**IN THE HIGH COURT AT CALCUTTA**

**CIVIL APPELLATE JURISDICTION**

**APPELLATE SIDE**

**Present:**

**THE HON'BLE JUSTICE HARISH TANDON**
**&**
**THE HON'BLE JUSTICE RABINDRANATH SAMANTA**

**M.A.T. 612 OF 2022**
**With**

**CAN 1 OF 2022**

**Sanghamitra Bhattacharya**

**Vs.**

**Sudeshna Kar & Ors.**

***Appearance:***

For the Appellant : **Mr. Kalyan Bandopadhyay, Adv.**
**Mr. Jayotosh Mujumdar, Adv.**
**Mr. Arjun Roy Mukherjee, Adv.**
**Mr. Sougata Mitra, Adv.**
**Mr. Rameshwar Sinha, Adv.**

For the Petitioners : **Mr. Abhratosh Majumdar, Adv.**
**Mr. Shubra Prakash Lahiri, Adv.**
**Mr. Kausheyo Roy, Adv.**

For the WBCSSC : **Mr. Sutanu Kumar Patra, Adv.**
**Ms. Supriya Dubey, Adv.**

For the State : **Mr. Supriya Chattopadhyay, Adv.**
**Mr. Sabyasachi Mondal, Adv.**

Judgment On : **11.05.2022**

***Harish Tandon, J.:***

The present appeal is directed against a judgment and order dated 31st March, 2022 passed by the Single Bench in WPA 2133 of 2022 whereby and whereunder the appellant was directed not to discharge duties and functions as Assistant Headmistress of Kamala Vidyamandir High School for Girls (HS) nor shall sign any papers and documents including the attendance register in such capacity in the said school. The order impugned runs thus:-

> ***"The fundamental question involved in this matter is how one Assistant Headmistress can be transferred from one school to another school as Assistant Headmistress.***
>
> ***The school does not require any Assistant Headmistress as has been shown before me by the learned advocate for the petitioners and it was supported by the Managing Committee of the Kamala Vidyamandir High School for Girls (H.S) that the school has now 355 students. An Assistant Headmistress can be appointed if the students strength of the school is above 750 and not below that. Therefore, the school need not have any***

***Assistant Headmistress and the Central School Service Commission is directed to post the Respondent No.8 as an assistant teacher in any other school by giving her pay protection which is to be looked into by the Commissioner of School Education as she was once selected as Assistant Headmistress of a school. The Respondent no.8 being the said Assistant Headmistress from today shall not be the Assistant Headmistress of Kamala Vidyamandir High School for Girls (H.S) and she shall not sign any papers or documents including attendance register as the Assistant Headmistress of the school or as the Teacher-in-Charge of the school from today.***

***With this observation and direction this writ application is allowed."***

It appears from the impugned order that apart from the restrain having created upon the appellant in discharging duties as Assistant Headmistress or the Teacher-in-Charge, the West Bengal Central School Service Commission was also directed to post the appellant as Assistant Teacher in any other school with pay protection. Therefore, the pivotal issue involved in the instant appeal is whether the writ court can pass an order demoting the appellant to the post inferior to the post which she held without following and/or keeping adherence to the statutory Rules or end provisions of law applicable thereto.

Indubitably, the appellant was appointed as Assistant Teacher in Garden Reach Nutbehari Das Girls High School on November 3, 1997 which was duly approved by the DI of Schools (S.E) on 4th February, 1998.

Subsequently, the post of the Assistant Headmistress was duly sanctioned vide Memo No. 4G-633/80 dated 6th September, 2010 by the then Director of School Education, West Bengal. Pursuant to the sanction of the said post, the Selection Committee was constituted and the process of selection was initiated for filling up the said sanction post of Assistant Headmistress. The appellant offered her candidature for such post and passed all the tier of examination conducted by the Selection Committee and the D.I. of Schools (S.E.), Kolkata approved the panel and appointed the appellant in such post. Initially, the said appointment was for a period of two years which was confirmed on 11th September, 2013. Subsequently, the appellant was transferred from the said school to Sumatinagar Sarat Kumari High School (HS) on administrative grounds. Since the said school where such transfer was made is situated at a distant place i.e., **Sagar**, the appellant challenged the said order by filing a writ petition being WP 10053 (W) of 2019 before this Court. The primary ground for challenge was that the order of transfer depicted that the transfer is made at transferee school as Assistant Teacher though she held the post of the Assistant Headmistress which is impermissible. The further challenge was made that the transferee school is at the distant place and she has to commute more than 215 km for her residence being a patient suffering from various ailments.

At the time of argument, the reliance was placed upon a notification dated March 12, 2018 issued by the School Education Department, Secondary Branch, Government of West Bengal which postulates that the transfer shall only be effected against the sanction post and the post to

which the transfer is recommended shall be of the same category of pay and medium of instructions as the teacher held.

So far as the first ground of challenge was concerned, the writ court noticed that subsequently a corrigendum was issued on March 8, 2019 by the West Bengal Board of Secondary Education as well as the West Bengal Central School Service Commission correcting the designation of the appellant in supersession of the earlier order of transfer. So far as the second ground of challenge was concerned, the Court did not find such ground to be tenable and directed the appellant to join the transferred post as Assistant Headmistress immediately and liberty was granted to the appellant to make a representation before the Commissioner of School Education raising her difficulties on account of illness and also to regularise the period of her absence between the order of transfer and the date of joining.

This said order was carried by way of intra-Court appeal before the Division Bench in MAT No. 1077 of 2019. The order of the writ court was modified to the extent that the moment liberty is granted to the appellant to make representation to the Commissioner of School Education, it is expected that the said authority would consider the said representation within the stipulated time after giving an opportunity of hearing to the appellant, if necessary; but till the final decision is taken on such representation, the order of transfer should not be insisted upon.

Pursuant to the said order, the Commissioner of School Education, West Bengal considered and passed the order on 24.10.2019 with categorical finding that the order of transfer was made on administrative

ground as per the instruction issued by the School Education Department. The said authority was of considered opinion that in view of Clause 7 of the Notification dated 12.3.2018, the Commissioner of School Education is authorised to deal with any dispute arising in the process of effecting such transfer i.e., to tackle with the administrative difficulties in implementing the Government order but not a case where the difficulties are faced by the appellant on personal ground and, therefore, he is not competent to grant any relief. However, the liberty was given to the appellant to approach the School Education Department for consideration of her prayer to transfer the appellant to school in North Kolkata instead of South 24-parganas on administrative ground. Liberty was further granted to the appellant to approach the competent authority for addressing her grievance pertaining to her absence as a special leave.

In terms of the said order, the president of the West Bengal Board of Secondary Education issued a further transfer order dated 17th December, 2009 transferring the appellant from Garden Reach Nutbehari Das Girls High School to Sailandra Sarkar vidyalaya but subsequently this transfer order was cancelled and by an order dated 18th December, 2019 the appellant was transferred to the present school i.e., Kamala Vidyamandir High School for Girls, Kolkata as Assistant Headmistress. It further appears that the Central School Commission also recommended the transfer of the appellant to the said school which would be evident from the documents annexed to the application for stay. In compliance of the order of transfer the appellant joined the present school on 2nd January, 2022 and is a still posted therein.

In the meantime, the Joint Secretary to the Government of West Bengal informed the appellant that her absence has been regularised by the Governor by treating the same as spent on duty. The President of the School vide letter dated 31st December, 2020 directed the appellant to act as a Teacher-in-Charge w.e.f, 1st January, 2021 as the Headmistress of the said school is due to retire on the next date. The said order was duly approved by DI of Schools (S.E), Kolkata. It appears from the pleading that several allegations and non-cooperation were levelled against the appellant and the matter reached to the Board and the competent authority directed the president to call a meeting to resolve such dispute in order to maintain congenial atmosphere in the school. Thereafter, the private respondents herein filed a writ petition WPA 2133 of 2022 not only challenging the order of transfer dated December 18, 2019 but also seeking a mandamus directing the respondent authorities to take a necessary disciplinary action on the basis of the complaint lodged against her. By the impugned order, the said writ petition has been disposed of which is challenged in the instant appeal.

Mr. Kalyan Bandopadhyay, Learned Senior Advocate appearing for the appellant challenged the impugned order primarily on the ground that the writ court cannot usurp the power of the authorities and inflict the penalties neither contemplated in the relevant Rules nor even prayed for in the instant writ petition. He further submits that the West Bengal Board of Secondary Education (appointment, confirmation, conduct and discipline of teachers and non-teaching staff) Rules, 2018 (hereinafter referred to as "Disciplinary Rules" for the sake of convenience) which came into effect on 8th March, 2018 contains the exhaustive provisions pertaining to a

disciplinary proceeding against the teachers and non-teaching staff as well as the penalties to be imposed in the event, the article of charges are proved. He vociferously submits that the penalties contemplated under the said Rules does not provide for demotion and, therefore, any penalty which is de hors the said provisions of law cannot be imposed by the writ court. He further submits that the transfer was effected on an administrative ground and not on the basis of an application filed by the appellant and, therefore, the other Rules pertaining to general transfer has no manner of application. He arduously submitted that the impugned order is unsustainable as the writ court has travelled beyond the conceivable restraint self-imposed by the courts in exercise of powers under Article 226 of the Constitution. According to him, the writ court cannot sit as a court of appeal over the views of the competent authority and substitute its own view treating itself to be such competent authority and placed reliance upon a judgment of the Supreme Court in case of State **of W.B. and Ors. –vs- Manas Kumar Chakraborty and Ors. reported in (2003) 2 SCC 604**. Mr. Bandopadhyay further submits that though the power to issue writs of mandamus under Article 226 of the Constitution of India is wide enough to reach as even the injustice is done which is distinct from the power of prerogative writs issued by the English Courts because of the unique expression "nature" used therein as held in **Secretary, Cannanore District Muslim Education Association, Karimbam vs. State of Kerala and Ors., reported in (2010) 6 SCC 373** but the court should not substitute itself in place of an authority as it would tantamount to transgression or usurpation of competence as held in **Manohar Lal (Dead) by Lrs. Vs. Ugrasen (Dead) By Lrs. and Ors. reported in (2013) 5 SCC 453**. By relying upon a judgment of the Apex

Court in case of **State of Kerala and Ors. vs. Kandath Distilleries, reported in (2013) 6 SCC 573**. Mr. Bandopadhyay, the learned Senior Advocate submits that though the High Court is not powerless to deal with the particular situation but while dispensing the justice should not break or bent the law as it would amount to transgression of its power and overreach the domain of an authority. On the same proposition that the High Court should not have taken over the function of the authorities, Mr. Bandopadhyay, learned Senior Advocate relies upon the another judgment of the Supreme Court in case of **D.N. Jeevaraj vs. Chief Secretary, Government of Karnataka and Ors., reported in (2016) 2 SCC 653**. Mr. Bandopadhyay is very much vocal in his submission and attacked the finding returned by the Single Bench in relegating the appellant from the post of the Assistant Headmistress to the Assistant Teacher with pay protection, in contending that the Single Bench has, in fact, introduced the concept of reduction in rank solely by protecting the scale of pay which cannot be termed as an equivalent post and relied upon a decision of the Supreme Court in case of **Vice-Chancellor, L.N. Mithila University vs. Dayanand Jha, reported in (1986) 3 SCC 7** and **Tejshree Ghag and Ors. Vs. Prakash Parashuram Patil and Ors., reported in (2007) 6 SCC 220**. Mr. Bandopadhyay, thus, submits that the court cannot inflict any punishment, not contemplated in the disciplinary Rules nor can substitute itself with the competent authority upon whom, the power is conferred under the statutory Rules nor can pass an order not contemplated therein in exercise of the powers conferred under Article 226 of the Constitution of India. In addition to the aforesaid submission, Mr. Bandopadhyay, the learned Senior Advocate further submits that there was no dispute over the

appointment of the appellant upon transfer to the post of Assistant Headmistress but the real cause behind the filing of the writ petition by the teaching and non-teaching staff of the said school is when the head of the institution entrusted upon the appellant to act as a Teacher-in-Charge which is obviously temporary in nature as they thought that one amongst them shall lose the opportunity to act in such capacity.

Mr. Majumdar, the learned Senior Counsel appearing for the private respondents submits that there is no impediment on the part of the teaching and non-teaching staff of the school to maintain a writ petition challenging an order which is per se illegal. He further submits that the plea of locus has been considered liberally with an avowed object to remedy the legalities and/or the injustice perpetuated by the authority and placed reliance upon a judgment of the Full Court of this court in case of **Prabhat Pan and ors. vs. State of West Bengal and Ors., reported in AIR 2015 Calcutta 112**. Mr. Majumdar, learned Senior advocate further submits that Section 10C of the West Bengal School Service Commission Act, 1997 provides for a transfer on twin grounds, firstly, in the interest of the education and secondly, in the interest of public but such transfer from one school to another should be made against the sanctioned post. He further relied upon a Memo dated 10th July, 2002 issued by the School Education Department, Government of West in support of his contention that the post of Assistant Headmaster/ Assistant Headmistress can only be filled up by the Managing Committee/ad-hoc Committee/ Administrator from amongst the sanctioned strength of a teaching staff subject, however, to the prior permission of the D.I. of Schools (SE) against the sanctioned post. According to him, the

Headmaster/ Headmistress cannot be appointed in high/high madrasah unless the roll strength exceeds 750 or above for three consecutive years and for Higher Secondary Institutions including Madrasah with Higher Secondary Courses unless the roll strength exceeds 1000 or above for three consecutive years. He, thus, submits that the total strength of the students in the said school is far below the bench mark and, therefore, such appointment is contrary to the Memo dated 19th May, 2004. To conclude, Mr. Majumdar, the learned senior advocate submits that in view of the aforesaid Memos it is evident that there cannot be an appointment to the post of Assistant Headmistress in the said school because of the roll strength nor such appointment can be made upon transfer as there was no sanctioned post of the Assistant Headmistress. He further submits that there is a different modalities of effecting transfer and if the transfer is made on an application at the behest of the teacher, such transfer is to be routed through a set procedure and not in the fashion as has been done in the instant case.

Mr. Sutanu Patra, learned advocate appearing for the Central School Service Commission submits that the transfer was made on an administrative ground envisaged under Section 10C of the West Bengal School Service Commission Act and, therefore, the other provision relating to a general transfer on an application by the teacher is inapplicable. He further submits that there is no impediment on the part of the Central School Service Commission in recommending the transfer and the moment sanction is granted by the competent authority it led to a transfer against the sanctioned post.

The learned advocate appearing for the State has virtually echoed the submission of the appellant and the Central School Service Commission. It is submitted that the writ court cannot pass an order de hors the statutory Rules and the provisions of law nor can issue a writ of mandamus commanding the competent authorities to act contrary to law.

On the conspectus of the pleadings, submissions and the arguments advanced at the bar, we find two primary questions involved in the instant appeal, firstly, whether the recommendation of the West Bengal Central School Services Commission and approval by the D.I. of Schools (HS) proposing a transfer of an Assistant Headmistress is legally sustainable if the same is not against a sanctioned post, secondly, whether the writ court can usurp the power of the authorities under the relevant Rules and pass an order inflicting the punishment which is not contemplated in the disciplinary Rules or whether the court can impose a punishment de hors the procedures and norms provided in the statutory Rules substituting itself with the disciplinary authority by ignoring the aforesaid procedures.

***Question No.1***

Before we proceed to determine the aforesaid question, a little prelude to the laws enacted and made applicable within the State of West Bengal concerning the education, its policies and the regulation are required to be recapitulated. West Bengal Secondary Education Act, 1950 and West Bengal Secondary Education (Temporary Provisions) Act, 1954 which were occupying the field for nearly a decade were subsequently repealed upon promulgation of West Bengal Board of Secondary Education Act, 1963 which received the assent of the Governor and published in the extraordinary

Gazette on 28th February, 1963. Apart from the constitution of a Board, Committees and their respective functions of its constituents, Section 45 thereof empowers the State Government to make Rules in relation to a diverse fields of education for its sustenance, development and permission as well as appointment, determination of scale of pay and other benefits and emoluments including the terms and conditions of the service as exhaustively provided therein. By virtue of the said Rule making power, more particularly, to sponsor recognition and the control and management of the various educational institutions, Management of Sponsored Institutions (Secondary Rules, 1972) was framed imbibing within itself the constitution of the committees and their duties, powers and the roles. The said Rule further provides the duties and responsibilities of the various authorities and the manner of their appointment so that a healthy and congenial atmosphere can be created in the educational sector. Subsequently, the West Bengal School Service Commission Act, 1997 was enacted to provide for the constitution of the Regional School Service Commission and Central School Service Commission in West Bengal for diverse matters connected therewith and incidentally thereto. Section 2 (p) of the said Act defines "Teacher" as follows:

> ***"Teacher means an Assistant Teacher or any other person, holding a teaching post of a school and recognized as such by the Board or the Council as the case may be, and includes the Headmaster or the Headmistress but shall not include the Assistant Headmaster or the Assistant Headmistress or the***

***Teacher holding a post against short-term vacancy caused by deputation, leave or lien."***

From the bare look of the said definition clause Assistant Headmaster or the Assistant Headmistress or the teacher holding a post against short-term vacancy caused by deputation, leave or lien are excluded from the purview of the said definition. However, the said Act has undergone a sea change for various amendments having brought from time to time to which we are not concerned with in relation to a subject dispute except the amendments which have been brought in relation to a general transfer and the transfer on special grounds. Section 10B was introduced by way of an amendment having brought in the year 2013 providing an opportunity to an eligible teacher to apply for transfer and the Central commission to recommend such transfer in the same category of vacant post on such conditions as may be prescribed. Section 10C which is harped upon by the respective parties and appears to have some relevance empowers the State Education Department of the State Government to direct the commission to make recommendation for placing any teacher including Assistant Headmaster or any non-teaching staff including the librarian from one school to another school against any sanctioned posts on twin grounds, firstly in the interest of education and secondly in the interest of public. The later amended provision is an exception to Section 10B and gives somewhat unbridled powers to the State Government through the School Education Department to issue direction upon the commission for transfer of any teacher including the Assistant Headmasters/Assistant Headmistress against any sanctioned posts having necessitated by the interest of

education or public. The said provision is not dependant upon the choice of the teacher nor required any application to be taken for transfer but such power is vested upon the State Government to direct the commission to recommend the transfer on those specified grounds.

Though the definition of a teacher in West Bengal School Service Commission Act, 1997 excludes the Assistant Headmasters/Assistant Headmistress but by virtue of a subsequent amendment having brought such definition has been expanded and encompasses within itself the Assistant Headmaster or Assistant Headmistress. We do not delve to go deep into the matter on the legislative competence of the State in incorporating something in departing from the parent Act nor any of the parties appearing before us have taken such plea. The undisputed facts discerned from the said amended provision, namely, Section 10C conveys the manifest intention of the legislature that the State Government through its School Education Department is empowered to transfer the Assistant Headmasters/Assistant Headmistress on the ground envisaged therein and direct the Commission to make recommendation. Though a plea was feebly taken before us that the order of the School Education Department transferring the appellant was issued first followed by the recommendation of the Central School Service Commission but we do not find any discrepancies in this regard as the language employed in the said Section is plain, unambiguous and clear that the State Government through the School Education Department may issue direction upon the commission to recommend such transfer which necessarily implies that the recommendation would follow the mandate of the State through such

department. Be that as it may even when the said amendment has not been brought within the said Act of 1997, the guideline vide Memo No. 1628-G.A./OM-18/2001 dated 10th July, 2002 was issued by the School Education Department, Government of West Bengal for recruitment of the Assistant Headmasters/Assistant Headmistress of the recognised aided non-Government Secondary Schools/Higher Secondary Schools, Government Sponsored Schools and all types of recognized and aided Madrasah.

Paragraph 2 of the said guidelines manifestly created an obligation on the Headmaster or the Headmistress or Teacher-in-Charge upon receiving the prior permission from the Dist. Inspector of Schools (SE) to fill up the post of Assistant Headmasters/Assistant Headmistress to notify and collect the applications from the approved and willing teacher(s) of his/her Institution, who had the requisite qualifications enumerated therein.

Paragraph 3 thereof contemplates the permission of the Selection Committee with its constituents and the exhaustive provisions concerning the suitability of the candidates for such posts subsequently, by Memo No. 671-SE(S)/ 1A-1/2004 dated 19th May, 2004 was issued by the School Education Department, Secondary Branch, Government of West Bengal indicating the necessity of appointment of the Assistant Headmasters/Assistant Headmistressin high school/high madrasah and Higher Secondary School and/or Higher Secondary Madrasah where the roll strength exceeds 700 or above and 1000 or above respectively for three consecutive years. It was further indicated that the creation of such posts in any School shall have to be approved by Director of School Education which has been re-designated as the commissioner of School Education.

It is, thus, apparent from the aforesaid the provisions that initially the Assistant Headmasters/Assistant Headmistress were excluded from the purview of the definition assigned to teacher in West Bengal School Service Commission Act, 1997 but by subsequent Rules the intention is manifest that the aforesaid Rules have been extended to such posts within the category of the teacher. The aforesaid impression gets further impetus from the West Bengal Board of Secondary Education (Appointment, Confirmation, Conduct and Discipline of teacher and non-teaching staff) Rules, 2018 while defining the "misconduct" under Rule 2(m) thereof. The note appended thereto in relation to teacher includes Assistant Headmaster or Assistant Headmistress. Thus, it is beyond cavil of doubts that the said displinary Rules concerning the teacher or non-teaching staff is also applicable to the Assistant Headmasters/Assistant Headmistress though not coming within the strict meaning of the teacher under the relevant Act. The conjoint reading of the aforesaid provisions as enumerated hereinabove leaves no ambiguity that the Assistant Headmasters/Assistant Headmistress can be appointed in a school from the willing teachers of the said institution provided the post is sanctioned by the competent authority subject, however, to the fulfilment of the eligibility criterion enshrined therein. Section 10C of the Act of 1997 brought subsequently conveys the manifest intention of the legislature that such category of persons can be transferred to any other school in the interest of the education and/or public against the sanctioned post.

The Memo dated 19th May, 2004 creates an embargo in appointment to such post depending upon the roll strength of the students as well as the

creation of such post in any educational institutions. It is no longer *res integra* that the authorities cannot act de hors the statutory provisions nor can effect the transfer in contravention thereto. The harmonious reading of the provisions contained in the Act, Rules and the memo issued from time to time by the competent authority exposes the legislative intention that though the transfer can be effected from one school to another but against the sanctioned post and therefore, any order of transfer which contravenes the statutory provisions or the mandate of law, if challenged, should not receive the sanction of the court or its blessing solely on the ground of locus. The powers of the writ court cannot be understood to give sanction to the action of the statutory authorities but to bring within the precincts of law. Whenever, the injustice is found, such injustice cannot get away solely on the ground of locus.

In the instant case, it is not in dispute that there was no sanctioned post of the Assistant Headmistress in Kamala Vidyamandir High School for Girls (HS) and, therefore, such transfer is contrary to Section 10C of the West Bengal School Service Commission Act, 1997. The Memo dated 19th May, 2004 is expressed in the sense that such posts cannot be created nor any appointment can be made if the roll strength as indicated therein is absymally low. It appears from the pleading that the roll strength of the school is absymally low nor there is any document is coming before us that the commissioner of the School Education has sanctioned and approved the post of the Assistant Headmasters previously. If the law requires such transfer to any sanctioned posts, merely by issuing an order of transfer such post cannot be presumed to have been created and/or approved by the

commissioner of School Education being the competent authority in this regard. We, thus, have no hesitation to hold that order of transfer issued in favour of the appellant is per se illegal and contrary to the provision of the law and is, therefore, quashed and set aside. The question no.1 is answered accordingly.

***Question No.2***

The aforesaid question was necessitated because of the nature of the impugned order passed by the Single Bench directing the authority to post the appellant as assistant teacher in any other school keeping the pay protection as she was one selected as the Assistant Headmistress of the school. It is nobody's case; rather it has been admitted by the respective counsels that the mode of selection and the nature of duties and functions of the respective posts are distinct and different. It would be evident from the Memo dated 10th July, 2002 that the post of Assistant Headmasters/Assistant Headmistress is separate and independant post and not akin or equivalent to the post of assistant teacher. The modalities of the selection to such post is also distinct for the simple reason that such post can only be filled up on an application of the approved and willing teachers of the institutions who are graduates with honours including a special honours or holding master degree with 2 years course having 5 years teaching experience in a Junior High School/Secondary Institution. The expression "approved" has been clarified to mean having service in an educational institution recognized by West Bengal Board of Secondary Education/ West Bengal Council of Higher Secondary Education including the West Bengal Madrasah Education Board which received sanction from

the D.I. of Schools (SE) of the concerned district. It is further indicated that apart from the said qualification, the said approved teacher must hold the regular B.T. /B.Ed./P.G.B.T. Degree/ Diploma Certificate such qualification having included therein make such post distinct and different from the post of the assistant teacher. It is apparent from the said Memo dated 10th July, 2002 that the approved teachers having such requisite qualification are entitled to be posted as Assistant Headmasters/Assistant Headmistress in the educational institutions. The mode of the selection is also indicated therein which leads to an inevitable conclusion that such post is not equated with the post of the assistant teacher; rather the assistant teachers who showed their willingness for the post of Assistant Headmasters/ Assistant Headmistress can only be appointed to such post provided they fulfil the eligibility criterion and found successful in the selection process. The duties and responsibilities of the Assistant Headmasters/Assistant Headmistress is evidently different from the duties and responsibilities of the assistant teacher which is evident from Rule 23 (B) of the Management of Sponsored Institutions (Secondary) Rules, 1972. It would be apposite to quote the aforesaid provision which runs thus:

***"23B. Powers and duties of Assistant Headmasters/Assistant Headmistress of an institution.- (1) The Assistant Headmaster or the Assistant Headmistress of an institution, subject to any order of the Government or the Director of School Education or the Board or the District Inspector of Schools (Secondary Education) of the district or the Additional District Inspector of Schools (Secondary Education) of the concerned Sub-Division, shall, with the approval of the Head of***

***Institution, perform the following functions and discharge the following duties:-***

***(a) To maintain daily class routine and provisional routine, if required;***

***(b) To prepare routine for examination in the institution;***

***(c) To conduct the continuous comprehensive evaluation of students;***

***(d) To maintain progress reports of students;***

***(e) To hold parent-teacher meetings;***

***(f) To prepare reports on drop out of students and take remedial measures for checking drop out;***

***(g) To conduct remedial teaching for the slow learners;***

***(h) To assist the Head of Institution to monitor as to whether Assistant Teachers are taking classes as per syllabus and curriculum;***

***(i) To follow the provision of law relating to the right to education as laid down in the Right of Children to Free and Compulsory Education Act, 2009 in respect of elementary education, if the institution imparts elementary education;***

***(j) To obey any other general or specific order of the Government or the Director of School Education or the Board or the District Inspector of Schools (Secondary Education) of the district or the Additional District Inspector of Schools (Secondary Education) of the concerned Sub-Division, or the Head of Institution in the interest of education;***

***(k) To officiate in the post of Headmaster or Headmistress during the temporary vacancy in the post of Headmaster or Headmistress.***

***(2) The head of institution shall perform the duties as referred in clause (1), in absence of Assistant Headmasters/Assistant Headmistress in an institution."***

It is evident from the aforesaid Rule that the powers and duties of the Assistant Headmasters/Assistant Headmistress in an institution is to oversee the daily management of the functioning of the school and remedial measures to be taken in this regard and in absence of the Headmaster or Headmistress may officiate during such interregnum period to such post. The aforesaid disclosure leads to an inescapable conclusion that the post of the Assistant Headmasters/Assistant Headmistress is occupying the field in between the assistant teacher and the headmaster. The mode of selection the powers and duties as well as the scale of pay being different it invites an apparent distinction with the post of the assistant teacher which appears to us to be an independent post. Though it is contended that it is a promotional post as it had an independent source of appointment but from paragraph 2 of the said Memo dated 10th July, 2002 the position appears to be different. The post of Assistant Headmasters/Assistant Headmistress can only be filled up on an application of the approved and willing teachers of the said institutions which obviously leads to an inference that such teachers are holding a post of assistant teacher in the said educational institution.

Such being the conclusion whether the writ court in exercise of power or judicial review can usurp the duties, functions and the powers of the statutory authority and/or bypassing the statutory Rules can inflict the punishment de hors such statutory Rules. In other words, whether the writ court can issue a writ of mandamus in such manner which impliedly overrides the statutory provisions in so called artificial pursuit of imparting justice.

The power of the writ court to issue a writ of mandamus can trace its origin from the common law remedy based on the royal authority. It was widely used by the courts in England in the public law domain to prevent injustice in the form of a prerogative writ. After the adaptation of the Constitution of India, there has been a several discourses at various corners including the court whether the power of the court to issue writ of mandamus is akin and /or somewhat similar to the powers enjoined by the courts in England in prerogative writs. In **Secretary, Cannanore District Muslim Educational Association (supra)**, the Apex Court has succinctly narrated the distinction and the nature of the writs issued by the Indian Courts under the Constitution to be somewhat different and wide in its nature in the following paragraphs:

> ***35. In Dwarka Nath v. Ito a three-Judge Bench of this Court commenting on the High Court's jurisdiction under Article 226 opined that this article is deliberately couched in comprehensive language so that it confers wide power on the High Court to "reach injustice wherever it is found". Delivering the judgment Justice Subba Rao (as His Lordship then was) held that the***

***Constitution designedly used such wide language in describing the nature of the power. The learned Judge further held that the High Court can issue writs in the nature of prerogative writs as understood in England; but the learned Judge added that the scope of these writs in India has been widened by the use of the expression "nature".***

***36. The learned Judge in Dwarka Nath made it very clear that the said expression does not equate the writs that can be issued in India with those in England but only draws an analogy from them. The learned Judge then clarifies the entire position as follows:***

> ***"4. ... It enables the High Courts to mould the reliefs the meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government to a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself."***

***37. The same view was also expressed subsequently by this Court in J. R. Raghupathy v. State of A.P Speaking for the Bench, Justice A.P. Sen, after an exhaustive analysis of the***

***trend of Administrative Law in England, gave His Lordship's opinion in para 29 at p. 1697 thus:***

> ***"30. Much of the above discussion is of little or academic interest as the jurisdiction of the High Court to grant an appropriate writ, direction or order under Article 226 of the Constitution is not subject to the archaic constraints on which prerogative writs were issued in England. Most of the cases in which the English courts had earlier enunciated their limited power to pass on the legality of the exercise of the prerogative were decided at a time when the courts took a generally rather circumscribed view of their ability to review ministerial statutory discretion. The decision of the House of Lords in Padfield case marks the emergence of the interventionist judicial altitude that has characterised many recent judgments."***

***38. In the Constitution Bench judgment of this Court in LIC v. Escorts Ltd. This Court expressed the same opinion that in constitutional and Administrative Law, law in India forged ahead of the law in England (SCC p.344, para 101).***

***39. This Court has also tgaken a very broad view of the writ of mandamus in several decisions. In Comptroller and Auditor General of India v. K.S. Jagannathan a three-Judge Bench of this Court referred to Halsbury's Laws of England, 4th Edn., Vol. I, para 89 to***

***illustrate the range of this remedy and quoted with approval the following passage from Halsbury about the efficacy of mandamus:***

> ***"89. Nature of mandamus.- is to remedy defects of justice; and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy, for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."***
>
> ***"20. ... and in a proper case, in order to prevent injustice resulting to the parties concerned, the court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion."***

***40. In a subsequent judgment also in Andi Mukta Sadguru Shree Muktajee Vandas Swamii Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani this Court examined the development of the law of mandamus and held as under:***

> ***"22. .. mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor de Smith states: "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been***

***imposed by charter, common law, custom or even contract.' We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be out into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available 'to reach injustice wherever it is found.' Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition."***

***41. The facts of this case clearly show that the appellant is entitled to get the sanction of holding higher secondary classes. In fact the Government committed itself to give the appellant the said facility. The Government's said order could not be implemented in view of the court proceedings. Before the procedural wrangle in the court could be cleared, came the change of policy. So it cannot be denied that the appellant has a right or at least a legitimate expectation to get the permission to hold higher secondary classes.***

It is discerned from the aforesaid report that the courts in India enjoins wide power and grants wide remedy to reach injustice wherever it is found and the technicalities if pitted against the justice should not come in the way of granting relief while exercising the power of judicial review. Even a writ court can pass an order or give directions which the government or the public authority should have passed if exercised lawfully. In our

opinion, the aforesaid judgment has given a clear indication that the writ court should not be a mute spectator nor should at on the *ipse dixit* of the statutory authority but shall exercise such power if the injustice is evident and the authority have not acted lawfully and in consonance with the law. The power of the writ court cannot be brindled if the injustice is patent from the action of the statutory authority and grant reliefs to the aggrieved person who has been subject to such injustice.

The question still begging an answer whether the writ court can usurp the power of the authority in a case where the authority have not exercised the discretion nor have an occasion to deal with it. The aforesaid judgment is to be understood in such perspective where the order of the statutory or the public authority is exercised causing injustice to the citizenry and not when such authority had no occasion to deal with it and the writ court substituting itself in the place of such authority and passed the final order inflicting the punishment.

Even in a case where the selection in a post is a very sensitive one and the Government must have on necessarily highest confidence the deployment to such posts is susceptible to be interfered with in exercise of judicial review. The Apex Court in case of State of **W.B and Ors. Vs. Manas Kumar Chakraborty and Ors. (supra)** held that the writ court should not sit in appeal over the decision of the appointing authority in such sensitive matters nor should substitute a view as a constituted authority in the following :

***" 17. The learned Senior Counsel for the first respondent then contended that if a person moves to a post of grater***

***prestige, duties and responsibilities, honour or status, as compared to the previous post held, then that movement, even if lateral, would amount to promotion, even if both the posts carry the same scale of pay. Learned counsel relied upon the case of Meera Massey (Dr) v. Dr. S.R. Mehrotra and Vice-chancellor, L.N. Mithila University v. Dayanand Jha to support the contention urged. Even if the contention is accepted, the fact remains that the second respondent was promoted by the Composite order dated 23-5-2001 to the substantive rank of DGP and simultaneously posted as DG & IGP. We see no illegality in this. Secondly, there is no dispute that the post of DG &IGP is a selection post like the other DGPs. The post of DG & IGP being a post of very sensitive nature can only be filled by an incumbent in whom the state Government must necessarily have the highest confidence. We are, therefore unable to accept the contention of the respondent that deployment of an incumbent in such a post can go only by seniority. Merit in the nature of past record, the credibility and confidence which one is able to command with the Government of the State must play a predominant role in selection of an incumbent to such a post. ; in the opinion of the appointing authority, the second respondent was the most suitable one. It is not open to the courts to sit in appeal over the view taken by the appointing authority in such a case of substitute its own view for that of the duly constituted authority. The administrative tribunal, as a matter of comparison of merit, was inclined to hold that the second***

***respondent was by far the better and more meritorious candidate. The High Court has skirted this question and declined to decide this issue. Since we are of the view that there was no legal ineligibility in the second respondent to hold the post of DG & IGP, we must necessarily accept the comparative assessment of merit by the first appellant State of West Bengal and give credence to its own choice, of a suitable incumbent for being posted as such.".***

In case of **Manohar Lal (Dead) By Lrs. (supra)**, the Hon'ble Chief Minister himself allotted the land when he lacks such authority. It is held that when the statute requires a particular authority to discharge such function, the allotment by the Hon'ble Chief Minister substituting himself as such statutory authority amounts to transgression and/or usurpation of the power of competence in these words:

***"14. The Hon'ble Chief Minister passed the allotment letter himself mentioning the plot numbers of the land, as it was the authority himself which is impermissible in law. The Chief Minister could not take upon himself the task of the Authority. It tantamount to transgression/usurpation of competence. While deciding a representation/petition, an authority or court may issue direction to the person concerned to consider the grievance. However, it is not permissible to pass the order by the superior authority/court itself."***

The enlightening observation in this regard can be profitably taken note of from a judgment of the Supreme Court in the case of **State of Kerala**

**and Ors. vs. Kandath Distilleries (supra)** where it is held that when the legislatures have conferred the powers upon an authority such power should be exercised by such authority and not by the Court. The writ court is not concerned with the decision but certainly with the decision making process. It is relevant to quote the relevant excerpts from the said report which runs thus:

> ***"30. The legislature when confers a discretionary power on an authority, it has to be exercised by it in its discretion, the decision ought to be that of the authority concerned and not that of the court. The court would not interfere with or probe into the merits of the decision made by an authority in exercise of its discretion. The court cannot impede the exercise of discretion of authority acting under the statute by issuance of a writ of mandamus. A writ of mandamus can be issued in favour of an applicant who established a legal right in himself and is issued against an authority which has a legal duty to perform, but has failed and/or neglected to do so, but such a legal duty should emanate either in discharge of the public duty or operation of law. We have found that there is no legal duty cast on the commissioner or the state Government exercising powers under Section 14 of the Act read with Rule 4 of the 1975 Rules to grant the licence applied for. The High Court, in our view, cannot direct the State Government to part with its exclusive privilege. At best, it can direct consideration of an application for licence. If the high Court feels, in spite of its direction, the***

***application has not been properly considered or arbitrarily rejected, the High Court is not powerless to deal with such a situation that does not mean that the High Court can bend or break the law. Granting liquor licence is not like granting licence to drive a cab or parking a vehicle or issuing a municipal licence to set up a grocery or a fruit shop. Before issuing a writ of mandamus, the High Court should have, at the back of its mind, the legislative scheme, its object and purpose, the subject-matter, the evil sought to be remedied, the State's exclusive privilege, etc. and not to be carried away by the idiosyncrasies or the ipse dixit of an officer who authored the order challenged. Majesty of law is to be upheld not by bending or breaking the law but by strengthening the law".***

In case of **D.N Jeevaraj (supra)**, the Apex Court held that when the powers and discretions are conferred upon the authority under the statute such power and discretion is required to be exercised first and the court should not take over the function of such statutory authority in the guise of writ of mandamus in these words:

***" 41. This Court has repeatedly held that where discretion is required to be exercised by a statutory authority, it must be pr4emitted to do so. It is not for the courts to take over the discretion available to a statutory authority and render a decision. In the present case, the High Court has virtually taken over the function of BDA by requiring it to take action against Sadananda Gowda and Jeevaraj. Clause 10 of the lease-cum-***

***sale agreement gives discretion to BDA to take action against the lessee in the event of a default in payment of rent or committing breach of the conditions of the lease-cum-sale agreement or the provisions of law. This will, of course, require a notice being given to the alleged defaulter followed by a hearing and then a decision in the matter. By taking over the functions of BDA in this regard, the High Court has given a complete go by to the procedural requirements and has mandated a particular course of action to be taken by BDA. It is quite possible that if BDA is allowed to exercise its discretion it may not necessarily direct forfeiture of the lease but that was sought to be pre-empted by the direction given by the High Court which, in our opinion, acted beyond its jurisdiction in this regard."***

The support to this aforesaid proposition can further be lent from the constitutional Bench decision of the Supreme Court in case of **Mafatlal Industries Ltd. and Ors. vs. Union of India and Ors., reported in (1997) 5 SCC 536** wherein it is held that the power under Article 226 of the Constitution should be exercised within the regime of law and never intended to abrogate. The writ court can neither override the law nor pass a writ of mandamus in ignorance thereof. Any order which overrides the law or in clear violation thereof would tantamount to transgression of the powers which the legislature never intended. The following observations from the aforesaid report shall be useful in this regard which runs thus:

**"108 (x). By virtue of sub-section (3) to Section 11-B of the Central Excises and Salt Act, as amended by the aforesaid Amendment Act, and by virtue of the provisions contained in sub-section (3) of Section 27 of the Customs Act, 1962, as amended by the said Amendment Act, all claims for refund (excepting those which arise as a result of declaration of unconstitutionality of a provision whereunder the levy was created) have to be preferred and adjudicated only under the provisions of the respective enactments. No suit for refund of duty is maintainable in that behalf. So far as the jurisdiction of the High Courts under Article 226 of the Constitution –or of this Court under Article 32 – is concerned, it remains unaffected by the provisions of the Act. Even so, the Court would, while exercising the jurisdiction under the said articles, have due regard to the legislative intent manifested by the provisions of the Act. The writ petition would naturally be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the regime of law and not for abrogating it. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law nor can lit override it. The power under Article 226 is conceived to serve the ends of law and not to transgress them."**

From the aforesaid reports, the law as expounded is that though the power of the writ court under Article 226 of the Constitution is wide or even

wider than the power enjoined by the courts in England in prerogative writs yet there has been a self-imposed restraint and should be exercised within the contour of law. Ordinarily, the writ court does not enjoin the legislative powers but the primary object is to uphold the law by interpreting the legislations under the well-known canon of interpretations of law. Such power cannot be exercised to bend or break the law but to uphold the same inconsonance therewith. It is one thing to say that ordinarily the writ court does not loath with the legislative powers of competence but it is absolutely different when the writ court test the legitimacy of the law being in conformity with the constitutional ethos and its provisions and passes through the test of reasonability (wednesbury principle). The writ court while exercising its power in pursuit of justice should be careful and cautious in not causing injustice to the other while rendering justice. The balance is required to be maintained as the same is never intended to be one way traffic. The moment of Court finds that there is a statutory Rule in place which requires a thing to be done in a particular manner, the Court while rendering justice should not ignore such statutory provisions and pass an order to create a wreck in a statutory machination having a larger impact of injustice on the other.

The disciplinary Rules, 2018 having enacted in exercise of the Rule making powers reserved in the parent act contains an exhausted provision pertaining to a disciplinary action to be taken against the teacher including the Assistant Headmaster or Assistant Headmistress. Rule 5 thereof imbibed within itself the procedure and the modalities of initiating the disciplinary proceeding and Rule 9 thereof contained the different form of

penalties to be inflicted in the event the allegation is found to be correct. No person should be condemned nor penalised without affording an opportunity to defend. The adherence to the principles of natural justice before the imposition of the penalty is the hallmark of the constitutional ethos and any transgression and/or denial of such opportunity entail the decision/order illegal and impermissible.

As indicated above, the writ court discharges his solemn duties to uphold the law and render justice in accordance with law and not to break or bend it. The penalty which is not contemplated in the said disciplinary Rule cannot be imposed in exercise of so-called plenary jurisdiction which has a different concept and cannot be assumed to show wide or even wider power to overreach the provision of law. The penalty imposed in relegating the appellant to the post of assistant teacher is not contemplated under Rule 9 of the disciplinary Rules and, therefore, such order cannot be legally sustainable. Furthermore, the writ court cannot assume the jurisdiction of the disciplinary authority and proceed in violation of the statutory provisions by inflicting the penalties not contemplated in the statutory Rules. Therefore, the impugned order cannot be sustained and is hereby quashed and set aside.

Since this Court has found that the order of transfer is bad-in-law and has quashed on the grounds stated hereinabove, the competent authority is directed to take a decision afresh and if decided to transfer the appellant from a school where she is posted to any other school, such order of transfer should be strictly in terms of Section 10C of the Act of 1997 and in terms of Memo dated 10th July, 2002. Since the appellant has already joined the

school where she has been transferred and is discharging the function as such she may be directed to revert back to her original school within two weeks from date. It goes without saying that the appellant was not at fault when the order of transfer was issued and, therefore, all the benefits which she received at the transferred post shall not be taken back nor shall be recovered at any point of time. With this observation, the appeal is hereby allowed and all connected applications pending of this day are accordingly disposed of.

Urgent photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree. **(Harish Tandon, J.)**

**(Rabindranath Samanta, J.)**