North 24-Parganas citing ill-health of both herself as well as her twenty-two months" old son, and also because her husband was transferred from Cooch Behar to Durgapur in the district of Burdwan. By a further letter dated September 8, 2014, she sought to bring such fact to the notice and knowledge of the Headmaster and the Secretary of the said school. Since the writ petitioner had sought for transfer, she applied before the Headmaster of the school for "no objection" on August 3, 2015. However, no action to ameliorate the grievance of the writ petitioner was forthcoming and this compelled her to resume duty in the said school on October 16, 2015. The Headmaster duly allowed her to join. At last, fortune smiled on the writ petitioner and her attempt to have a transfer yielded result. The Assistant Secretary to the Government of West Bengal, School Education Department (hereafter the assistant secretary) by his memo dated March 2, 2016 conveyed to the Chairman of the Central Commission that he was under direction to recommend the prayer of the writ petitioner for transfer on special ground in terms of the West Bengal School Service Commission (General Transfer, Transfer on Special Ground and Reallocation) Rules, 2015 (hereafter the Transfer Rules) from the said school to a school preferred by her or a school near to her residence. Receiving such memo, steps were initiated to ascertain vacancy status to accommodate the writ petitioner and ultimately, the Chairman of the Central Commission by his letter dated May 18, 2016 recommended her for appointment on transfer at Sreenagar High School, P.O. & P.S. Habra, District 24 Parganas North (hereafter "SHS"). The Secretary of SHS offered her appointment vide letter dated June 8, 2016. Armed with the said recommendation and the appointment letter, the writ petitioner approached the Secretary of the said school by submitting a representation dated June 15, 2016 seeking a formal release order to enable her join as an assistant teacher in SHS. A letter dated June 20, 2016 was also written by the writ petitioner to the DIoS complaining of inaction of the said school to issue release order and prayed for direction so that the release order may be issued soon. Neither the DIoS nor the authorities of the said school came to rescue the writ petitioner leaving her with no other option but to seek legal remedy.

4. In course of hearing of the writ petition by the learned Judge, the appellants who were arrayed therein as respondents 9 to 11 did not enter appearance despite service. The State and its officers, who were some of the other

respondents, were represented. Upon hearing the appearing parties, His Lordship directed as follows: "Having heard the learned counsel for the petitioner and in considering of the Gazette Notification of the year 2015, this Court does not find any reason for the Headmaster of the first school to withhold the release order to facilitate the petitioner to join her new posting as a teacher in the transferee school. Therefore, this Court is pleased to allow this writ application. After receipt of copy of this order the respondent nos. 9, 10 and 11 are directed forthwith to issue letter of release order together with leave accounts certificate and to send the service book to the District Inspector of Schools (S.E.), Barasat, North 24-Parganas."

5. The plinth of the preliminary objection of Mr. Ray is that the appellants are not "persons aggrieved" having locus standi to question the judgment and order dated July 20, 2016. According to him, issuing a formal order of release in favour of the writ petitioner to enable her join at SHS on transfer cannot prejudicially or adversely affect the appellants, for, the vacancy created as a result thereof in the said school could be filled up once again on an appropriate recommendation being made by the Regional Commission. It is his further contention that the appellants, having regard to the Transfer Rules, have no right to stand in the way of a teacher seeking transfer to another school faced with genuine difficulties, and a fortiori, to question the wisdom of the Government when it allows such a prayer for transfer. He has, thus, urged us to dismiss the appeal at the threshold without entering into the merits thereof.

6. Prior to countering the preliminary objection, Mr. Ghosh, learned advocate for the appellants referred to the circumstances disabling them to appear and place their version before the learned Judge leading to the ex parte judgment and order under appeal. Since it is not the law that a satisfaction has to be reached by the appellate court before it proceeds to hear an appeal against an ex parte judgment and order on merits of there being sufficient cause that prevented the party in appeal from contesting the proceedings before the court of the first instance, we consider it unnecessary to advert to the explanation offered by the appellants regarding their non-appearance before the learned Judge.

7. Mr. Ghosh, in answer to Mr. Ray's objection, contended that the learned Judge having decided that the writ petitioner is entitled to relief and there being a positive direction to issue the order of release, which is binding on the appellants, noncompliance of such direction would attract contempt. To avoid contempt, the law provides a remedy of appeal and this is precisely the reason why the appellants have questioned the judgment and order dated July 20, 2016. That apart, he contended that the entire facts and circumstances since joining of the writ petitioner in the said school had not been placed either before the Government or the learned Judge; and, if placed, the decision could well have been otherwise. Since the writ petitioner was not entitled to exercise of discretion in her favour by the writ court, the appellants do have the locus standi to invoke the appellate jurisdiction of this Court.

8. Referring to the merits of the appeal, Mr. Ghosh contended that the conduct of the writ petitioner was unworthy of even a bare consideration of her prayer, not to speak of any recommendation for her transfer. He highlighted the fact that the writ petitioner, since her joining on July 27, 2011, had discharged duty as teacher for a few months before she proceeded on leave on and from January 2, 2012. Thereafter, she did not resume duty and went on submitting applications for leave on one pretext or the other. When she applied for transfer on July 22, 2014 by approaching the Hon'ble Minister-in-Charge, School Education Department of the Government, the Transfer Rules had not even seen the light of the day, yet, rule 4 was invoked in her case and recommendation made in terms of rule 7 without the Government seeking the views of the appellants as to why they had not taken steps in terms of rule 7(2). Our attention was also drawn to rule 3 which ordains that none can apply for transfer under the Transfer Rules before completing five years of approved service, and it was contended that the writ petitioner not having put in the qualifying service in the said school, which is a condition precedent, the appropriate department in the Government assumed and exercised a jurisdiction which it did not possess. It is on these grounds that Mr. Ghosh urged us to set aside the impugned judgment and order and thereby, dismiss the writ petition.

9. Mr. Ray in his usual fairness did not dispute that : the writ petitioner had actually discharged duty as a teacher in the said school for a little in excess of three months; she had not put in five years of approved service even prior to presenting the writ petition; her application for transfer was made at a point of time when such transfer was not statutorily permitted; no application was made to the Managing Committee of the said school expressing her desire of seeking a transfer; and the views of the appellants as well as the DIoS (the authority who approved her service) were not obtained prior to the recommendation for transfer being made. It was, however, contended by Mr. Ray that the writ petitioner's claim for transfer was covered not by rule 3 but by the special conditions mentioned in rule 4(a) and a genuine case of difficulty having been set up by her, which the Government found to be true, there is no justification for the appellants to offer resistance. He, accordingly, prayed that in the peculiar facts, the discretion exercised by the learned Judge in favour of the writ petitioner may not be interfered with.

10. Considering the contentions raised by Mr. Ghosh, we thought it necessary to peruse the relevant file containing the Government's recommendation in favour of the writ petitioner. Mr. Datta, learned Advocate General placed the file and left it to us to draw our own conclusions on perusal thereof.

11. The revelations are indeed startling. We propose to advert to the same a little later after deciding the preliminary objection to the maintainability of this appeal.

12. Right to appeal, it is well known, is the creature of a statute. The relevant provision of law that confers a right of intra-court appeal on a party against the

decision made by a learned Judge exercising jurisdiction under Article 226 of the Constitution is Clause 15 of the Letters Patent, ordaining that "\*\*\*\*an appeal shall lie to the said High Court of Judicature at Fort William in Bengal, from the judgment (not being an order made in the execution of revisional jurisdiction and not being a sentence or order passed or made in the revision of the power of superintendence under the provision of section one hundred and seven of the Government of India Act, 1915, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 13 of the said recited Act, and that an appeal shall also lie to the said High Court from the judgment (not being a sentence or order as aforesaid) of two or more Judges of the said High Court, or of such Division Court, whenever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being; but that the right of appeal from other judgments of Judges of the said High Court, or of such Division Court, shall be to Us, Our heirs or successors in Our or Their Privy Council, as hereinafter provided."

13. It is, therefore, clear that a decision of a learned Judge in order to be construed as appealable must be a "judgment" within the meaning of Clause 15 of the Letters Patent. The decision of the Supreme Court reported in AIR 1981 SC 1786 [Shah Babulal Khimji v. Jayaben D. Kania and anr.] authoritatively lays down when a decision would constitute a "judgment" within the meaning of Clause 15 of the Letters Patent and, thus, liable to an intra-court appeal. Mr. Ray could not dispute that the present appeal is indeed one challenging a "judgment". Viewed from that angle, the appellants must be held to have crossed the first hurdle.

14. We are also of the clear view, regard being had to the factual position emphasized by Mr. Ghosh, that the appellants could reasonably consider themselves "persons aggrieved" having the locus standi to come up in appeal against the judgment and order dated July 20, 2016. They are opposing the prayer of the writ petitioner tooth and nail and if they are found remiss in complying with the direction contained in it, they would expose themselves to be hauled up for contempt. To avoid contempt, they could have either prayed for recall of the said judgment and order or carry it in appeal. The second option has been exercised in this case and there is no reason whatsoever to hold that the appellants are not "persons aggrieved". They, thus, have the necessary locus to maintain this appeal.

15. The preliminary objection is, thus, answered and we now move on to decide the appeal on its merits.

16. It would be pertinent, at this stage, to clear a legal issue arising out of Mr. Ray's interpretation of rules 3 and 4. The issue is : whether a teacher, not fulfilling the criteria appearing in rule 3, can claim a right to be considered for transfer on the premise that he/she fulfills any of the special conditions appearing in rule 4?

17. Mr. Datta submitted that the issue ought to be answered in the negative. That has also been Mr. Ghosh's submission.

18. Answering the issue would require reading of the Rules in its entirety.

19. "General Transfer" is defined in rule 2 (f) as "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".

20. A conjoint reading of Rules 3 (Primary Condition of General Transfer), 4 (General Transfer on Special Ground), 5 (Eligibility for General Transfer), 6 [Procedure for submission of application for General Transfer in respect of a teacher under rule 3 and 4(1)(c)], 7 [Procedure for General Transfer on Special Ground under rule 4(1)(a) and rule 4(1)(b)] and 14 (Non-compliance of these rules by School Managing Committee or Administrator of the school concerned, as the case may be) results in manifestation of the scheme of transfer of teachers. Reading such rules one after the other, we are of the firm opinion that while rule 3 provides for the basic conditions one seeking transfer is required to fulfill, certain special conditions are also carved out and incorporated in rule 4. A teacher fulfilling the basic conditions, as of right, may apply for and claim consideration of his/her prayer for transfer in accordance with the Transfer Rules; but it is not quite the other way round. Fulfillment of the special conditions, in a given case, without fulfillment of the basic conditions would not authorize issuance of a transfer even on special ground. The situation is clarified by rule 5, which applies to all teachers seeking transfer including teachers seeking transfer on special grounds.

21. Although two different procedures are prescribed by rules 6 and 7 for submission of application for general transfer by a teacher, the conclusion is irresistible that submission of an application for transfer on special ground is hedged with fulfilment of the primary conditions engrafted in rule 3. Also, in terms of rule 7(2), the managing committee of a school upon receipt of an application for transfer on medical ground is required to receive the views of a medical practitioner whereupon the prayer for transfer with an appropriate resolution is required to be forwarded to the District Inspector of Schools (Secondary Education) for onward transmission to the School Education Department. It is only after proper examination of all the papers so received that the School Education Department may recommend the prayer for transfer to the West Bengal School Service Commission. Rule 14 ordains that it shall be mandatory for the managing committee of the concerned school to issue "no objection" certificate to the eligible applicant as well as issue "release order" to him to join the school to which he has been transferred, once a recommendation for transfer is made by the Central Commission.

22. Three factors go against the writ petitioner. First, she had not made any application for general transfer on special ground after the Transfer Rules were notified i.e. post - March 11, 2015. Secondly, she did not fulfil one of the primary

conditions for general transfer spelt out in rule 3, i.e. she had not put in 5 (five) years of approved service. Thirdly and finally, there being no application under the Transfer Rules, question of compliance with rule 7(2) at the end of the managing committee of the said school did not arise, resulting in the necessary ground work for ordering a general transfer on special ground being unavailable.

23. That apart, the writ petitioner also did not fulfil any of the requirements for consideration of her general transfer on special ground. From the materials that are available on record, it does not appear the writ petitioner or her spouse/son has been suffering from any of the diseases spelt out in rule 4(1)(a). The attempt of Mr. Ray to bring the case of the writ petitioner within the last alternative of rule 4(1)(a) i.e. to assist in proper treatment of her son, is one advanced in desperation. The son of the writ petitioner, a young kid of twenty-two months was stated to suffer from cold and cough as well as high fever. Most children of such age usually suffer from such ailments and the writ petitioner's son is no exception. Rule 4(1)(a) cannot be read that broadly so as to include any disease from which the teacher's spouse/child suffers calling for assistance in proper treatment thereof and for which a transfer could be contemplated. We are inclined to hold that treatment of diseases of the nature found in rule 4(1)(a) would be of absolute necessity if a teacher seeks to obtain a general transfer on special ground.

24. The aforesaid lacuna has to be viewed seriously, notwithstanding the personal difficulties that the writ petitioner may have been facing in her personal life.

25. Having held that the writ petitioner was not entitled to invoke the provisions of the Transfer Rules, we now move on to look at the file that was placed by Mr. Datta. The file bearing no. SL/5S-231/16 was generated once the writ petition came to be presented by the writ petitioner. In such file, we found a document generated in reference to file no. SE/S/15/02-16. It contains a list of teaching and non-teaching staff of different schools who had applied for transfer on special ground and whose prayers were recommended by dignitaries. It further proceeds to record that all the applications were scrutinized in terms of the Transfer Rules and findings were noted against each of them. The list contains the names of 48 candidates, majority of whom were recommended for transfer by Hon"ble Ministers-in-Charge of various departments of the Government, Hon"ble Ministers of State, Hon"ble Members of Parliament, Hon"ble Members of the Legislative Assembly, Secretaries of Departments, Army Officers, a Borough Chairman of Kolkata Municipal Corporation, etc. The name of the writ petitioner appears at serial no.16. Curiously, her case was not recommended by any dignitary. Also, since she was reportedly suffering from high cholesterol, triglyceride, uric acid, sugar, etc., it was observed in the note that she had no genuine special ground. Despite the same, the writ petitioner's name came to be recommended. For the purpose of a decision on the present appeal, we need not embarrass the Hon"ble Minister-in-charge, School Education Department on

whose approval some of the teachers having genuine ground for transfer on special ground reaped the benefit of the Transfer Rules but would record our utter displeasure at the manner in which such transfers have been recommended. Suffice it to record that the writ petitioner was successful in obtaining a recommendation for general transfer on special ground despite clear indication in the note that she was not entitled to such special consideration.

26. For the foregoing reasons, we declare that the appellants are under no obligation to issue "release order" in favour of the writ petitioner based on a recommendation which itself is tainted. The judgment and order impugned stands set aside, with the result that W.P. 1888 (W) of 2016 shall stand dismissed. The appeal (MAT 1466 of 2016) stands allowed. There shall be no order as to costs.

27. Before parting, we wish to place on record our serious dissatisfaction as to how without the writ petitioner being found entitled to general transfer on special ground, the assistant secretary could recommend her name for transfer to the Chairman of the Central Commission. An appropriate enquiry ought to be initiated by the School Education Department upon granting adequate opportunity to the assistant secretary to explain his position, and appropriate action taken against him if he is found guilty. A note of caution is sounded that should any recommendation for transfer be made in future on the basis of recommendations of political leaders and such incident comes to the notice of this Court, we would not hesitate to come down heavily on it.

28. We would also be failing in our duty if we do not advert to one other important aspect. We had called for an affidavit from the Chairman of the Central Commission to explain how the recommendation of the State Government was accepted and the writ petitioner accommodated in S.H.S. despite she not having applied for transfer under the Transfer Rules. The affidavit reveals the Chairman's view of the procedure in rule 7 of the Transfer Rules virtually leaving the Central Commission with no role to play, as if such commission is a mere post-office which is to issue a recommendation for transfer irrespective of whether he/she is qualified or not in terms of the Transfer Rules. We are afraid the Chairman cannot evade his responsibility by reason of his incorrect reading of the Transfer Rules. Holding a responsible position as the Chairman of the Central Commission, the incumbent must not allow subversion of law. We hold that notwithstanding the recommendation of the State Government, the Chairman in future cases shall individually look into all the papers in respect of the recommendation forwarded by the Government for general transfer of a teacher on special ground and if in any particular case it is found not to be meritorious enough for issuing recommendation for transfer, the Chairman shall be at liberty to make necessary observation and furnish the same to the State Government for appropriate reconsideration. Should the State Government stick to its earlier recommendation and the Chairman is insisted upon to go ahead with acceptance of such recommendation, it shall be open to the Chairman to



seek legal remedy. Urgent photostat certified copy of this judgment and order, if applied for, may be furnished to the applicant at an early date.