

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

BEFORE:

**The Hon'ble Justice Soumen Sen
and
The Hon'ble Justice Uday Kumar**

**MAT 586 of 2022
with
I.A No. CAN 1 of 2022**

**State of West Bengal
Vs.
Somnath Ghosh & Ors.**

With

**MAT 773 of 2022
With
I.A No. CAN 3 of 2022**

**State of West Bengal
Vs.
Aparna Mandal Saha**

For the State/Appellant
in both the appeals

: Mr. S.N. Mookherji, Ld. A.G
Mr. Biswabrata Basu Mallick, Adv.
Mr. Sanjib Das, Adv.

For the Respondent
in MAT 586 of 2022

:Mr. Bikash Ranjan Bhattacharyya, Sr. Adv
Mr. Ujjay Ray, Adv.
Mr. Arpa Chakraborty, Adv.

For the Madrasah
Service Commission
in both the appeals

:Mr. Prosenjit Mukherjee, Adv.
Ms. Madhurima Sarkar, Adv.

For the Respondent no. 1/
Writ Petitioner in
MAT 773 of 2022

: Mr. Subhrangsu Panda

Hearing Concluded On : 17th October, 2023

Judgment On : 19th October, 2023

Soumen Sen, J.

1. The appeal is arising out of an order dated 22nd February, 2022 in which the learned Single Judge directed the Principal Secretary to the School Education Department to give an opportunity of hearing to the Madrasha Service Commission and the petitioners in order to consider the right of the petitioners as teachers who were appointed prior to the introduction of the West Bengal Madrasha Service Commission Act in 2008 and pass a reasoned order keeping in mind that the teachers of the institutions, which were given special rights to appoint their own teachers and not by the School Service Commission (like Ramkrishna Mission) have been given the right recently to get the advantage of the General transfer.

2. Although the said order appears to be innocuous but having regard to the important question raised with regard to the jurisdiction of the Principal Secretary of School Education Department to consider the representation for general transfer of teachers recruited prior to coming into force of the Madrasha Commission Act, it needs to be decided whether after their service have been transferred to Madrasha Schools their case can be considered for general transfer under the West Bengal School Service Commission Act, 1997 (in short '1997 Act'), although they were all recruited

under the School Service Commission Act that, is to say, prior to the bifurcation.

3. Both the School Education Department and West Bengal Minority Affairs and Madrasa Education Department are aggrieved by the impugned order.

4. The appellants are represented by Mr. Advocate General. The Advocate General has given a brief background of the relevant statute applicable in the present case.

5. The West Bengal School Service Commission Act, 1997 was promulgated on 1st April, 1997 with no provision for transfer like Section 10A, 10B and 10C recently introduced and upheld by the Hon'ble Division Bench of this court.

6. During 2006-07 the writ petitioners were appointed by the respective managing committee of Madrasa, as assistant teacher in Madrasa on the recommendation of School Service Commission.

7. Mr. Advocate General has referred to paragraph 2 of the writ petition where the details of the appointments of the West Bengal have been mentioned.

8. On 22nd October, 2008 the West Bengal Madrasa School Service Commission Act, 2008 (in short '2008 Act') was promulgated.

9. The 1997 Act was amended wherein the word "Madrasah" was excluded from the definition of "school" in Section 2(n) and the words

"Madrasah Teacher" were excluded from the definition of Teacher" in Section 2(p).

10. Section 8 of the 2008 Act was amended on 9th June, 2010 to include transfer of teachers/non teaching staff of the Madrasa Service Commission. The West Bengal Madrasah Service Commission Recruitment (Selection and recommendation of persons for Appointment and Transfer to the Post of Teacher and Non-Teaching Staff) Rules, 2010 has been promulgated on 12th November, 2010 under Section 18, read with, inter alia section 8 of the 2008 Act. Rule 33 of the said Rules sets out the procedure for transfer of Madrasah Teachers.

11. Section 10(B) was inserted in the 1997 Act on 11th July, 2013 w.e.f. 20th January, 2014, thereby introducing general transfer of teachers in schools. The West Bengal School Service Commission (General Transfer) Rules, 2013 was promulgated on 3rd October, 2013 under Section 17, read with Section 10(B) of the 1997 Act (2013). The West Bengal School Service Commission (General Transfer, Transfer on Special Grounds and Reallocation) Rules, 2015 was promulgated on 27th February, 2015 in supersession of the 2013 Rules. On 28th June, 2021 the Utsashree online transfer portal was introduced, to give an opportunity to teachers in schools to apply for transfer to any school in the State of their choice.

12. A writ petition bearing WPA No. 1202 of 2022 was filed by various teachers appointed to Madrasahs as per recommendation of the West Bengal School Service Commission between the year 2006-2007,

seeking the right to apply for transfers, including from Madrasahs to Schools, through the Utsashree Portal, and under the 2015 Rules. On 22nd February, 2023 an order was passed by the Hon'ble Single Bench of this High Court, in WPA No.1202 of 2022, inter alia, directing the Principal Secretary, School Education Department to grant hearing to the Petitioners and pass a reasoned order regarding their plea to be allowed to apply for transfer through the Utsashree Portal.

13. On 11th April, 2022 the present appeal, being MAT 586 of 2022 was filed by the School Education Department. On 4th November, 2022 a contempt petition, bearing CPAN No 1071 of 2022 was filed by the petitioner alleging non-compliance with the Impugned Order. On 14th December, 2022 it was decided that it was necessary to obtain the views of the MAME Department, regarding obtaining a No-Objection Certificate for the Petitioner to avail the benefit of the transfer through the Utsashree Portal.

14. On 15th December, 2022 a communication was made by the Principal Secretary, School Education Department to the MAME Department, requesting their views on providing an NOC for the Petitioners to avail transfer through the Utsashree Portal.

15. MAME department on 21st December, 2022 communicated their inability to grant a No Objection Certificate. On 23rd December, 2022 Principal Secretary, School Education Department passed an interim order

relying on the proceeding of 14.12.2022 and fixed the date of hearing on 30.12.2022.

16. The Principal Secretary, School Education Department on 10th January, 2023 passed a reasoned order, concluding that the School Education Department could not accept the prayer of the petitioners, inter alia, in light of the communication dated 21.12.2022, sent by the MAME Department. The Hon'ble Division Bench on 18th January, 2023 directed the Appellant and the Madrasah Service Commission to file reports.

17. The West Bengal Madrasah Service Commission Recruitment (Selection and recommendation of persons for Appointment and Transfer to the Post of Teacher and Non-Teaching Staff) Rules, 2023 was promulgated on 19th April, 2023 under Section 18, read with sections 8, 9 and 24 2008 Act, and in supersession of the 2010 Rules.

18. Mr. Advocate General has assailed the impugned order on the ground that teachers in Madrasahs cannot be treated on the same footing as teachers of schools, in view of the following reasons:

i) Teachers of Madrasahs are covered by the West Bengal Madrasah Service Commission Act, 2008, and the West Bengal School Service Commission Act, 1997 no longer applies to such Madrasah teachers.

ii) The 1997 Act was amended in 2008 with effect from 1st January, 2009, wherein the word "Madrasah" was excluded from the definition of "school" in Section 2(n) of the 1997 Act and the words "Madrasah Teacher"

were excluded from the definition of "Teacher" in Section 2(p) of the 1997 Act. The 2008 Act was promulgated on 22.8.2008, and subsequent to coming into effect of the same, teachers in Madrasahs were governed by the 2008 Act.

19. The terms and conditions of service of teachers in Madrasah in employment before 2008 Act in view of Section 13 of 2008 Act should not be varied to their disadvantage, however, the said provision although relied upon by the writ petitioners would be no assistance to them since prior to the promulgation of the 2008 Act, there was no provision for transfer in the 1997 Act. Accordingly, Madrasah teachers appointed while the 1997 Act still applied to them, were not covered by any statutory provisions relating to transfer.

20. The provision for general transfer of teachers in schools was only introduced on 11th July, 2013 with the insertion of Section 10B with effect from January 2014. In supersession of the 2013 Rules the West Bengal School Service Commission (General Transfer, Transfer on Special Grounds and Reallocation) Rules, 2015 ("2015 Rules") was promulgated on 27 February, 2015. Such provisions/rules were introduced at a time when Madrasahs were excluded from the 1997 Act and Madrasah teachers were governed solely by the 2008 Act.

21. It is submitted that in any view of the matter the procedures relating to transfer for Madrasah teachers are governed by Section 8 of the 2008 Act, as amended, read with Rules 29 to 36 of the West Bengal Madrasah

Service Commission Recruitment (Selection and recommendation of persons for Appointment and Transfer to the Post of Teacher and Non-Teaching Staff) Rules, 2023 (in short "2023 Rules")

22. Mr. Advocate General has submitted that the argument of the writ petitioners, that the 2015 Rules ought to be made applicable to Madrasah teachers since they were made applicable for teachers from another "minority institution", i.e., Ramkrishna Mission Schools must be rejected. This is so, as Ramakrishna Mission Schools stand on a different footing from Madrasahs, as Ramakrishna Mission Schools are still "schools" within the meaning of the 1997 Act.

23. Mr. Advocate General has referred the Government Order No. 351-SSE/12/ES dated 6th September, 2012 read with the Order No. 840-SE(S) dated 20th September, 2017 whereby the schools under Ramkrishna Mission, Belur Math had been exempted from the purview of the 1997 Act in exercise of power conferred under Section 15A of the said Act subject to certain conditions mentioned in such orders. By a subsequent Government Order no. 26-SE/S10M-03/2022 dated 6th January, 2022 the teachers and non-teaching staff who are working in the schools under Ramkrishna Mission, Belur Math on the basis of the recommendation of the SSC prior to 6th September, 2012 shall be eligible to avail the facilities of general transfer in terms of the Rule 2015 subject to certain conditions. The said Government Order refers to all the earlier orders where the issue of transfer was considered. It also refers to the letter of the Ramkrishna Mission, Belur Math

dated 2nd December, 2021 in which the Mission had issued no objection in favour of those teachers and non-teaching staff working in their schools who desired to avail the facilities of general transfer and transfer on special ground. It was on the aforesaid basis the Advocate General has submitted that the observation of the learned Single judge that the case of the petitioners are on the similar footing as that of the teachers and non-teaching staff of the Ramkrishna Mission is erroneous.

24. Mr. Advocate General has referred to Section 2(n) of 1997 Act and further submits that Madrasha are no longer “schools” within the meaning of 1997 Act.

25. Mr. Advocate General has submitted that the writ petitioners have given previous instances of Madrasha teachers from being transferred from Madrasha to schools and accordingly they are entitled to the benefit of 2015 Rules is misplaced.

26. The transfer of Smt. Baishali Shah, was, in fact a case of deputation, taking into account special circumstances.

27. Two other instances pointed out by the writ petitioners, regarding Shri Abu Safian Ali Ahmed, and Sri. Sukumar Barman, have no applicability to the present case, as the two individuals involved were not transferred from Madrasahs to schools, but were, as apparent from the pleadings of the writ petitioners, appointed to schools after successfully participating in examinations conducted by the West Bengal School Service Commission.

28. In any event it is argued that an administrative oversight allowing the transfer of Madrasha teacher to a school would not create a vested right in favour of other similarly placed Madrasha teachers in view of the pronouncement of the law in this regard in ***Chandigarh Administration and Ors. vs. Jagjit Singh and Ors.*;1995(1) SCC 745** (paragraph 8).

29. It is submitted that the direction upon the Principal Secretary School Education Department to consider the grievance of the writ petitioner is erroneous as the School Education Department has no administrative/executive control or oversight over affairs concerning Madrasahs.

30. This is so, as the West Bengal Rules of Business, promulgated by the Governor under Article 166(3) of the Constitution, allocates the business relating to Madrasah Education to the Minorities Affairs and Madrasah Education Department ("MAME Department"), and not the School Education Department.

31. Mr. Advocate General has relied upon the relevant extract of the Notification No. 199-HOME(CONS) dated 12th July 2006 read with para XLVI of the Rules of Business of the Government of West Bengal to show that administrative control of Madrasha Education was transferred to the Minorities Affairs and Madrasha Education Department, Government of West Bengal.

32. It is in such view of the matter it is submitted that the instant appeal is required to be allowed and the impugned order is required to be set aside.

33. Mr. Advocate General, however, has clarified that the Principal Secretary, School Education Department, has complied with the Impugned Order, by passing a reasoned order dated 10.1 2023, subject to the appeal. Such compliance with the Impugned Order, pending appeal, would not render the appeal infructuous as clearly held in ***Union of India (UOI) and Ors. vs. Ram Kumar Thakur ; 2009 (1) SCC 122.***

34. Per contra, Mr. Bikash Ranjan Bhattacharya, learned Senior Counsel appearing on behalf of the writ petitioners has submitted that even it is assumed for the sake of argument that after coming into force of the Madrasah Service Commission Act 2008 (herein after called the 'MSC Act, 2008) and also after change of department as per Rules of Business, Government of West Bengal, the writ petitioners' service have been transferred to a different department; however, the admitted position remains that such change of Employer has been done without the consent of the Employee which is impermissible in law. After coming into force of the MSC Act, 2008, the recruiter in Madrasahs has been changed and before that most of the writ petitioners were already recruited by West Bengal Regional School Service Commission (hereinafter called, as 'WBRSSC).

35. Moreover, the writ petitioners were already recruited by West Bengal Regional School Service Commission (in short WBRSSC) prior to

coming into force of MSC Act, 2008 by which the recruitment process for Madrasha have been changed. When the said writ petitioners were recruited by SSC in 2006-2007 there was no process of counselling. The same necessarily means, unlike the present time, the said writ petitioners were not given any choices or options to choose any School or Madrasah. Therefore at that relevant point of time some of the candidates similarly situated with the said writ petitioners were recommended for school and the present writ petitioners were abruptly recommended for Madrasahs without any option being sought from them. However at the time of recommendation, the said writ petitioners were not prejudiced since they knew the service condition for the Assistant Teachers in the Schools and Madrasahs are same. Moreover, as per the Rules prevalent, ie, Rule 18(a) of the West Bengal School Service Commission (Selection of Persons of Appointment to the Post Of Teachers) Rules, 2006, (herein after referred to as the SSC Rules, 2007) the said writ petitioners were barred from appearing in the Regional Level Selection Test Examination for three successive years for appointment in the same post. Therefore neither the said writ petitioners had any option to choose a School over a Madrasah or vice versa, nor they had reasons to apprehend that they would be barred from accessing any beneficial scheme which would be applicable to a school teacher in future, nor they had reasons to apprehended that they would ever be regarded separately in future than a school teacher nor they had reasons to apprehended that their employer would be changed without intimation or seeking for any option from them.

36. It is submitted that on an enquiry made by the respondent no.1 in the office of the SSC, School Education Department and other department about his eligibility for complying before the SSC though he is a teacher of Madrasha, the Assistant Secretary to SSC replied him that he was eligible for applying transfer before the SSC itself. In view thereof the respondent no. 1, as also few other respondents, namely, Mili Aich and Debojyoti Halder, could successfully apply for transfer before the SSC through online process prevalent then. One of the respondents namely Debojyoti Halder appeared in the eligible candidates' list for transfer published by the SSC in the year 2014. However, he was not granted transfer since he could not qualify the seniority criteria mentioned therein.

37. Mr. Bhattacharya has submitted that while dealing with the constitutionality of Section 10C of the WBSSC Act 1997 which is inserted by way of amendment in the year 2017, the Hon'ble Division Bench of This Hon'ble Court in a judgment reported in ***Rabin Tudu v. State of West Bengal and Ors.; 2023 SCC Online Cal 2182***, accepted the contention of the Learned Advocate General that though such amendment and insertion of the said Section 10C of the Act was done in 2017 it would be applicable to all teachers appointed by the School Service Commission after coming into force of the Act of 1997, the Hon'ble Bench at Para 86 held, "... We have already held in the preceding paragraph that Section 10 of the said Act applies within the limited contour the condition of service of a teacher appointed prior to coming into force of the Act of 1997 and not in respect of the appointments

made after coming into force of the said Act, the further reason can be supplied in support of the aforesaid discussion that every employment in a public service are contractual but such service conditions are governed by the statutory Act or the Rules framed in this regard and the concept of contractual service loses its existence Obviously, Section 10C cannot be operated retrospectively to the extent that it cannot impinge upon the terms and conditions of the service of the teachers appointed prior to the promulgation of the School Service Commission Act" However, the said order has been challenged before the Hon'ble Supreme Court in SLP (C) No. 21996/2023 and vide order dated 09th October, 2023 an interim protection from transfer is given only to teachers who have been appointed prior o the section 10C coming into force. The said matter is still pending for disposal and lastly posted on 5th December, 2023. Likewise, though Section 10B was inserted and amended by the amendment of 2013; only by dint of Section 10B, the Transfer Rules has been introduced to which the instant Uthshashree is a part; the same should naturally be applicable to all the teachers appointed by the SSC after coming into force of the WBSSC Act of 1997 including the writ petitioners. Moreover, such benefit of the Act of 1997 of the present writ petitioners are also protected under Section 13 of the West Bengal Madrasah service Commission Act, 2008; which provides, "Notwithstanding anything contained elsewhere in this act, the terms and conditions of service of teachers in the employment of a Madrasah immediately before the commencement of this Act, shall not be varied to the

disadvantage of such teacher in so far as such terms and conditions related to the appointment of such teachers to the post held by them immediately before the commencement of this Act".

38. Mr. Bhattacharyya has submitted that the prayer of the writ petitioners were refused initially by the MAME on the ground that there were scarcity of teachers in Madrasha due to stay orders passed by the High Court. However, having regard to the fact that there is no order of stay either by the High Court of Calcutta or the Hon'ble Supreme Court of India the appellants are free to fill up the vacancies by way of regular recruitment process.

39. It is submitted that the contention of the appellant that some of the writ petitioners accepted the benefit of transfer under MSC and hence they cannot now fell back on the Utsashri online portal for non Madrasha institutions is not acceptable since at that time some of the writ petitioners participated for the transfer initiated by MSC in view of non introduction of the Utsashri Online portal. The said teachers at the relevant point of time had no other option. However after introduction of the scheme and challenging the denial for the Madrasah teachers to participate in the same, those writ petitioners voluntarily abstained from participating in such process of transfer by MSC.

40. Mr. Bhattacharyya submits that there are several instances where the assistant teachers of Madrasahs have been duly recommended by the Commissioner of School Education or the WBSSC for transfer to schools and as per the said recommendations and transfer orders those incumbents have

already joined and continuing their services in the schools; such as one assistant teacher namely Smt. Baishali Saha of Metekona Moulana Abu Taher Sr. Madrasah has been recommended by the Commissioner of School Education and accordingly transferred to Kasba Chittaranjan High School vide Memo No. WBBSE/Apt./KOL/GT(S)/AT-192/1 dated 10.12.2020; similarly, one assistant teacher namely Smt. Debalina Chatterjee Datta of Neemdighi High Madrasah (H.S.) has been recommended by the WBCSSC as per the West Bengal School Service Commission (General Transfer, Transfer on Special Ground and Reallocation) Rules, 2015 and accordingly transferred to Jadavpur Baghajatin High School vide Memo No. 1637(2)/.../SPL-150/CSSC/GT/2017 dated 13.09.2017. From time to time several teachers of Madrasahs have been transferred to schools.

41. Mr. Bhattacharya has extensively referred to the reasoned order passed by the Assistant Secretary School Education Department in compliance with the order under appeal to show that the situational difficulties are the primary reason for not issuing 'no objection' by the Madrasha Commission. Mr. Bhattacharya has specifically referred to paragraph 10 of the reasoned order to show that principally it was decided that the teachers appointed prior to 2008 Act can be transferred to schools with 'no objection'. The paragraph reads:

"10. In response to the communication of the School Education Department, the Minority Affairs and Madrasha Education Department replied vide their letter no. 2898-MD-99011/197/2022-SECTION

(MAME) dated 21.12 2022, to the School Education Department. The same was placed before me today in the hearing. The Minority Affairs and Madrasha Education Department vide said letter informed that has the Minority Affairs and Madrasha Education is not in position to grant any No Objection for transfer of petitioners through the Utsasree Portal from Madrasahs to School for the following reasons.

a. The non-Govt. Aided Madrasahs are facing severe shortage of teachers and non-teaching staff At present there are total 5734 vacancies in teaching and non-teaching posts of Madrasahs of which more than 4500 posts are vacant in Assistant Teacher posts. Transfer of teachers from Madrasahs to Schools will lead to further increase in vacancies in Madrasahs resulting to acute problem in teaching of Madrasah students

b. Fresh recruitment for appointment of staff in vacancies of Madrasahs will take time due to pending court cases in the Hon'ble Supreme Court and High Court till that time the students of the Madrasahs will suffer

c. Out of 19 petitioners, 12 petitioners had applied to the W B Madrasah Service Commission for transfer As they have not got preferred Madrasahs for transfer, they want to be covered under the Utsashree portal. They still have recourse to get transferred according to the WB Madrasah Service Commission Recruitment (Selection and recommendation of persons for Appointment and transfer to the Posts of Teachers and non-teaching Staff) Rules 2010 as per their merit

d. The petitioners get same monetary benefits as of teachers of recognized aided school.

e. The recommendation, appointment and transfer of staff of madrasah are governed by the provisions of the W B Madrasah Service Commission Act 2008 and the WB Madrasah Service Commission Recruitment (Selection and recommendation of persons for Appointment and transfer to the Posts of Teachers and non-teaching Staff) Rules 2010. There is no such provision for transfer of staff from a madrasah under the administrative control of the Minority Affairs and Madrasah Education Department to a school under the administrative control of the School Education Department and for granting no objection by this Department.

f. Once transfer from Madrasahs to Schools as the case of the petitioners start, huge number of other staff of madrasahs may also seek apply for transfer in similar way resulting further shortage of staff in madrasahs and more Court cases.

Under the above facts and circumstances, this Department is not in a position to grant any no objection for transfer of the petitioners through the Utsashree portal from Madrasahs to Schools.”

42. Mr. Bhattacharya has referred to an application from Somnath Ghosh dated 19th December, 2013 one of the writ petitions to the Secretary, WBSSC seeking clarification about his eligibility for General Transfer under sub-rule (e) of Rule -1. The General Transfer Rules 2013 and as per

notification no. 1325-SE/S/1S-04/95 dated 03.10.013 and the reply from the WBSSC dated 28th January, 2014. It is submitted that in reply the Assistant Secretary, WBSSC has directed Sri Ghosh to submit application as per procedure after publication of notice inviting General Transfer as per Section 5(1) of the WBSSC (General Transfer) Rules 2013 which clearly shows that teachers appointed prior to 2008 Act shall be government by the transfer rules as framed by WBSSC.

43. In view of thereof the order passed by the learned Single Judge is required to be upheld and necessary order be passed directing the MSC to issue 'no objection certificate' for transfer.

44. Mr. Prasenjit Mukherjee learned Counsel appearing on behalf of MSC has submitted that all the petitioners participated in the 6th and 7th RLST 2006 and 2007 conducted by West Bengal Regional School Service Commission and being successful candidates their names are included in the panel and the concerned Secretary of the West Bengal Regional School Service Commission had recommended the names of the petitioners/ respondents for appointment to the post of Assistant Teachers in different Madrasahs. The then concerned Regional School Service Commission prepared the respective separate panel for the post of Assistant Teacher in different aided Madrasahs in West Bengal. There was no combined panel for the post of Assistant Teachers of both the Madrasahs and Secondary and Higher Secondary Schools and admittedly there was separate panel for the Madrasahs and Secondary and Higher Secondary School. As the petitioners appeared in the

counselling and opted for the respective Madrasahs, the recommendations were duly issued in their favour and subsequently joined in the respective posts and after discharging their service of more than 15 years cannot opt for transfer process through Utsashree Portal to the respective Secondary and Higher Secondary Schools under School Education Department.

45. The writ petitioner nos 1,2,6,7,8,9,10,11,12,13,18 and 19 already had submitted in their application for transfer in terms of the notification issued by the West Bengal Madrasah Service Commission invoking Rule 33 West Bengal Madrasah Service Commission Recruitment (Selection and Recommendation of persons for Appointment and Transfer to the Post of Teacher and non-teaching Staff) Rule 2010. Twelve writ petitioners/respondents out of nineteen, already had invoked Rule 33 of the said 2010 Rules and when they failed to obtain their preferred Madrasah for transfer, they wanted to be transferred to the schools covered by Utsashree Portal. In the year 2021 the West Bengal Madrasah Service Commission issued the notification for online transfer process similar to Utsashree Portal and near about more than 4000 candidates had availed the benefits of online transfer process and the transfer process has been successfully completed.

46. Prior to the enactment of the West Bengal Madrasah Service Commission Act, 2008, in the year 2006-2007, the West Bengal Regional School Service Commission used to conduct the recruitment process for the post of Assistant Teachers in different aided Madrasahs along with the schools in terms of West Bengal School Service Commission Act 1997. At the

relevant point of time there was no provision of transfer. After the enactment of West Bengal School Service Commission Amendment Act 2008 and in terms of clause (n) of section 2, Madrasah was excluded from the term 'school' and as per the amendment of clause (p) section 2, Madrasah teachers were also excluded from the term of "teacher" of the said Act and neither in the West Bengal School Service Commission Act 1997 nor in the West Bengal School Service Commission Amendment Act 2008, there was any provision of transfer.

47. Subsequently in terms of the notification dated 11.03.2015, after the notification of West Bengal School Service Commission (General Transfer, Transfer on Special Ground and Re-allocation) Rules 2015, the right of transfer has been given to teachers of the school, in terms of Rule 2 (m) of 2015 Rules as amended on 08/09/2021 but not to the Assistant Teachers or teachers of West Bengal aided Madrasahs. In terms of the notification dated 11/03/2015 and 08/09/2021, the benefits of transfer under Utsashree Portal are restricted to the teachers of Secondary and Higher Secondary Schools not to the teachers or Assistant Teachers or headmaster of the aided Madrasahs.

48. In the year 2014, some provisions of West Bengal Madrasah Service Commission Act 2008, had been declared ultravires and the said issue continued till 6th January 2020 and ultimately the Hon'ble Supreme Court held that the West Bengal Madrasah Service Commission Act 2008 as Constitutional. The West Bengal Madrasah Service Commission due to the long pendency of the litigation since 2014-2020 could not undertake any

recruitment process. Due to pendency of the litigations the non-Government aided Madrasahs are facing severe shortage of teachers and non-teaching staff. At present there are total number of 5734 vacancies in teaching and non-teaching posts in different Madrasahs all over West Bengal of which more than 4500 posts are vacant in Assistant Teachers category. The transfer of teachers from Madrasahs to Secondary Schools will lead to further increase in vacancies in Madrasahs resulting to acute problem in teaching of Madrasah students.

49. All the petitioners are getting same monetary benefits as of teachers of recognized schools. There is no provision neither under the West Bengal Madrasah Service Commission Act 2008 nor in Rules 2010 permitting the Assistant Teachers of the concerned Madrasah to get transfer to the respective Secondary or Higher Secondary School under West Bengal, School Education Department. The aided Madrasahs are under the administrative control of Minority Affairs Department and Madrasah Education Department and the school teachers are under the administrative control of the School Education Department and there is no provision for granting no objection by this department to the Assistant Teacher of different Madrasahs seeking for transfer through Utsashree Portal.

50. Hence this instant appeal is liable to be dismissed.

51. The principal issue is whether after coming into force of the West Bengal Madrasah Service Commission Act, 2008 it would be open for the teachers who have been recruited under the 1997 Act to insist that their

application is required to be processed by the SSC applying the general transfer rules under the said act.

52. At the time of introduction of the 2008 Act there was no transfer policy in existence under the 1997 Act.

53. The terms and conditions of service of teachers in Madrasha in employment before 2008 Act in view of Section 13 of 2008 Act should not be varied to their disadvantage. Prior to the promulgation of the 2008 Act, there was no provision for transfer in the 1997 Act. Accordingly, Madrasah teachers appointed while the 1997 Act still applied to them, were not covered by any statutory provisions relating to transfer. The provision for general transfer of teachers in schools was only introduced on 11th July, 2013 with the insertion of Section 10B with effect from January 2014. In supersession of the 2013 Rules the West Bengal School Service Commission (General Transfer, Transfer on Special Grounds and Reallocation) Rules, 2015 (in short "2015 Rules") was promulgated on 27 February, 2015. The transfer rules under the 2008 Act is prior to the transfer rules framed under 1997 Act. Admittedly and evidently these transfer rules have been introduced at a time when Madrasahs were excluded from the purview of the 1997 Act, and Madrasah teachers were governed solely by the 2008 Act. In absence of transfer rules as on the date of their transfer it cannot be contended that such transfer order MSC, 2008 and transfer rules of 2010 would affect their rights preserved and protected under Section 13 of the 2008 Act. Moreover transfer is incidental of service condition and by reason of 2010 Rule the writ petitioner cannot claim that their

application for transfer is to be considered under SSC Act. All teachers transferred to Madrasha under MSC Act, 2008 have availed transfer within Madrasha following the 2010 Rules. They have never challenged the vires of the 2010 Rules.

54. Moreover, the Madrasha Act has been upheld by the Honble Supreme Court in **Sk. Md. Rafique vs. Managing Committee, Contai Rahamania High Madrasah and Ors.; 2020(6) SCC 689**. In view thereof the transfer rules of 2010 is applicable to the writ petition. The decision in **Rabin Tudu** (supra) cannot be of any assistance as it has clearly stated that section 10(c) would be applicable to all teachers appointed by the SSC after coming into force of the 1997 Act. As stated earlier the transfer rules for teachers appointed under SSC was introduced for the first time on July 11, 2013.

55. The argument that no option was given to the present writ petitioners at the time of their transfer from school to Madrasha cannot be accepted at this stage. They have voluntarily agreed to join Madrasha carrying with them the privilege and protection under Section 13 of the 2008 Act. It was a conscious and voluntary decision. Moreover, as explained by the learned Advocate General the writ petitioners cannot be treated at par with the teachers of Ramkrishna Mission schools as the Mission has provided no objection in favour of those teachers and non-teaching staff working in their schools, who desire to avail the facilities of general transfer and transfer

on special grounds. The Mission schools are treated as “schools” within the meaning of Section 2(n) of 1997 Act.

56. School is defined under Section 2(n) of 1997 Act as follows:

“2(n). "school" means a recognised non-Government aided-

(i) secondary school, or educational institution, or part or department of such school or institution, imparting instruction in a secondary education, or

(ii) higher secondary school, or educational institution (other than a college), or part or department of such school or institution, imparting instruction in higher secondary education, or

(iii) Madrasa,

And includes a sponsored school.

Explanation – Recognised with its grammatical variations used with reference to a school, shall mean -

(a) recognised or deemed to have been recognised under the West Bengal Board of Secondary Education Act, 1963, or

(b) recognised under the West Bengal Council of Higher Secondary Education Act, 1975, or

(c) recognised or deemed to have been recognised under the West Bengal Board of Madrasah Education Act, 1994.

Explanation II.-"Aided" with its grammatical variations, used with reference to a school, shall mean aided by the State Government in the shape of financial assistance towards the basic pay of the teachers of that school.

Explanation III.-"Basic pay" shall mean the monthly pay of a teacher of a school which corresponds to a stage in the time-scale of pay of the post held by the teacher in that school.

Explanation IV-"Secondary Education" shall have the same meaning as in clause (1) of section 2 of the West Bengal Board of Secondary Education Act, 1963.

Explanation V.-"Higher secondary education" shall have the same meaning as in clause (d) of section 2 of the West Bengal Council of Higher Secondary Education Act, 1975.

Explanation VI.-"Sponsored school" shall mean a school declared as a sponsored school by the State Government by notification;"

57. In response to the letter of Somnath Ghosh, Mr. Advocate General has explained that the answer to the query of Mr. Somnath Ghosh cannot create any right in favour of Mr. Ghosh to be considered for general transfer under the 2013 Transfer Rules. It appears from the communication of the Assistant Secretary, West Bengal Central School Service Commission dated 28th January, 2014 that the said authority has referred to the provision of the 2013 Rules in answer to the query raised by Mr. Somnath Ghosh. The letter of Mr. Ghosh would itself show that he wanted to know about the eligibility criteria for general transfer Rules 2013 and the manner in which it cannot be made.

58. In any event, the said reply by the School Education Department cannot create any right in favour of Mr. Ghosh as the School Education Department has no authority or jurisdiction to consider the transfer

application of a teacher who has joined Madrasha from the School Service Commission in 2008 and their service conditions are to be governed by 2010 and 2023 Rules. Moreover as earlier observed the teachers appointed through SSC did not have any transfer rules prior to 2013. Mr. Ghosh in any event had already exercised his option for transfer in 2021 as would be evident from the affidavit filed by MSC in the year 2021.

59. Even assuming that any transfer has been allowed in favour of a teacher transferred from SSC to Madrasha in 2008 and subsequently allowed transfer from Madrasha to SSC it cannot create any right in favour of any of the writ petitioners. It is well settled that the mere fact that the authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. If the order in favour of other person is found to be contrary to law or not warranted in the facts of the case it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the authority to repeat the illegality or to pass another unwarranted order. (See. **Chandigarh Administration and Anr.** (supra) paragraph 8)

60. In any event, we have already indicated that the instances relied upon on behalf of the writ petitioners to show similarity are factually incorrect and are not similar.

61. The learned Single Judge appears to have proceeded on the basis that the writ petitioners are similarly placed as that of the teachers of Ramkrishna Mission. We have already dealt with the said issue earlier which

would show that on the request of Mission the transfer policy have been made applicable to the teachers of Mission and the schools under said Mission are treated as schools. This fact could not be brought to the notice of the learned Single Judge as no opportunity was given to the respondent to file an affidavit to bring on record such facts. Each case is required to be decided on its own merits, factual and legal in accordance with relevant legal principles. Before any direction could be passed to the School Education Department to consider the transfer of teachers from Madrasha to School an opportunity should have been given to the respondents to bring on record all relevant facts to show the legal rights of the writ petitioners. Moreover, the writ petitioners have acted upon the transfer rules of Madrasha and they are now clearly estopped from raising any dispute with regard to the authority of the Madrasha Commission to decide on such transfer application. Mr. Bhattacharya has argued that there cannot be estoppel against the statute. However, in the instant case we are of the view that the teachers transferred from the SSC in the year 2008 after coming into force of 2008 Act are to be governed by the 2010 Rules. In fact, they have accepted the said rules and acted accordingly. In the absence of any challenge to any of the rules contemporaneously and also having regard to the fact that the Madrasha Act has been upheld by the Hon'ble Supreme Court, it is no more open for the writ petitioners to contend that their transfer is required to be considered by the SSC in terms of 2013 Rules.

62. The contention of the writ petitioners that the School Education Department having accepted and implemented the order under challenge it is no more open for the MSC not to issue 'no objection certificate'. We have earlier noted the argument of Mr. Advocate General that the order of compliance by the SSC was on the threat of contempt. The appellant no. 1 preferred a appeal on 11th April, 2022. The application for stay of operation of the order was filed on 12th April, 2022. Thereafter an application for condonation of delay was filed on 21st April, 2022. The contempt notice was served on 15th January, 2022 and the contempt petition was filed on 4th November, 2022. The appellant no. 2 was impleaded on 16th August, 2023. This would show that the Education Department has not accepted the order of the learned Single Judge but complied with the said order on the threat of contempt. Mr. Advocate General has submitted that in spite of best effort the appeal and the application could not be heard prior to the 18th of January, 2023 and in the meantime the School Education Department in compliance of the order dated 22th February, 2022 passed a reasoned order on 10th January, 2023. It appears that on 18th January, 2023 the coordinate bench directed the appellant no. 1 to place a report on affidavit of development of subsequent to the order of the learned Single Judge and the appellant no.2 to explain its stand by way of a separate report on affidavit. It is settled law that implementation pending appeal to a higher forum so as to avoid contempt proceeding does not render the appeal infructuous. (See **Ram Kumar Thakur** (supra) paragraphs 2, 3 and 7)

63. Moreover it appears that the School Education Department prior to compliance has preferred an appeal raising jurisdictional issue with regard to consideration of the transfer application by the School Education Department under 2013 Rules due to promulgation of 2008 Act and transfer rules 2010.

64. The School Education Department has lost all control over the Madrasha by reason of the 2008 Act read with the Rules of Business issued under Clause 3 of Article 166 of the Constitution of India dated 30th March, 2012 clearly specifying the department who should have control over the Madrasha namely, the Minority Affairs and Madrashes Education Department under such circulars the Principal Secretary, School Education Department could not have been directed to consider the prayer for transfer. The said authority is no more vested with the power and jurisdiction to consider the representation for transfer from Madrasha to school by reason of clear bifurcation of jurisdiction. The recruitment policies, selection and service conditions are operating under two different statutes. In fact the appointment and transfer Rules namely 2010 Rules has come into operation much prior to the transfer Rules applicable to teachers appointed by the SSC. Twelve writ petitioners have in fact, availed of Rule 33 of the 2010 Rule for transfer and when they failed to obtain their preferred Madrasha for transfer, they wanted to be transferred to the schools covered by Utsashree portal. This has been explained in detail in the affidavit filed by the MSC. The affidavits filed by the MSE has clearly clarified the issue and justified its stand that the writ petitioners are not entitled to be considered for transfer to schools. The writ

petitioners were never denied of transfer within the Madrasha Schools. The transfer is only restricted to the cadre of Madrasha service. We feel that an opportunity ought to have been given to the appellants to file an affidavit to make clear the aforesaid distinction and bring on record relevant materials for proper adjudication.

65. In view of the above we set aside the order of the learned Single judge.

66. The appeals succeed and all the connected applications are disposed of.

67. The impugned order is set aside.

I agree

(Soumen Sen, J.)

(Uday Kumar, J.)