

CONSTITUTIONAL WRIT
PRESENT: The Hon'ble Justice Mr. Tapen Sen
Judgment on: 05.02.2010
W.P. No. 12388 (W) of 2008
with
CAN No. 10149 of 2008
(application for vacating an order
dated 19.9.2008)
with
CAN No. 8028 of 2008
(Application for interim Order)
Sri Rabi Prasad Mandal
Vs.
The State of West Bengal & Ors.

Point:

Change of teaching subject: Change of Teaching Group from Language to Social Science whether permissible - West Bengal School Service Commission Act, 1997-S.9.

Fact: By filing the instant writ petition, the petitioner prays for a direction upon the respondents to change his Teaching Group from Language to Social Science (History).

Held: The mode and manner of recruitment of a Teacher have now been laid down under the West Bengal School Service Commission Act, 1997 and therefore, by filling up a vacancy by a graduate Teacher of a Language Group would amount to filling up of a vacancy of a candidate by jumping the provisions of the West Bengal School Service Commission Act, 1997. (Paragraph – 21)

For the Petitioners : Mr. Saptangsu Basu,
Mr. Uttam Kumar Bhattacharya
For the S.S.C. : Mr. Santanu Patra
For the State : Mr. Alope Kr. Ghosh,
Mr. Nilanjan Chatterjee

Tapen Sen, J.: In this Writ Petition, the Petitioner prays for the issuance of an appropriate writ or a writ of or in the nature of a writ of Mandamus commanding upon the Respondents to change his Teaching Group from Language to Social Science (History) in the Asanda Siksha Niketan , P.O. Lalnagar, Dist. Paschim Medinipur.
2. In CAN No. 8028 of 2008, the Petitioner has

prayed for an interim Order restraining the Respondents (Regional School Service Commission) Western Region, from recommending the name of any candidate for appointment on the vacant post of Assistant Teacher in History in the above mentioned school with a further direction upon the school not to take any steps by way of issuing any appointment letter to any candidate for the post of Assistant Teacher in History (Social Science Group) till disposal of the Writ Petition.

3. The above Application being CAN No. 8028 of 2008 was taken up on 19.9.2008 by one of us and after hearing, an Order was passed that there shall be an interim Order restraining the Respondent authorities from giving any appointment to the post of Assistant Teacher in the Social Science Group (History) in the said school for a period till 15.12.2008 or until further Order whichever is earlier. Opposition etc. were ordered to be filed and the Application was directed to be listed for hearing two weeks after the Puja Vacation. On 11.12.2008, this Court passed an Order that instead of taking up the matter piecemeal, the main Writ Petition itself be decided as Affidavits filed on behalf of the Respondent Nos. 1 to 4 as well as reply thereto which had also been filed. The matter was then Ordered to be listed on 17th December, 2008 and the interim Order was directed to continue in the meantime. Thereafter, the matter taken up on various dates and lastly, on 17.12.2009 when the case was heard finally and judgment reserved.

In the meantime, another Application being CAN No. 10149 of 2008 for vacating the Order dated 19.9.2008 was filed but since no Order appears to have been passed on that Application till now, the same is being dealt with the along with the main Writ Petition as well along with the other CAN No. 8028 of 2008.

4. The facts as could be gathered from the pleadings are that having obtained his Bachelor's Degree with Bengali and English in 1979 as compulsory combinations, from the Calcutta University and having thereafter obtained M.A. in History in 1983 from the University of Calcutta, the Petitioner obtained his B.Ed. Degree in 1987 from the Vidyasagar University. He joined the Asanda Siksha Niketan as an Assistant Teacher on 5.5.1997 in the permanent vacancy declared under Memo No. 726-S dated 13.2.1995. His appointment was approved by a subsequent Memo dated 22.5.1997 and since then, the Petitioner has been functioning on his post.

5. According to the Petitioner, although he was appointed in the Language Group, yet he was also appointed Examiner of History by the West Bengal Board of Secondary Education in the year 2006 and in support of such contentions, the Petitioner has relied on Annexure- P2 where he has been shown to be taking History classes.

6. According to the Petitioner, the only other History Teacher in Social Science namely, one Byomkesh Manna, had retired on 31.12.2007 and as such, the post fell vacant and the School submitted the

records before the Additional District Inspector of Schools (SE), Kharagpur who sanctioned the said vacancy and recommended the filling up of the said post with an M.A. (History) with B.Ed. candidate from the general category.

7. According to the further case of the Petitioner, since there was no History Teacher, he was assigned to take History classes in addition to the classes in the Language Group. It is his further case that apart from him there are other Assistant Teachers in the Language Group to teach English and the vacancy caused owing to the retirement of Manna, is the 17th post which is meant for a general category candidate as per the 100 point roster. The Petitioner had been directed by the School authorities to function as a Social Science Group Teacher in History from 1.1.2008 and as such, he had been taking such classes.

8. The Petitioner has further stated that since he had the necessary qualifications and since there was a provision for change of Group in respect of the existing Staff, he accordingly submitted an Application before the School authorities by hand on 12.10.2007 praying for change of his Group from Language to Social Science with all financial benefits. The said Application has been marked as Annexure- P4.

9. It is the further case of the Petitioner that thereafter in a meeting of the Managing Committee dated 13.10.2007, the Application of the Petitioner was taken into consideration and it was inter alia Resolved, vide Annexure- P5, to obtain Departmental approval for changing the Group w.e.f. 1.1.2008 in view of the vacancy caused due to the retirement of Manna on 31.12.2007. In the said Resolution, it was further resolved that the Petitioner may be allowed to function on the said vacant post of Social Science Group as an M.A. (History) B.Ed. Teacher with all facilities subject to the approval of the concerned authorities.

10. The Petitioner has further stated that thereafter, the Secretary of the School submitted all relevant records vide Annexure-P6 to the Additional District Inspector of Schools (SE), Kharagpur stating that since the Petitioner was a bona fide Teacher in the Language Group who normally taught History in the top classes, an opportunity therefore be given to him to get the benefit of the M.A. Scale by changing his Group from Language to Social Science against the existing vacancy.

11. The Petitioner has stated that his Application is in terms of Memo No. 57-SE (S) dated 27.1.1995 which confers a right upon the Petitioner to apply as he has the necessary requisite higher qualifications for the vacant post but is unable to draw the pay according to such higher qualification. The Memo No. 57-SE (S) dated 27.1.1995 is quoted below:-

“Government of West Bengal
Education (School) Department
Secondary Branch
Bikash Bhavan, Salt Lake, Calcutta-91

No. 57-SE (S) Dated: 27.01.1995

From : Shri P. Bhattacharyya

Asstt. Secretary to the Govt. of West Bengal.

To : The Director of School Education, West Bengal

Sub: *Granting of Pay according to qualification to the Assistant Teachers of Non-Government Secondary Schools.*

The undersigned is directed to say that the question of granting higher scales of pay according to qualification to the Assistant teachers of Non- Government Jr. High Schools/Jr. High Madrasahs and High Schools/High Madrasahs (including Higher Secondary Schools/Higher Secondary Madrasahs) in this State who have obtained higher qualification in subjects not relevant to their respective subject or group in which they were appointed in the schools but relevant to their respective teaching subject had been under consideration of the State Government for sometime past. Such a situation exists in some secondary schools where, in the academic interest of the students the authorities of the schools have allotted classes on particular subjects to some approved teachers of the schools who were, respectively, appointed for a different subject/group as per available vacancies. The Education Department also is not in a position always to sanction the required number of additional posts to the schools owing to financial stringencies.

Considering the prevailing situation in the secondary schools in this State as mentioned above, the State Government in the Education Department has decided as follows to cope with the said situation and in the academic interest of the schools:-

(i) Approved Assistant Teachers of non-Government Secondary Schools and Madrasahs who will take classes in subjects relevant to their respective higher qualification, though appointed/approved respectively in a different group/subject other than the aforesaid teaching subject shall, henceforth, be allowed to draw pay according to their respective higher qualification, as prescribed by the State Government, provided such Assistant Teachers take individually at least six such periods per week as officially allotted by the authorities of the respective schools to such Assistant Teachers within the normal workload upon the written consent of the concerned teacher and with the prior permission of the concerned District Inspector of Schools and strictly according to the actual academic need of the individual school. If there be more than one Assistant Teacher in a school with relevant higher qualification agreeable to this arrangements, preference shall be in order of seniority. If any school has already effected such an arrangement in its academic interest, the same has to be get approved by the concerned D.I. of Schools, subject to eligibility, for the purpose of drawal of qualification pay by the concerned teachers.

(ii) In future, when any clear vacancy of Assistant Teacher occurs in the normal section (Class V to Class X) in a non-Government Secondary School/Madrasah, the authorities of the concerned school may apply to the concerned D.I. of Schools for filling up the vacancy by an existing approved Assistant Teacher of the normal section of that institution who has applied to the school authorities in writing for being placed in that post and who has the requisite higher qualification for that vacant post but is not drawing pay according to such higher qualification by reason of his/her appointment/approval in a different group. The concerned D.I. of Schools may permit the school authorities to place the services of such Assistant Teacher in that post, with effect from a certain date to be indicated by the D.I. of Schools, if the concerned District Inspector of Schools is satisfied that the arrangement will be beneficial to the students. The Assistant Teacher so transferred to the vacant post will be entitled to draw pay according to his/her higher qualification as prescribed by the State Government from the date of his/her placement in that vacant post. The concerned Assistant Teacher shall have to take classes from that date as allotted to that new post. In that case, the resultant vacancy shall be filled up according to existing rules. If there be more than one eligible applicant Asstt. Teachers in a school for one such vacant post preference shall be in order of seniority. No further approval of appointment will be necessary. The aforementioned decisions have been taken in conformity with the concurrence of the Finance Department vide their U/O No. 648 Group 'J' dated 07.03.1990.

All concerned may please be informed accordingly. The G.O. NO. 22-SE (SECY.) dated 06.01.95 is hereby cancelled.

Sd/- P. Bhattacharyya

Assistant Secretary.”

(Quoted)

12. The Petitioner has submitted that in view of the aforementioned Circular/Memo, the authorities cannot sit over his Application for an indefinite period of time and they should have actually passed necessary Orders by changing his Group. He has further submitted that in spite of submission of all the records by the School authority, the District Inspector of Schools and the Additional District Inspector of Schools, have not disposed of the matter causing injustice to him. The Petitioner has a further grievance that the post had fallen vacant w.e.f. 1.1.2008 and the Petitioner had submitted his Application on 12.10.2007 and therefore, the authorities should have acted expeditiously but till date they have not done so.

13. In their Affidavit-in-opposition, the Respondent Nos. 1 to 4, have stated inter alia that the Petitioner had applied for the post of a Graduate Teacher having the qualification of B.A. with English and he was selected and appointed as such, i.e. a Post-Graduate Teacher with B.A. in

English and his services were accordingly approved by the District Inspector of Schools (SE), Midnapur in that post. So far as the Petitioner's obtaining the Degree of M.A. in History and B.Ed. and taking History classes is concerned, these Respondents have stated in para-7 of their Opposition that "*Be that as it may, the Petitioner was appointed as a Teacher in language Group as per staff pattern and as such he should take at least 25 theoretical classes in English in a week and rest 11 classes in other subjects up to Class 9 and 10. As such there is no abnormality in assigning the classes of History*".

14. These Respondents have further stated that the Petitioner being a Teacher in the Language Group, cannot make a prayer for shifting to the vacancy of B. Manna in the Social Science Group on the plea that he was taking classes in History. So far as Annexure- P3 is concerned, these Respondents have stated that the same is not a Roster but only an arrangement of names of Teachers serially. They have also stated that as per the 50-Point and 100-point Rosters dated 6.4.1995 introduced w.e.f. 27.3.1990 with amendment on 7.10.1997, the vacancy caused due to retirement is the 4th vacancy and the same has to be kept reserved for a ST candidate. A mere direction by the authorities to the Petitioner to take History classes does not create any right in his favour. It is their further case that the Petitioner wants to be absorbed on the post of an Assistant Teacher in History with the object of getting of higher Scale of pay because of the enhancement of his qualification but there is no law which provides for taking recourse to a process of changing the Group itself and therefore, the request of the Petitioner for change of Group cannot be acceded to. They have also stated that no approval can be given by the concerned authorities for changing the Group from Language to Social Science and that the Resolution of the Managing Committee dated 13.10.2007 cannot confer a lawful right upon the Petitioner. In view of the aforementioned facts, they have submitted that the question of sitting idle over the matter for an indefinite period of time does not arise as the law provides that whenever a vacancy arises on an approved post, the same has to be filled up with the prior permission of the competent authority and a fresh selection process has to be resorted to by the School Service Commission and that there is no other mode to fill up and approve a vacant post. They have stated that in this case prior permission had already been given to fill up the vacant post and necessary steps were taken to initiate the process for selection of candidates by the School Service Commission and if the Petitioner has any intention to be appointed on the post of an Assistant Teacher in History, he has the liberty to participate in the said selection process, provided he is otherwise eligible but, he cannot claim to be appointed on the post by asking for a change in his Group as it will have the effect of frustrating the law. According to them, the Petitioner is not entitled to get any relief.

15. In his reply to the aforementioned Affidavit-inopposition, the Petitioner has disputed the submissions of these Respondents and has reiterated that the vacancy of B. Manna is the 17th vacancy which has to

be kept open for a general category and if it is reserved for an ST candidate, it will become illegal and erroneous. He has further stated that he never prayed for absorption and that since he has the qualification of M.A. in History together with B.Ed., he merely wants a change in the Group subject to approval of the competent authority and if such a change is allowed, then he would obviously get the M.A. Scale of Pay and therefore, the Application submitted by him cannot be said to be unlawful or untenable. The Petitioner has also supported the Resolution of the Managing Committee taken on 13.10.2007 and has further submitted that in view of the Circular dated 27.1.1995 quoted above, he is entitled to get an opportunity for a change of Group from Language to Social Science (History) and the said Circular cannot be ignored. Other submissions have been made in the Reply but they are in the nature of repeating the same submissions and supporting the Resolution of the Managing Committee and reiterating his claims that he is entitled to a change in the teaching Group.

16. An Affidavit-in-opposition has also been filed by the Respondent Nos. 5 and 6. These Respondents have stated that the Petitioner is a Teacher in the Language Group and had obtained M.A. Degree in History prior to his appointment of May 5, 1997. They have stated in Para-4(c) that as a result of retirement of the Assistant Teacher in History on 31.12.2007, a post of such an Assistant Teacher in History fell vacant and therefore, on 12.10.2007, the Petitioner had prayed before the Secretary of the School for transferring him from the Language Group to the Social Science Group. They have also referred to the Resolution of the Managing Committee in Para-4 (d) which was held on 13.10.2007 resolving to allow the Petitioner to function as a Social Science Group Teacher in History (M.A.) and to refer the matter to the concerned Department.

17. These Respondents in para-4(e) have stated that it is their function to select and recommend candidates after conducting regional level selection tests and once a candidate joins, the Commission then has no role to play with regard to the service of the candidates. They have further made it clear in this paragraph that the grievance of the Petitioner as raised in the Writ Petition is against the State Respondents and not against the Commission.

18. In paragraphs 12 and 13 of the Writ Petition, the Petitioner has stated that the School Service Commission, Western Region, is not entitled to take steps in relation to the vacancy created on the retirement of B. Manna. In reply to these paragraphs, these Respondents have disputed that the Commission is not entitled to take any steps with regard to the filling up of the vacancy and they have stated that under the Rules, they are the appropriate authority to take steps. They have therefore disputed allegations of violation of the principles of legitimate expectation as alleged by the Petitioner. They have also disputed the contention of the Petitioner to the effect that if they take steps to fill up the vacancy in the Social Science Group (History) then the Petitioner's legitimate claim will be jeopardised. They have stated that on the contrary, the Commission is under a statutory obligation to fill up the vacancy by

recommending the candidates as per the panel published in June 7, 2008.

19. Mr. A.K. Ghosh, learned Counsel for the State, has submitted that the Petitioner's claim to be entitled to the benefit of a change from the Language to the Social Science Group (History) solely on the basis of Memo No. 57-SE dated 27.1.1995 quoted above is totally misconceived. He submits that the Petitioner was appointed as a Language Teacher and was selected as such on a permanent vacancy in the Language subject. Under these circumstances, Merely because there is a

Circular dated 27.1.1995, it cannot override the law which, in the instant case, is the **West Bengal School Service Commission Act, 1997** and which came into force w.e.f. 1.11.1997. He submits that after coming into force of the said West Bengal School Service Commission Act, 1997 the provisions of Section 9 therein lays down the procedure in relation to the appointment against vacancies. He submits that therefore, a Circular of 1995 cannot be applied in the case of the Petitioner in view of the coming into force of the said 1997 Statute. He further submits that the said Circular which has been quoted above, relates only to the grant of Pay according to qualification to the Assistant Teacher of nongovernment Secondary Schools and therefore, it cannot be said to be an authority in support of the claim of the Petitioner pertaining to change of Group. He also submits, referring to the Written Notes of Arguments filed by the State Respondents, that the said Memo dated 27.1.1995 lost its significance after the promulgation of the said Act. He submits that under Section 9 of the said Act, it is clearly provided that notwithstanding anything contained in any other law etc., the appointments to the post of a Teacher in a School shall be made by the Managing Committee, by whatever name called, or by the Administrator where there is no such Managing Committee on the recommendation of the Regional Commission and if any appointment of a Teacher is made in contravention of the provisions of the Act and if such appointment is made on or after the commencement of the Act, the same shall be invalid and shall have no effect and a Teacher so appointed shall not be a "Teacher" within the meaning of Clause (b) of Section 2 of the said Act. Section 9 of the West Bengal School Service Commission Act, 1997 reads as follows:-

"9. Effect of recommendation of Commission- (1) Notwithstanding anything contained in any other law for the time being in force or in any contract, custom or usage to the contrary, appointments to the posts of Teachers in a school shall be made by the Managing Committee, by whatever name called, or by the ad-hoc committee, or by the administrator, if any (where there is no managing committee), of that school on the recommendation of the Regional Commission having jurisdiction.

(2) Any appointment of a Teacher made on or after the commencement of this Act in contravention of the provisions of this Act shall be invalid and shall have no effect and the Teacher so appointed shall not be a Teacher within the meaning of clause (p) of section 2."

(Quoted)

20. Before this Court proceeds to make an adjudication, some dates are necessary to be taken note of. They are as follows:

- a) 27.1.1995 - Publication of the Circular relied upon by the Petitioner quoted in Para-11 above
- b) 1.11.1997 - The West Bengal School Service Commission Act, 1997 came into force
- c) 12.10.2007 - The Petitioner applied for change of Group
- d) 31.12.2007 - Vacancy occurred on account of retirement of B. Manna.

21. Upon a perusal of the aforementioned dates, it is evident that the Petitioner's application for change of Group as well as the occurrence of the vacancy both occurred after coming into force of the West Bengal School Service Commission Act 1997. It is very easy for the Petitioner to say that this is not a case of appointment but a case of a simple change of Group. After all, what does a change of Group mean? It would mean a sudden jump in the pay scale of the Petitioner who was appointed on the post of an Assistant Teacher in the Language Group as a Graduate Teacher. It was this appointment that was approved. He now wants to be recognised as an Assistant Teacher in History in the form of a change of Group for which there is no procedure under the said Act save and except the Circular of 1995 (quoted above). The mode and manner of recruitment of a Teacher have now been laid down under the West Bengal School Service Commission Act, 1997 and therefore, by filling up a vacancy by a graduate Teacher of a Language Group would amount to filling up of a vacancy of a candidate by jumping the provisions of the West Bengal School Service Commission Act, 1997. Merely because the Petitioner has been taking classes in History does not mean that the said act can waive the conditions and the mode of recruitment. Although the Petitioner claims a mere change of Group, it will ultimately have the effect of appointment because a vacancy has to be filled up and such a vacancy can only be filled up in accordance with law which, in the facts of the case, means in accordance with the procedure prescribed under the West Bengal School Service Commission Act, 1997.

22. It is true that the 1995 Circular, heavily relied upon by the learned Counsel for the Petitioner, is of some relevance in favour of the Petitioner in paras- 1 and 2 thereof but one cannot lose track of the fact that in this case, when the vacancy arose, it was 10 years after the West Bengal School Service Commission Act, 1997 had come in force. Under these circumstances, it cannot be said that the benefit of a 1995 Circular should be extended to the Petitioner because if it were to be so allowed, it would have the effect of overriding the provisions of the said Statute of 1997. The argument of the learned Counsel for the Petitioner to the effect that the 1995 Circular gave him an accrued right therefore, cannot be taken into consideration.

23. The Writ Petition is therefore bereft of merits. It is accordingly Dismissed.

As a result, CAN No. 8028 of 2008 is also Dismissed and as a consequence, the interim Order granted by this Court on 19.9.2008 by one of us, is vacated. However, CAN No. 10149 of 2008 filed by the Respondents Managing Committee, Secretary and Head Master of the Asanda Siksha Niketan praying for vacating of the Order is allowed.

The Writ Petition is Dismissed. No Order as to costs.

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Upon appropriate Application(s) being made, urgent Xeroxed Certified copy of this Judgment, may be given/issued expeditiously subject to usual terms and conditions.

(Tapen Sen, J.)
