

I/70894/2019

Government of West Bengal
Labour Department, I. R. Branch
N.S. Buildings, 12th Floor
1, K.S. Roy Road, Kolkata - 700001

No. Labr./ 1023. /(LC-IR)/11L-136/11

Date : 2/12/19.

ORDER

WHEREAS an industrial dispute existed between M/s Julien Day School, 35 E, Elgin Road, Kolkata - 700 020 and Sri Sankar Sarkar, C/o Sri Tapan Gupta, 68 C, Satyan Roy Branch Road, Kolkata - 700 034 regarding the issue, being a matter specified in the third schedule to the Industrial Dispute Act, 1947 (14 of 1947);

AND WHEREAS the workman has filed an application under section 33 A of the Industrial Dispute Act, 1947 (14 of 1947) to the Judge, Fifth Industrial Tribunal specified for this purpose under this Deptt.'s Notification No. 1085-IR/12L-9/95 dated 25.07.1997.

AND WHEREAS, the Judge of the said Fifth Industrial Tribunal heard the parties under section 33 A of the I.D. Act, 1947 (14 of 1947) and framed the following issue dismissal of the workman as the "issue" of the dispute.

ISSUE

1. Whether the order of transfer dated 28.03.2011 issued by the Managing Trustee of Julien Educational Trust to the employee/workman Mr. Sankar Sarkar of Julien Day School is justified or not ?

2. Whether the Managing Trustee of Julien Educational Trust has got authority to issue order of transfer to the employee concerned ?

3. To what relief, if any, is the complainant/workman entitled to ?

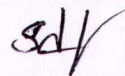
AND WHEREAS the said Judge Fifth Industrial Tribunal has submitted to the State Government its Award on the said Industrial Dispute.

Now, THEREFORE, in pursuance of the provisions of Section 17 of the Industrial Dispute Act, 1947 (14 of 1947), the Governor is pleased hereby to publish the said Award as shown in the Annexure hereto.

ANNEXURE

(Attached herewith)

By order of the Governor,



Deputy Secretary
to the Government of West Bengal

I/70894/2019

: 2 :

No. Labr/1023/RS/LE-IRDate : 2/12/19

Copy with a copy of the Award forwarded for information and necessary action to :-

1. M/s Julien Day School, 35 E, Elgin Road, Kolkata - 700 020.
2. Sri Sankar Sarkar, C/o Sri Tapan Gupta, 68 C, Satyan Roy Branch Road, Kolkata - 700 034.
3. The Asstt. Labour Commissioner, W.B. In-Charge, Labour Gazette.
4. The O.S.D. & E.O. Labour Commissioner, W.B., New Secretariat Buildings, (11th Floor), 1, Kiran Sankar Roy Road, Kolkata - 700001.
- ✓ 5. The O.S.D., IT Cell, Labour Department, with the request to cast the Award in the Department's website.

Mankar
Deputy Secretary

No. Labr/1023/2(2)/LC-IRDate : 2/12/19

Copy forwarded for information to :-

1. The Judge, Fifth Industrial Tribunal, West Bengal, with respect to his Memo No. 1466 - L.T. dated 14.11.2019.
2. The Joint Labour Commissioner (Statistics), West Bengal, 6, Church Lane, Kolkata - 700001.

Deputy Secretary

In the matter of an application U/s 33A of Industrial Dispute Act, 1947 filed by Sri Sankar Sarkar, C/o. Shri Tapan Gupta, 68C, Satyan Roy Branch Road, Kolkata – 700 034 against his employer M/s. Julien Day School, 35E, Elgin Road, Kolkata – 700 020.

(Case No. 02/2014 U/s. 33A)

BEFORE THE FIFTH INDUSTRIAL TRIBUNAL: WEST BENGAL

P R E S E N T

SRI TAPAN KUMAR DAS, JUDGE

5th Industrial Tribunal, Kolkata.

(Dated 25th October, 2019)

A W A R D

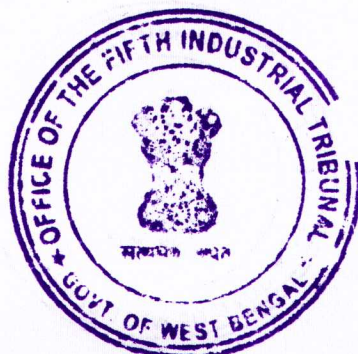
Industrial dispute between M/s. Julien Day School, 35E, Elgin Road, Kolkata – 700 020 and their workman Sri Sankar Sarkar, C/o. Shri Tapan Gupta, 68C, Satyan Roy Branch Road, Kolkata – 700 034 through the union namely Julien Day School Non-Teaching Employees' Association was raised by filing an application U/s. 33A of the Industrial Disputes Act, 1947 upon the following issues for adjudication:-

I S S U E S

1. Whether the order of transfer dated 28.03.2011 issued by the Managing Trustee of Julien Educational Trust to the employee/workman Mr. Sankar Sarkar of Julien Day School is justified or not?
2. Whether the Managing Trustee of Julien Educational Trust has got authority to issue order of transfer to the employee concerned?
3. To what relief, if any, is the complainant/workman entitled to?

This is an application/complaint U/s. 33A of the Industrial Disputes Act, 1947 brought by Sri Sankar Sarkar against M/s. Julien Day School, 35E Elgin Road, Kolkata.

It is the case of the complainant that the above-mentioned opposite party School is a non-government, unaided educational institution recognized by Education Department, Government of West Bengal and affiliated to ICSE and ISC. There are in total 3 (three) units of the aforesaid school namely at 1. Elgin Road; 2. Jessore Road, Ganganagar and at 3. Kalyani, Dist. – Nadia. The dispute started between the management of the school and all the non-teaching staff (workmen) when the management issued notice on 08.05.2006 curtailing existing benefits of non-teaching workmen. The non-teaching workmen of the school had formed trade union for the purpose of protecting their interest and ventilating their grievance.



When the management of the school had curtailed 65 days' holiday for non-teaching workmen then dispute raised by the union and thereafter school management with a *mala fide* intention, transfer the present complainant from 'Julien Day School', Elgin Road, to sister organization at Jessore Road, Ganganagar Unit to the serious prejudice of the interest of the employee in absence of any condition of service of transfer and in contrary to the provision of law in this regard. The complainant was involved in the dispute represented by the union namely "Julien Day School Non-teaching Employees' Association" being registration No. 25260 having its registered office at 357, Ganguly Bagan, Post – Naktala, Kolkata – 47. That the complainant has his pay slip indicating his payment of salary from the aforesaid school and the school collects the tuition fees from the students and makes payment and disburse salary to the employees through Julien Day School Bank Account and not through Julien Educational Trust Bank Account.

That the school authority has tried to project the trust as ultimate authority in respect of the school administration and also has tried to establish a wrong fact to the effect that the trust is synonymous with the name of the school. The chairman and the managing trustee have got no authority to do anything with the internal management of the school. Julien Educational Trust has got no legal authority to intervene into any matter of the employee concerned who is under the employment of Julien Day School. The Julien Educational Trust claims as the management of Julien Day School and transferred the complainant from his age-old place of work i.e. Julien Day School, 35E Elgin Road Branch, Kolkata – 700 020 to Sister organization, at Ganganagar without giving any reason whatsoever. All the three units of Julien Day School are separate and independent institution having separate entity and identity and the complainant cannot be transferred from one Unit to another Unit in absence of any condition of transfer in his employment.

That the purported transfer of the complainant dated 28.03.2011 was *ex-facie* illegal, unjustified under the facts and circumstances of the case. The above transfer order was imposed on the complainant while a separate industrial dispute was pending before the Conciliation Officer and subsequently the same was referred to the Industrial Tribunal for adjudication which was raised by the Julien Day School Non-teaching Employees' Association on the issue of purported transfer order inflicted upon 22 Non-teaching employees of the school in absence of any service Rules and transfer policy.

The pending collective dispute has been referred before the Industrial Tribunal for adjudication on the following issue namely : -



1. Whether the transfer of John Simon and 21 Non-teaching employees from one Branch to another Branch of the school by the management of Julien Day School are justified?
2. To what relief, if any the workmen are entitled to?

The applicant was to face extra financial burden as well as physical extortion for the illegal imposition of order of transfer to him by the school management. The action taken by it was retaliatory measure against the complainant who is a member of the aforesaid union. That apart, the charter of demands placed by the union to the management also antagonized the management and the management introduced the policy of transfer as their device to victimize the complainant. The complainant is one of the concerned workmen in the pending dispute before the Tribunal which is awaiting for adjudication in respect of charter of demand relating to pay and allowance and other issue. Purported order of transfer issued to the complainant by the management violates the provisions of Section 33 of the Industrial Disputes Act, 1947 while a collective dispute on the same transfer issue and pay & allowance issue are pending before the Tribunal for adjudication and so the complainant had filed this complaint U/s. 33A of the Industrial Disputes Act. Deputy Director of School Educational, Government of West Bengal, Directorate of School Education passed administrative order to the DI of the school for enquiry of the grievance of the union vide its Memo No. 464 (S.C.) AIS dated 31.12.2012. The complainant workman has been denied his monthly wages/salary by the management of the school from the date of imposing illegal and unjustified transfer order. The applicant is not / was not gainfully employed anywhere and has no other source of income.

The applicant was working in the Elgin Road Branch since 10.02.1975 in the post of Durwan. Though the order of transfer was issued on 28.03.2011 but the school authority did not give any effect of the same. Since 01.12.2011 the workman was not allowed to enter into the school premises to perform his job of Durwan at Elgin Road Branch and School Authority moved a petition U/s. 144(2) Cr.P.C. against the applicant which had been disposed of subsequently for non-appearance of the school authority at the time of hearing. So-called managing trustee on the basis of some wild allegation issued purported letter on 30.08.2011 and 23.11.2011 illegally and without any legal authority restrained the applicant from discharging his normal duties in the said school at Elgin Road.

Hence the applicant has prayed for an Award to the effect that the transfer order dated 28.03.2011 passed by the so-called management of the school is illegal, invalid, inoperative and unjustified and the applicant is entitled to work and perform his duty in his working place



at Elgin Road, Kolkata, School and also has prayed for all service benefits including other consequential reliefs.

In the instant case the management of the school has filed Written statement and has denied the contents of the application U/s. 33A to the effect that the same is incorrect, baseless and misleading. In part 1 of the Written statement of the school it has been specifically pleaded that the application U/s. 33A is not maintainable since the school did not violate any provision of Industrial Disputes Act, 1947. The application of the workman is barred by *res judicata* as the workman had already raised dispute regarding his order of transfer and such dispute has been referred by Government of West Bengal for adjudication on the self-same issue of transfer. The management has denied the allegation of unfair labour practice. It is stated that the management did never indulges unfair labour practice and/or curtailed any existing benefits of the workman as alleged. It is the specific case of the school that no such union functioning in the school nor the school has recognized any such union. It is the specific case of the school that the transfer of the employee was made as per school manuals and said transfer is a routine transfer like other employees based on service manual and it is not contrary to the provision of law as alleged. It is the positive case of the school that all branches of the school are running under Julien educational Trust and Chairman and the Managing Trustee has got every power to intervene / do anything with the internal management of different branches of the school including the transfer of employees. So, the entire allegation as made out in Para 9 to Para 14 of the application U/s. 33A is incorrect, mala fide and misleading. The school manuals have been exhibited in all branches of school and every employee has got free access to the same including the present workman. The workman has deliberately flouted lawful order of transfer and did not join his transferred post. The order of transfer of the workman is legal and justified and it is a routine transfer as per service manual of the school and so the allegation made out in Para 18, 19 and 20 in the application are false and misleading and travesty of truth. The person who passed the order of transfer has got legal authority to pass such order of transfer and therefore the allegations made in Para 21 to Para 27 of the application are vague and misleading and also a deliberate falsehood on the part of the employee. The statement in Para 28 to Para 37 made in the application are denied by the school. It is stated that as no union functioning in the school and as the school did not recognize any such union, so the union has got no locus standi to raise any dispute on the point of issue of transfer on behalf of the employees of the school. The workman cannot claim as a matter of right to remain and to work in Elgin Road Branch of the school for his whole life without joining to his place of transfer deliberately flouting the lawful order of transferred passed by the school management.



The application U/s. 33A filed by the workman is fully suppression of fact and it is not *bona fide* and employee did not come before this Tribunal with clean hands and as such the case is liable to be dismissed.

Decision with reason

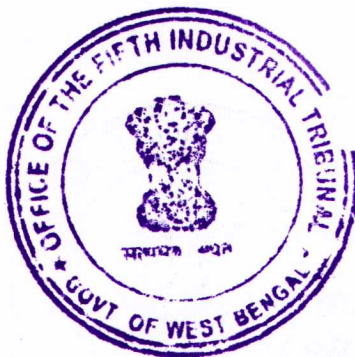
It is admitted case of both the parties that the employee Sri Sankar Sarkar was engaged by M/s. Julien Day School, 35E, Elgin Road, Kolkata as an employee on and from 10.02.1975 and his job was initially on temporary basis and thereafter his job became permanent on 01.03.1978. No letter of appointment was issued to the employee either at the time of his such engagement or subsequently and this is also not disputed.

The complainant/employee has started to perform his duty as Durwan in the said school from 10.02.1975 and continued the same till the end of the month of November, 2011. It is alleged by complainant that since 1st December, 2011, he was not allowed by the management of the school to enter into the campus of the said school to join and to perform his duty as Durwan on the ground that an order of transfer was issued to him on 28.03.2011 with direction to join his new place of posting Julian Day School, at Ganganagar Branch and so he was not permitted to enter and to join duty at Elgin Road Branch, Kolkata.

In this case, considering the respective stand of both parties, it is necessary to adjudicate as to whether the transfer of the employee (complainant) from main unit to another sister unit was a condition of his service or not at the time of his employment? Admittedly, no letter of appointment was issued to complainant at the time of his employment nor it was issued to him at subsequent stage, i.e. at the time of his confirmation of service as a permanent staff. Therefore, there is no scope to get direct light from any written document on this point and so this tribunal has to depend upon the chain of circumstances brought by the parties in this case to come to a conclusion on this issue. Ext. – 1 is the order of transfer dated 28.03.2011. This document speaks “considering the business exigencies and administrative requirements, it has been decided to transfer you from our Kolkata Branch to the Ganganagar Branch of our School with effect from 1st April, 2011.

Please note that this is a routine transfer and will not affect your service conditions and salary benefits which shall continue to remain the same.

You are advised to report to Mr. N. McNamara of our Ganganagar Branch on 1st April, 2011 at 8.30 a.m.”.



The words mentioned in the order of transfer namely 1. “business exigencies” ; 2. “administrative requirement” ; 3. “routine transfer” ; 4. “will not affect your service condition” are very much important to be analysed in the context of the complaint made by the employee.

It is the first surprise transfer order which has been received by the complainant long after 35/36 years of his joining in the service at Elgin Road school. School Authority did not show the basis or foundation of reason and cause of the word ‘business exigency’ either in their Written statement or in the evidence. It has not been explained as to whether the Durwan engaged at Ganganagar Unit at the time of its establishment suddenly left the job or suddenly expired or absented on duty for any other reason for which an emergent situation arose and to tackle the emergent situation immediate alternative arrangement was required to be taken and required to be filled up the vacant post of Durwan by lifting another Durwan from another unit where there was surplus Durwan and such lifting by transfer in no way affect day to day duty of durwan by alternative existing Durwan at Elgin Road Main Unit. When school authority has got no explanation about such foundation of the reason of transfer, in such circumstances, it can safely be said that the word “business exigency” and “administrative requirement” has lost its meaning and strength and so it is far from its true sense and meaning. Mere writing the word “business exigency”, “administrative requirement” does not carry its true sense and weight nor it does justify true reason attached with it. If that be so, it is hard to believe that there was any business exigency or administrative requirement as mentioned in the transfer order.

Let me consider the word ‘routine transfer’ as mentioned in the ‘transfer order’. This word indicates to understand, a time bound regular transfer. It speaks regular transfer under certain time gap. It may be each after one or two or three years of interval. If it is not done on that mode and manner on any previous years, then certainly, such transfer does not come under the category of ‘routine transfer’. On the contrary, it can be said that it was a first time surprise, transfer after 35/36 years of service with some special motive and intention by the school authority. So from the above discussion, it is now clear that the cause or reason of transfer mentioned in the alleged transfer order is baseless having no foundation.

Let me consider the next point which has strongly raised by the complainant to the effect that Mrs. S.E. Bronghton, Managing Trustee has got no authority to issues the order of transfer and as such, it has got no legal effect and it is illegal. To consider this point, it is necessary to look into some important aspect of foundation of establishment of the school, foundation of recognition of the school and the founding guideline of general rules and regulations of its authority.

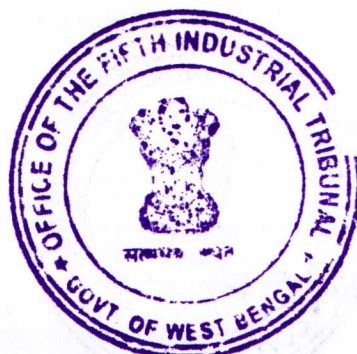


There is no doubt that the “Julien Day School”, 35E, Elgin Road, Kolkata is a recognized school by the Education Department West Bengal State Government and it is under the category ‘Anglo Indian School’. Code of Regulation for Anglo-Indian School has been issued and published in official gazette by the Government of West Bengal, Education Department. This code is fully applicable to Julien Day School. This regulation provides different aspects and guideline which are required to be followed by the Anglo-Indian Schools in respect of running the administration of such schools, either aided or non-aided. This code also speaks about the road map to be followed in establishing school in this category and its function and administration. Rule 2 of this Code deals with the application of the code. Rule 5 deals with the definition. Rules 5(8) defined the word ‘Founder’ which means the Cristian church, Registered Trust, Registered Society, Founding Body or Founder’s will which founded any Anglo-Indian School etc.

Chapter III of this Code provides the guideline about management and administration of the school. Rule 15 of the code specially provided that “all schools approved and recognized under this code will be managed by a Managing Committee duly constituted and acting under specific Rules which the Department of Education may require the schools to submit for approval.....”. Rules 16 provides that whenever a Managing Committee is constituted for a new term of office or whenever any change is made in the constitution of the Managing Committee, the Deputy Director of School Education shall be notified within 4 weeks of such change. Rule 17 speaks about the meeting of Managing Committee. Rules 18 provides the power of Managing Committee and Rule 19 speaks about internal management of the school.

From the above, it reveals that there must have three independent Body or Pillar holding different status and powers in respect of establishment of the school and functioning the school management and administration. According to this Code, first Body is the founder. The founder may be an individual or a Body of persons as defined in Rule 5(8) of this Code. It is the founder who is establishing the school on his own choice and takes necessary recognition from the State Government. The founder has got no direct role about the day to day management and administration of the school. To run the school, the founder has to depend upon constituted Managing Committee in view of Rule 15, Chapter 111 of the Code. Managing Committee is the 2nd Body or Pillar of the school.

Managing Committee shall be formed or constituted for certain period or term of the office as per Rule 15 of the Code and such formation is required to be notified within 4 weeks to the Deputy Director of school Education (Anglo-Indian School) as per Rule 16 of the Code. As it appears that Rule 17 of the Code deals with the mode and method of functioning of the Managing Committee and appointment/removal of Secretary of the Managing Committee.



Rule 18 is very important rule of the code, where power and authority of Managing Committee has been dealt with. Under this rule Managing Committee shall have powers (i) to make rules, not inconsistent with the provision of this Code, from time to time, for its guidance; (ii) to deal with all matters in respect of which authority has been delegated to it by the founder (iii) appointment of Headmaster, Principal etc.

Constitution or formation of Managing Committee and its function is a mechanism for the purpose of fulfilling the wish or will of the founder. It is the Managing Committee and its Secretary who has authority and power of general supervision and to make policy decision and other decision in regard to functioning of the school but it does not have authority or power to deal with internal management of the school. It is Rule 19 of the code which specifically provides that Principal, Headmaster/Headmistress i.e. Head of the institution has got authority for the internal management and administration of the school and he/she is responsible for his such day to day management and administration. Therefore, the Head of the institution is the 3rd or last body or pillar of the school for its smooth functioning. So, it is clear from the above that the foundation or establishment of Anglo-Indian School depends upon those Pillars namely Founder, Managing Committee and Head of the institution. All these three pillars have their separate independent status and power and one cannot interfere with the job of other body.

In the instant case no codified general Rules and Regulation of Julien Day School, 35E, Elgin Road, Kolkata has been produced in evidence or referred in the pleading/written statement by the school though it is clear mandate in Rule 15 of the Code that all schools approved and recognized under this Code will be managed by Managing Committee duly constituted and acting under specific rules with the approval of Department of Education. Rule 17 of the Code more clearly mandate that the general procedure for meeting of the Managing Committee shall be in terms of the Rules and Regulations to be drawn up, if it is not already there, and such rules shall expressly (a) state how meetings are called as well as the procedure to be followed at such meeting (b) state the number of meeting (which should be at least one in every quarter) which Managing Committee shall be required to hold, (c) provide a method by which members of Managing Committee shall be chosen (d) provide appointment and removal Secretary, his functions, powers and duties; (e) provide for appointment, dismissal and service conditions, not inconsistent with the provisions of chapter IV of school teachers and non-teaching staffs including the Principal/Headmaster/Headmistress, in the employ of the school. A general Rules and regulations duly drawn or framed or constituted by the Managing Committee of a particular school of this category covering all concerns of management and administration is a compulsory important document of the particular school

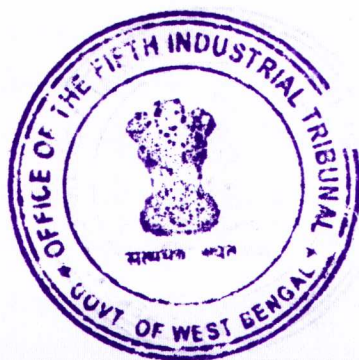


high lighting the road map of its functioning. This compulsory document of General Rules and Regulations is required to be approved by the Department of Education of West Bengal. If there is any such document under the custody of the Julien Day School, then it ought to have been produced before this Tribunal to show and establish the authority or power of Mr. S.E. Broughton, so called Managing Trustee to issue the order of transfer to the employee Mr. Sankar Sarkar.

When no such document of general Rules and Regulation is adduced into evidence, in such circumstances, it can safely be said that the school does not have any such document of general rules and regulations as required under the mandate of this code of Regulations for Anglo Indian Schools in West Bengal.

The Julien Day School has relied upon the document Ext. – B. It has been contended that the school authority has issued the order of transfer on the strength of this document. Let me consider, how far this document is reliable to ascertain the fact that Mrs. S.E. Broughton, so called managing trustee of Julien Day School, Elgin Road, Kolkata had/has legal authority to issue said order of transfer.

From the photocopy of first page of the document, it appears that it has been printed in a caption “Julien Day School Service Manual”. In page No. 2, it has been captioned “Employees Service Rules”. On careful scrutiny of this document, it has not been enlightened who has brought this document on the day light to play its role. The document does not have any designation, seal and signature of the person or persons having authority to bring this document for its role to play. Even this document does not have any date of its draft or preparation or publication. There is no indication in the document itself that it was legally approved by the authority of Managing Committee and recommended by it for obtaining approval from Department of Education, Govt. of West Bengal. There is nothing to show that Department of Education, Govt. of West Bengal already had approved the same. When this document itself is suffering from above mentioned major defects, lacuna and legal deficiency and requirement, it is beyond imagination to accept this document as a legal and valid document. That apart, this document Ext. – B cannot be said a document of “General Rules and Regulations” of the school covering all aspects of smooth functioning of its administration as per requirement of chapter III and IV of the code of Regulations of Anglo-Indian 1993. This document only reflects some rules of the school as per chapter IV of the code and it does not reflect anything as required under chapter III of the code. So, this is not a complete and full document as per requirement of the code and so it does not carry any legal value in support of the contention of the school. The Rules and Regulations about the matter of chapter IV of the Code depends upon the rules and regulations of the matter of chapter III of the Code. The



matter both in Chapter III and IV are inter-related to each other and matter of Chapter IV cannot stand alone to play its role. Therefore, this document does not inspire confidence to accept the stand of the school that it issued the order of transfer legally as per Rule 11 (eleven) of so-called service manual Ext. – B. In view of above, this plea of the school has got no leg to stand upon.

Ext. – 40 is the report of enquiry of Assistant Inspector of school, Kalyani Sub-Division, Dist. – Nadia. On careful scrutiny of this document it appears that an enquiry was held at Julian Day school, Kalyani unit on 16.07.2012 in respect of complaint lodged by the President of Julien Day School, Non-teaching Employees Association against the school authority. The inspecting officer called upon the school authority to produce document of foundation of Trustee Board of the school and document of standing resolution and other relevant documents, if any, in respect of the subject matter of the complaint but the head of the institution had failed to produce any such document at relevant time. The report further speaks that the attendance register of the staffs was lying without any signature of head of the institution. No service manual nor any written agreement by and between the employees and school authority regarding appointment of the staffs mentioning the service condition was produced. Even no appointment letter was issued by the school authority to the non-teaching employees. It further reveals from the report that attitude of the school authority was totally non-cooperative though further opportunity to produce document latter on was given to the school but it did not pay any heed. So, inspecting officer made his opinion to take strong-step against the school authority. This report is dated 24.08.2012. From this document Ext. – 40, it has clearly been established that the so-called ‘service manual’ of Julien Day School Ext. – B had no existence on 16.07.2012 as it was not produced at the time of enquiry or subsequent date to the enquiry officer in spite of the fact that opportunity to produce the document was offered to the school authority. Rule 1(b) of this document Ext. – B speaks “These Rules shall come into force from 1st April, 2005 and will be applicable to all the employees of the schools of the Trust in India” when this document was not in existence in the month of July, 2012 at the time of enquiry and did not see the light of the day, then how those rules would play its role from 1st April, 2005? The so-called document Ext. – B does not ventilate that retrospective effect has been given to this document.

So, considering all the aspects as a whole, I have no hesitation to hold that this document Ext. – B is subsequently procured document only for the purpose of covering or hiding the illegal administrative action taken by the school authority against the applicant of this case.

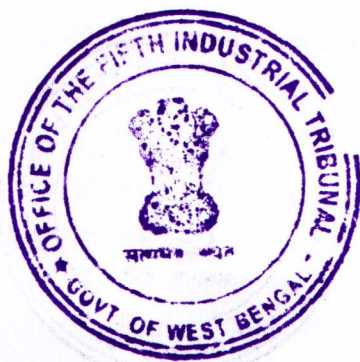


Assuming for the sake of argument but not admitting the same that this document Ext. – B is a proper document having legal force on it, the school authority itself of its own did not follow the rule. In rule 4, it provided “.....a written communication shall be issued to the employees to the effect that the period of probation has been satisfactorily completed and that his service is confirmed.....” when the word “shall” has been mentioned, then it was mandatory step and ought to have been taken by the school authority issuing written communication to the permanent employees whose service was already confirmed prior to coming into force of this service manual in 2005. No such written communication has been produced by the school to show that the school had acted upon the rules of this manual not only for the present applicant but also for other employees. No such document is produced by the school to show and establish the honest and *bona fide* activity of the school authority as against its employees. That being the position, it is clear that school authority itself did not act following its own rule for it. In that score also, it is clear that this document was never acted upon at any point of time and so it has got no legal value for its purpose.

I have already discussed earlier that there must have three independent pillars holding independent status to run the smooth functioning of the administration of the school as per mandate of the Code of Regulation of Anglo-Indian Schools, state of West Bengal namely (i) Founder; (ii) Managing Committee (i.e. body of individuals entrusted by the founder for management of the school); (iii) Head of the institution. ‘Julien Day Educational Trust’ may be the founder of the school and being founder it has got no direct entry into the functioning of Managing Committee of the school and Managing Committee also has got no direct entry into the day to day work of Head of the Institution. Julien Day School and Julien Educational Trust both are separate and independent identity. Therefore, so-called order of transfer issued by the Julien Day Educational Trust, being founder of the school is totally overlapping exercise of power having no direct control on the subject. Therefore, the order of transfer is illegal and inoperative in the eye of law.

I have already discussed that the document Ext. – B is not a document legally enforceable and so there is no scope to rely upon the same.

It is admitted fact that the applicant was engaged in the employment as Durwan at Julien Day School, Elgin Road, Kolkata in the year 1996. At that time, there was no existence of Julien Day School, Ganganagar under District North 24 Parganas. In *New India Flour Mills – Vs. – Union*, reported in (1) LLJ 1963 CAL, Page 745, Hon’ble Calcutta High Court held that it is never the implied condition of service of a workman that the employer has the right to transfer him to a new concern started by the employer subsequent to the date of the employment of the workman.



It is evident that the applicant is an active member of the union and raised voice against the management of the school making different demands and placed chatter of demand before the school management. I have already discussed that the grounds of transfer mentioned in the order of transfer has got no basis and foundation. If that be so, it is clear indicative circumstance that it was colourable exercise of power of transfer by the school in the form of punishment and victimization of applicant. This is against the legal principle laid down in the above mentioned decision.

‘Julien Day School’ Ganganagar, 24 Parganas was established long after the employment of the applicant in ‘Julien Day School’ Elgin Road, Kolkata. ‘Julien Day School’ Ganganagar may be a sister concern of ‘Julien Educational Trust’. Both the schools have their separate and independent identity in respect of location, management of the school and both teaching and non-teaching employees together with the pupil. Both schools cannot be said as on same merit and standard. When employees from main unit to sister unit is transferred by virtue of so-called service manual (Ext. – B), such transfer is no doubt comes under the purview of Sec. – 33(1)(a) of the Industrial Disputes Act. It is admitted position that the dispute of chatter of demand was pending at the time of issuance of order of transfer. In the chatter of demand, policy of transfer of employees is one of the main issues together with other issues. I have already observed that Ext. – B is not legally a valid document and in such a case, in absence of any express condition of transfer of service, the employer cannot transfer any employee from one organization to any other sister organization without express permission or approval U/s. 33(1)(a) of the I.D. Act. Therefore, it is clear that the transfer of applicant on the strength of order of transfer issued by unauthorized person is in violation of provisions contained in Section – 33(1)(a) of the Act. [Ref : - 2006(108) FLR – 306].

Mrs. S.E. Broughton, Managing Trustee signed the order of transfer of the applicant. Who is she of “Julien Day School”, Elgin Road, Kolkata? Head of the institution? Answer is “NO”. Head of the Managing Committed or Governing Body of the School? School Authority is silent to answer this question. When this complaint is filed U/s. 33A of the I.D. Act against ‘Julien Day School’, Elgin Road, Kolkata and when notice was issued from this Tribunal to the School and when School made its appearance through representative and filed written statement, it appears that Vice-Principal of the school signed the written statement for the school. Written Notes of Argument was filed by some other person designated as Authorized Representative. From this, it is implied that Mrs. S.E. Broughton, Managing Trustee has got no direct role to play in the matter of school administration. The school did not make any attempt to establish that the manging trustee is the sole authority being employer of the applicant to issue the order of transfer. Admittedly no letter of appointment was issued to the



applicant employee as Durwan at the time of his employment in the year 1975. Who made such appointment? Whether Mrs. S.E. Broughton, Managing Trustee or the Head of the Institution? So, there is no reason to accept introduced theory of the school that Managing Trustee has got authority to issue order of transfer. Onus lies upon the school to properly show and establish by cogent substantial evidence that Mr. S.E. Broughton, Managing Trustee has got authority to issue order of transfer and in absence of it, the applicant Durwan is entitled to the benefit of such failure by school. Hon'ble Supreme Court in the decision, Dr. Ramesh Chandra Tyagi Vs. Union of India, reported in 1994 II LLJ at page 192 has observed that the transfer order issued by a person having no authority to do so, such order is *non est* in the eye of law.

The decision, Pearlite Liners (P) Ltd. Vs. Manorama Sirsi, reported in (2004) 3 SCC 172 has been relied upon by the school. It is argued that the transfer is an incident of service unless there is a term to the contrary in the contract of service. The factual aspect of the case was that it was a civil suit under provision of Specific Relief Act and relief was sought for enforcement of contract, declaration and injunction. Trial Court rejected the plaint and Hon'ble Supreme Court confirmed the said decision. It was not a case under the provision of Industrial Disputes Act. Hon'ble Apex Court held that the relief sought for by the plaintiff cannot be given by Civil Court. That apart, the plaintiff has neither pleaded nor has there been effort on her part to show that the impugned transfer order was in violation of term of employment. Whereas in the present case the applicant specifically challenged the order of transfer on so many grounds including violation of term of employment. Therefore, the cited decision in no way relevant and applicable in this case.

The decision State of Rajasthan & Others Vs. Anand Prakas Solanky reported in (2003) 7 SCC 403 is also not relevant in present case. It is well known that the employment of a Government employee is regulated by the Service Rules of the Govt. and such service is transferrable subject to the requirement of specific rules or provision of the Act under which the employment was given to the Government employee. The fact of this case is not relating to the government employee rather it is private employment. The facts and circumstances of the cited case is totally different from the present case and so, it does not have any applications in this case.

The decision Soumush Tiwari Vs, Union of India reported in (2009) 2 SCC 592 cited by the school also had no application in the present case. In the case, it was not the question before the Hon'ble Apex Court as to whether the employment of the judicial officer Soumush Tiwari was transferable or not. It was not the question as to whether the transfer was one of the terms and conditions of such employment or not. It is well known that employment of



judicial officer is transferrable under the service rules. The question arose as to whether the order of transfer was *bona fide* or *mala fide* and it came before the Apex Court for decision. The Hon'ble Apex Court observed that in a transferable employment, it is a normal incident of service and should not be interfered with except where *inter alia mala fides* on the part of the authority proved. Facts and circumstances of this case is totally different from the above and therefore, it is irrelevant in this case.

It is relevant to mention the fact that order of transfer was issued to the applicant on 28.03.2011 wherein the effect of the same was given from 01.04.2011. It is admitted position that the applicant did not join Julien Day School, Ganganagar under district 24 Parganas North after receiving the order of transfer. He performed his duty as Durwan in the month of April to November and Julien Day School, 35E Elgin Road, Kolkata – 20 allowed him to perform his such job in that school in spite of the fact that the order of transfer was issued to him and he did not join to his new assignment. Non-joining at the new assignment in spite of the direction in the order of transfer, the School Authority did not take any administrative action against the applicant during this period and all on a sudden did not allow him to enter into the school campus from 01.12.2011. This facts and circumstances clearly indicate that the force of the order of transfer became collapsed in the passage of time and so it can safely be said that order of transfer became lost its relevancy and became infructuous and it was a dead order. Subsequent attempt of the School Authority to revive a dead order cannot be said a proper and justified attempt by the school to enforce the same and in that score the order of transfer has got no legal force to act upon.

In the light of my above observation and having regard to the facts and circumstances and evidence adduced by the parties, I have no hesitation to hold that the order of transfer of the applicant issued by Mrs. S.E. Broughton, so called Managing Trustee is illegal, invalid, inoperative and unjustified in the eye of law. As there is no express terms and condition of transfer of his employment at the time of his joining in service, so his employment cannot be treated as transferrable service and so, also he is an employee/Durwan at 'Julien Day School', 35E Elgin Road, Kolkata – 700 020. As the said school authority did not allow him to enter into the said school campus from 01.12.2011 in spite of the fact that the applicant on several times went to said school to perform his duty and so the applicant had no fault on his part to perform his allotted duty since 01.12.2011 and as such he cannot be treated as absentee from his duty or cannot be treated as absconder from service. It is the school authority who committed wrong in not allowing the applicant to perform his duty since then and therefore, the applicant is entitled to get his all back-wages/salary and all other benefits of service from 01.12.2011 and school authority is liable to disburse all the back-wages/salary including all



other normal benefits. As it prima facie appears that the applicant possibly crossed the date of superannuation today and as such there is no scope to allow him to join duty immediately in the said school. So he is entitled to get all backwages and other benefits of service and consequential benefits of retirement from the school authority and the school authority is directed to calculate the date of superannuation and disburse all the other benefits to him accordingly.

Hence,

It is awarded,

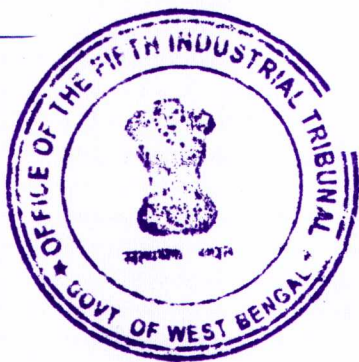
That the application U/s. 33A of the Industrial Disputes Act, 1947 filed by the employee/Durwan Sri Sankar Sarkar as against M/s. Julien Day School, 35E, Elgin Road, Kolkata – 700 020 is allowed on contest.

The order of transfer of the applicant dated 28.03.2011 issued by Mrs. S.E. Broughton, so-called Managing Trustee is illegal, invalid, inoperative and unjustified in the eye of law as there is no express terms and conditions of transfer of his employment at the time of his joining in service in the year 1975. So, his employment cannot be treated as transferable service. He is an employee/Durwan at Julien Day School 35E, Elgin Road, Kolkata 700 020. The applicant cannot be treated as absentee from his duty on and from 01.12.2011 and/or cannot be treated as absconder from his service. The applicant is entitled to get his all back-wages/salary and all other normal benefits of service from 01.12.2011 till the date of superannuation (to be calculated by the School Authority immediately) and the School Authority is directed to disburse all the back-wages/salary including all other normal benefits and consequential retirement benefits to the applicant accordingly.

This is my award.

Dictated & corrected by me.

Sd/ —
Judge.



Sd/ —
(Tapan Kumar Das)
Judge
Fifth Industrial Tribunal
Kolkata
25.10.2019