**IN THE HIGH COURT AT CALCUTTA**

**CONSTITUTIONAL WRIT JURISDICTION**

**APPELLATE SIDE**

**Present:**

**THE HON'BLE JUSTICE HARISH TANDON**
**&**
**THE HON'BLE JUSTICE PRASENJIT BISWAS**

**WPA/13628/2018**

with

**WPO/41/2020**

with

**WPO/306/2020**

**(Rabin Tudu vs. State of West Bengal & ors.)**

with

**MAT/378/2021**

**(Supriya Ray vs. State of West Bengal & ors.)**

with

**MAT/379/2021**

**(Ratanlal Halder vs. State of West Bengal & ors.)**

with

**MAT/380/2021**

(**Jyotirmay Jana vs. State of West Bengal & ors.)**

With

**WPA/10262/2023**

**(Mithun Sadhukhan vs, State of West Bengal & ors).**

with

**WPA/10271/2023**

**(Sanchita Bhowmick vs. State of West Bengal & ors.)**

with

**WPA/10301/2023**

**(Soumi Mondal vs. State of West Bengal & ors.)**

with

**WPA/10367/2023**

**(Sandipa Singha Roy Vs State Of West Bengal & Ors.)**

with

**WPA/10396/2023**

**(Kabita Murmu Vs State Of West Bengal & Ors.)**

with

**WPA/10399/2023**

**(Prakassindhu Pradhan Vs State Of West Bengal & Ors.)**

with

**WPA/10402/2023**

**(Rajasree Chakraborty Vs State Of West Bengal & Ors.)**

with

**WPA/10407/2023**

**(Shisutosh Karak Vs The State Of West Bengal & Ors.)**

with

**WPA/10428/2023**

**(Suprabhat Das Vs State Of West Bengal & Ors.)**

with

**WPA/10505/2023**

**(Aditi Purohit Vs State Of West Bengal & Ors.)**

with

**WPA/10543/2023**

**(Suvendu Panda Vs State Of West Bengal & Ors.)**

with

**WPA/10664/2023**

**(Archita Dey Vs State Of West Bengal & Ors.)**

with

**WPA/10790/2023**

**(Sakuntala Chakraborti Ganguly Vs State Of West Bengal & Ors.)**

with

**WPA/10810/2023**

**(Prajnamita Nath Vs State Of West Bengal & Ors.)**

with

**WPA/10858/2023**

**(Maumita Roy Vs The State Of West Bengal & Ors.)**

with

**WPA 10871 of 2023**

**(Bishnu Charan Patra & Anr. vs. State)**

with

**WPA/10874/2023**

**(Sunanda Mohanta Vs State Of West Bengal & Ors.)**

with

**WPA/10879/2023**

**(Atashi Patra Vs State Of West Bengal & Ors.)**

with

**WPA/10887/2023**

**(Aparajit Banerjee Vs State Of West Bengal & Ors.)**

with

**WPA/10892/2023**

**(Smita Bhattacharya Vs State Of West Bengal & Ors.)**

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**WPA/10941/2023**

**(Pinaki Mandal Vs State Of West Bengal & Ors.)**

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**WPA/10945/2023**

**(Sanjoy Mondal Vs State Of West Bengal & Ors.)**

with

**WPA/10965/2023**

**(Sangita Banerjee Vs State Of West Bengal & Ors.)**

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**WPA/10970/2023**

**(Sudeshna Das Biswas Vs State Of West Bengal & Ors.)**

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**WPA/10974/2023**

**(Meghnad Roy Vs State Of West Bengal & Ors.)**

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**WPA/10979/2023**

**(Pinky Biswas Vs State Of West Bengal & Ors.)**

with

**WPA/10981/2023**

**(Indrani Guha Vs State Of West Bengal And Ors.)**

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**WPA/10985/2023**

**(Pallabi Chatterjee Vs State Of West Bengal & Ors.)**

with

**WPA/10986/2023**

**(Mita Guha Thakur Vs State Of West Bengal & Ors.)**

with

**WPA/10988/2023**

**(Sutapa Mandal Vs State Of West Bengal & Ors.)**

with

**WPA/10989/2023**

**(Sucharita Chakrabarty Vs The State Of West Bengal & Ors.)**

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**WPA/10990/2023**

**(Kasturi Basak Vs State Of West Bengal & Ors.)**

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**WPA/10992/2023**

**(Tanusree Ghosh Vs State Of West Bengal & Ors.)**

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**WPA/10996/2023**

**(Marufa Khatun Vs State Of West Bengal & Ors.)**

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**WPA/10999/2023**

**(Barnali Bhakta Vs State Of West Bengal & Ors.)**

with

**WPA/11002/2023**

**(Gargi Chakraborty Vs State Of West Bengal & Ors.)**

with

**WPA 11004 of 2023**

**(Ranjit Saren vs. State)**

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**WPA/11009/2023**

**(Nikhilesh Dinda Vs The State Of West Bengal & Ors.)**

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**WPA/11150/2023**

**(Kaushik Sen Vs State Of West Bengal & Ors.)**

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**WPA/11155/2023**

**(Lipika Biswas Vs State Of West Bengal & Ors.)**

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**WPA/11156/2023**

**(Moumita Dutta Dey Vs State Of West Bengal & Ors.)**

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**WPA 11161 of 2023**

**(Bandana Rudra vs. State)**

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**WPA/11171/2023**

**(Piyali Mukherjee Vs State Of West Bengal & Ors.)**

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**WPA/11175/2023**

**(Madhushree Datta Vs State Of West Bengal & Ors.)**

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**WPA 11178 of 2023**

**(Amaresh Das vs. State)**

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**WPA/11180/2023**

**(Haimanti Ganguly Vs State Of West Bengal & Ors.)**

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**WPA/11183/2023**

**(Sreyasi Roy Vs State Of West Bengal & Ors.)**

with

**WPA/11189/2023**

**(Durba Bandyopadhyay Vs State Of West Bengal & Ors.)**

with

WPA/11195/2023

**(Sudeshna Lahiri Chakraborti Vs State Of West Bengal & Ors.)**

with

**WPA/11198/2023**

**(Soumita Mondal Vs State Of West Bengal & Ors.)**

with

**WPA 11202 of 2023**

**(Arpita Dutta vs. The State of West Bengal & Ors.)**

with

**WPA 11212 of 2023**

**(Mousumi Das vs. State)**

with

**WPA/11215/2023**

**(Priyanka Jana Vs State Of West Bengal & Ors.)**

with

**WPA 11221 of 2023**

**(Moumita Mitra vs. State)**

with

**WPA 11223 of 2023**

**(Mahua Basu vs. State)**

with

**WPA 11238 of 2023**

**(Sanjib Kumar Halder vs. State)**

with

**WPA/11283/2023**

**(Baishakhiparna Banerjee Vs State Of West Bengal & Ors.)**

with

**WPA 11288 of 2023**

**(Munmun Hazra [Roy] vs. State)**

with

**WPA/11293/2023**

**(Anusua Shaoo Vs State Of West Bengal & Ors.)**

with

**WPA/11300/2023**

**(Rupali Sengupta Vs State Of West Bengal & Ors.)**

with

**WPA/11302/2023**

**(Chinmay Ray Vs State Of West Bengal And Ors.)**

with

**WPA/11304/2023**

**(Shampa Das Vs State Of West Bengal & Ors.)**

with

**WPA/11308/2023**

**(Nandadulal Jana Vs State Of West Bengal And Ors.)**

with

**WPA/11311/2023**

**(Tulsidas Kabiraj Vs State Of West Bengal And Ors.)**

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**WPA/11314/2023**

**(Tapas Kumar Mandal Vs State Of West Bengal & Ors.)**

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**WPA/11319/2023**

**(Paulomi Maity Vs State Of West Bengal & Ors.)**

with

**WPA 11337 of 2023**

**(Shampa Ray vs. State)**

with

**WPA 11341 of 2023**

**(Jaita Mitra vs. State)**

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**WPA 11343 of 2023**

**(Purnima Karmakar vs. State)**

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**WPA 11348 of 2023**

**(Sriparna Bhattacharya vs. State)**

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**WPA 11349 of 2023**

**(Debjani Naskar vs. State)**

with

**WPA 11351 of 2023**

**(Mitali Das vs. State)**

with

**WPA 11355 of 2023**

**(Kashinath Patra vs. State)**

with

**WPA 11357 of 2023**

**(Aloke Giri vs. State)**

with

**WPA 11359 of 2023**

**(Prakriti Ghoshal vs. State)**

with

**WPA 11362 of 2023**

**(Anima Ray vs. State)**

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**WPA 11364 of 2023**

**(Barnali Nath vs. State)**

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**WPA 11367 of 2023**

**(Debraj Roy vs. State)**

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**WPA 11378 of 2023**

**(Satya Charan Sardar vs. State)**

with

**WPA 11383 of 2023**

**(Sounak Mukherjee vs. State)**

with

**WPA 11384 of 2023**

**(Indrani Dey vs. State)**

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**WPA 11423 of 2023**

**(Shreya Basu vs. State)**

with

**WPA 11497 of 2023**

**(Mithu Rani Naskar vs. State)**

with

**WPA 11501 of 2023**

**(Suchismita Guha Roy vs. State)**

with

**WPA 11507 of 2023**

**(Swati Goswami vs. State)**

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**WPA 11514 of 2023**

**(Arpita Nandi vs. State)**

with

**WPA 11517 of 2023**

**(Rakhi Ray vs. State)**

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**WPA 11522 of 2023**

**(Supratim Pramanik vs. State)**

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**(Debojyoti Choudhury vs. State)**

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**(Rumki Das vs. State)**

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**(Amrita Ghosh Roy vs. State)**

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**WPA 11558 of 2023**

**(Priyanka Sarkar vs. State)**

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**WPA 11586 of 2023**

**(Dola Guha Khasnabis vs. State)**

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**WPA 11603 of 2023**

**(Pinki Das vs. State)**

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**WPA 11607 of 2023**

**(Ananta Narjinary vs. State)**

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**WPA 11620 of 2023**

**(Suchita Bhattacharyya vs. State)**

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**WPA 11638 of 2023**

**(Malabi Sarkar vs. State)**

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**WPA 11642 of 2023**

**(Mahendra Biswas vs. State)**

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**WPA 11647 of 2023**

**(Rinku Chowdhury vs. State)**

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**(Anjanabha Ghorai vs. State)**

with

**WPA 11656 of 2023**

**(Arunima Chatterjee vs. State)**

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**WPA 11690 of 2023**

**(Soma Sarkar vs. State)**

with

**WPA 11714 of 2023**

**(Pranita Sardar vs. State)**

with

**WPA 11751 of 2023**

**(Maumita Das vs. State)**

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**WPA 11759 of 2023**

**(Biswadip Mitra vs. State)**

with

**WPA 11766 of 2023**

**(Shipra Roy Chowdhury vs. State)**

with

**WPA 11778 of 2023**

**(Sanchayeeta Banerjee vs. State)**

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**WPA 11781 of 2023**

**(Aparnita Saha vs. State)**

with

**WPA 11782 of 2023**

**(Dhanapati Tudu vs. State)**

with

**WPA 11783 of 2023**

**(Ujjwal Tanti vs. State)**

with

**WPA 11821 of 2023**

**(Kabita Ghosh vs. State)**

with

**WPA 11873 of 2023**

**(Karabi Sengupta vs. State)**

with

**WPA 11888 of 2023**

**(Baishali Sen Majumder vs. State)**

with

**WPA 11947 of 2023**

**(Chandraima Bhattacharya vs. State)**

with

**WPA 11981 of 2023**

**(Arbita Pathak vs. State)**

with

**WPA 11988 of 2023**

**(Tapati Gharami vs. State)**

with

**WPA 12016 of 2023**

**(Sahana Neogi [Saha] vs. State)**

with

**WPA 12110 of 2023**

**(Aparna Ghosh vs. State)**

with

**WPA 12114 of 2023**

**(Shanta Pal [Biswas] vs. State)**

with

**WPA 12149 of 2023**

**(Mahuya Biswas vs. State)**

with

**WPA 12174 of 2023**

**(Reajul Mondal vs. State)**

with

**WPA 12193 of 2023**

**(Krishna Roy vs. State)**

with

**WPA 12209 of 2023**

**(Debolina Sen vs. State)**

with

**WPA 12213 of 2023**

**(Saurav Basu vs. State)**

with

**WPA 12215 of 2023**

**(Sushoma Ghosh vs. State)**

with

**WPA 12221 of 2023**

**(Banani Saha vs. State)**

with

**WPA 12257 of 2023**

**(Tapas Mondal vs. State)**

with

**WPA 12289 of 2023**

**(Shaswati Maitra vs. State)**

with

**WPA 12373 of 2023**

**(Amitava Bhattacharyya vs. State)**

with

**WPA 12514 of 2023**

**(Sanjukta Saha vs. State)**

with

**WPA 12756 of 2023**

**(Priyanka Das vs. State)**

with

**WPA 13026 of 2023**

**(Piyali De vs. State)**

with

**WPA 13031 of 2023**

**(Anil Baran Hansda vs. State)**

with

**WPA 13036 of 2023**

**(Sima Chanda vs. State)**

with

**WPA 13085 of 2023**

**(Secondary Teachers & Employees Association (STEA) & Anr.)**

**vs.**

**State**

with

**WPA 13090 of 2023**

**(Shruti Mandal vs. State)**

with

**WPA 13651 of 2023**

**(Smt. Tuhina Rakshit vs. State)**

with

**WPA 13655 of 2023**

**(Smt. Tapati Mandal vs. State)**

with

**WPA15707/2021**

**(Sujata Mukhopadhyay Vs The State Of West Bengal & Ors.)**

with

**WPA 17476 of2021**

**(Krishna Bera (Baidya) Vs The State Of West Bengal & Ors.)**

**CAN 1 of 2021 & IA NO: CAN 1 of 2021**

**With**

**WPA 19808 of 2021**

**CAN1 of 2022**

with

**WPA 23626 of 2018**

**IA NO: CAN 1 of 2018 (Old No: CAN 5851 of 2018)**

**(Kamala Kanta Hansda Vs State Of West Bengal & Ors.)**

with

**WPA 23628 of 2018**

**Sandip Mandal Vs State Of West Bengal & Ors.)**

with

**WPA 3181 of 2020**

**(Jagannath Sardar Vs State Of West Bengal & Ors.)**

with

**WPA 5515 of 2020**

**(Debabrata Kanji Vs State Of West Bengal & Ors.)**

with

**WPA 5518 of 2020**

**(Shrabanti Debnath Vs State Of West Bengal)**

with

**WPA 5519 of 2020**

**(Anasuya Bodhak Vs State Of West Bengal & Ors.)**

with

**WPA 5522 of 2020**

**(Supriya Mukhopadhyay Vs State Of West Bengal & Ors.)**

**APPEARENCE:**

For The Petitioners: **Mr. Jayanta Mitra, Sr. Adv.**

**Mr. Ashoke Kumar Banerjee, Sr. Adv.**

**Mr. Pratik Dhar, Sr. Adv.**

**Mr. Subir Sanyal, Adv.**

**Mr. Ekramul Bari, Adv.**

**Mr. S.M. Ali, Adv.**

**Mr. Anindya Bose, Adv.**

**Mr. Diptendu Mondal, Adv.**

**Mr. Subhrangsu Panda, Adv.**

**Ms. Ina Bhattacharya, Adv.**

**Ms. Mithu Singha Mahapatra, Adv.**

**Mr. Sudip Ghosh Chowdhury, Adv.**

**Ms. Bina Baidya, Adv.**

**Mr. Abhishek Bose, Adv.**

**Mr. Biswarup Biswas, Adv.**

**Mr. Gora Chand Samanta, Adv.**

**Mr. Nirmalendu Bera, Adv.**

**Mr. Sakti Pada Jana, Adv.**

**Mr. Subhajyoti Das, Adv.**

**Mr. Partha Sarkar, Adv.**

**Mr. Abhijit Basu, Adv.**

**Mr. Ujjal Ray, Adv.**

**Mr. Arpa Chakraborty, Adv.**

**Mr. Sk. Abdur Rahim, Adv.**

**Mr. Arun Kumar Maiti (Mohanty), Adv.**

**Mrs. Kaberi Sengupta Mohanty, Adv.**

**Mr. R. R. Mohanty, Adv.**

**Ms. Iqra Rahaman, Adv.**

**Mr. Sumit Shaw, Adv.**

**Ms. Snigdha Ghosh, Adv.**

**Mr. Shivam Saha, Adv.**

**Mr. Ratul Biswas, Adv.**

**Ms. Sumouli Sarkar, Adv.**

**Mr. Sagnik Roy Chowdhury, Adv.**

**Mr. Syed Mausum Ali, Adv.**

**Mr. Falguni Bandyopadhyay, Adv.**

**Mr. Subir Chakraborty, Adv.**

**Mr. Suman Sengupta, Adv.**

**Mr. Tapash Maity, Adv.**

**Mr. Dip Jyoti Chakraborty, Adv.**

**Mr. Tamal Taru Panda, Adv.**

**Mr. Arnab Sinha, Adv.**

**Mr. Amartya Basu, Adv.**

**Ms. Suchita Bhattacharya, Adv.**

**Mr. Ramen Bose, Adv.**

**Mr. Banibrata Dutta, Adv.**

**Mr. Aktaruzzaman, Adv.**

**Mr. Uday Shankar Chattopadhyay, Adv.**

**Mr. Suman Sankar Chetterjee, Adv.**

**Mr. Santanu Majhi, Adv.**

**Ms. Trisha Rakshit, Adv.**

**Mr. Pronay Basak, Adv.**

**Mr. Subhayu Das, Adv.**

**Mr. Samir Halder, Adv.**

**Mr. Sudipta Dasgupta, Adv.**

**Mr. Arka Nandi, Adv.**

**Mr. Sandwip Sutradhar, Adv.**

**Mr. Kartik Kumar Roy, Adv.**

**Mr. Debranjan Das, Adv.**

**Mr. Samrat Chowdhury, Adv.**

**Mr. Gouranga Debnath, Adv.**

**Ms. Swagata Datta, Adv.**

**Mr. Suman Banerjee, Adv.**

**Ms. Munmun Tewari, Adv.**

**Mr. Sk. Imtiaj Uddin, Adv.**

For the State: **Mr. S.N. Mookherjee, Ld. Adv. General**

**Mr. Anirban Ray, Ld. Govt. Pleader**

**Mr. Tapan Kumar Mukherjee, Ld. AGP**

**Mr. Sirsanya Bandopadhyay, Ld. Jr.Standing Counsel**

**Mr. Bhsakar Prasad Vaisya, Ld. AGP**

**Mr. Swapan Kumar Datta, Ld. AGP**

**Mr. Md. T. M. Siddiqui, Ld. AGP**

**Mr. Biswabrata Basu Mullick, Adv.**

**Mr. Pantu Deb Roy, Adv.**

**Mr. Malay Singh, Adv.**

**Mr. Sk. Md. Galib, Adv.**

**Mr. Santanu Kumar Mitra, Adv.**

**Mr. Dipankar Das Gupta, Adv.**

**Mr. Arindam Chattopadhyay, Adv.**

**Mr. Suman Dey, Adv.**

**Mr. Mrinal Kanti Ghosh, Adv.**

**Mr. Ranjan Saha, Adv.**

**Mr. Sagnik Chatterjee, Adv.**

**Mr. Supriyo Chattopadhyay, Adv.**

**Ms. Sayantanee Bhattacharjee, Adv.**

**Ms. Iti Dutta, Adv.**

**Mr. Raja Saha, Adv.**

**Mr. Avishek Prasad, Adv.**

**Mr. Arka Kumar Nag, Adv.**

**Mr. Sudipto Panda, Adv.**

**Ms. Munmun Tewary, Adv.**

**Mr. Himadri Sekhar Chakraborty, Adv.**

**Ms. Tapati Samanta, Adv.**

**Mr. Gausul Alam, Adv.**

**Mr. Md. Yusuf Ali, Adv.**

**Mr. Arjun Roy Mukherjee, Adv.**

**Ms. Chaitali Bhattacharya, Adv.**

**Ms. Ranjana Har Chowdhury, Adv.**

**Mr. Pinaki Bhattacharya, Adv.**

**Mr. Shamim Ul-Bari, Adv.**

**Mr. Sanjib Das, Adv.**

**Mr. Manas Kundu, Adv.**

**Mr. Debabrata Mondal, Adv.**

**Mr. Biswajit Dey, Adv.**

**Ms. Rajlakhsmi Ghatak, Adv.**

**Mr. Somnath Naskar, Adv.**

**Mr. Subrata Ghosh, Adv.**

**Ms. Neelam Singh, Adv.**

**Mr. Bibekanand Tripathi, Adv.**

**Mr. Tapas Kumar Mondal, Adv.**

**Mr. Rama Prasad Sarkar, Adv.**

**Ms. Anita Deb Jana, Adv.**

**Ms. Manika Pandit, Adv.**

**Ms. Jhuma Chakraborty, Adv.**

**Mr. Aritra Ghosh, Adv.**

**Mr. Saptak Sanyal, Adv.**

**Mr. Panna Lal Bandyopadhyay, Adv.**

**Mr. Rajarshi Basu, Adv.**

**Mr. Shehnaz Tareq Mina, Adv.**

**Ms. Sayantanee Bhattacharjee, Adv.**

**Mr. Amartya Pal, Adv.**

**Mr. Anwari Quraishi, Adv.**

**Mr. Zainab Tahur, Adv.**

**Mr. Parikshit Goswami, Adv.**

**Ms. Lipika Chatterjee, Adv.**

For the SSC : **Dr. Sutanu Kumar Patra, Adv.**

**Mr. Kanak Kiran Bandopadhyay, Adv.**

**Ms. Debalina Chakraborty, Adv.**

**Mr. Sunit Kumar Roy, Adv.**

**Ms. Supriya Dubey, Adv.**

**Mr. Sourav Mitra, Adv.**

For the WBBSE: **Mr. Santanu Kumar Mitra, Adv.**

**Ms. Koyeli Bhattacharya, Adv.**

For the WBCSSC: **Dr. Sutanu Kumar Patra, Adv.**

**Mr. Sourav Mitra, Adv.**

**Mr. Sunit Kumar Roy, Adv.**

**Ms. Supriya Dubey, Adv.**

**Mr. Kanak Kiran Bandyopadhyay, Adv.**

**Ms. Debalina Chakraborty, Adv.**

Judgment on : **27.7.2023**

**Harish Tandon, J.:**

The slew of litigations which are assigned to this Bench relate to the Constitutional validity of the provisions contained under Section 10C of the West Bengal School Service Commission Act, 1997 (said Act) at the behest of the teachers appointed in a different aided school within the State assailing the order of transfer or placement of service from one school to another school. Taking aid of Section 10C of the said Act, the School Service Commission recommended the transfer of a teacher from a school to another school on the basis of the general or special order passed by the State Government necessitated in the interest of the education and/or in the interest of Public Service but till date the recommendation has not fructified

into an order of transfer or placement of service to another school. Since the constitutional validity of Section 10C of the said Act is assailed in all the aforesaid matters, the assignment was made to the Division Bench to decide the aforesaid issue.

All the counsels representing the respective writ petitioners have categorized their arguments in two compartments firstly, by introduction of Section 10C of the Act, the legislatures have impinged upon the condition of service which has been protected under Section 10 of the said Act; secondly, the introduction of Section 10C into the said Act by way of an amending Act cannot apply retrospectively as it has a larger impact on varying the condition of service to their disadvantages.

Since the second question is intricately related to the first question, we decided to permit the respective counsels to argue the said point and for the larger interest of the teachers within the State of West Bengal, proceeded to decide the aforesaid point as well in the event the first question is answered in favour of the writ petitioners.

A prelude to promulgation of the said Act is required to be recapitulated in order to understand the object and purpose for which the same was enacted. Since the time immemorial the education was always considered to be an important tool of learning, excellence and shaping the moral, ethical, cultural and political life; above all building the character and maintenance of a social fabric engrained into the society and ability to take a decision in various spheres of life having an impact on the development of

the country socially, economically, politically and culturally. Since the time immemorial there was an establishment the informal system of education though regarded as a most powerful tool of imparting education in early development of this country so that the citizenry of the princely State to play a very important role in a decision making process and above all rendering justices to the common people through the monarch or the decision of a king. The king used to dispense justice with the council of Ministers who are always considered to be erudite, educated, knowledgeable and abreast of the miseries and follies of the citizen of the said State. The system of education developed gradually as it is dynamic in nature necessitated by the need of the people of the State and advancement of the society in all spheres of life. The education thus inculcate not only the sense of responsibility or obligation into a citizen of a country but have a tremendous impact on its structuring the orderly society and a discipline to be inculcated in them in a more organized manner uniformly. Even during the British Era, the educational institutions were set up by several philanthropist, educationalist, philosopher and the person having a resource both economically, politically to provide such education to the citizenry of the country without having any aid or grant from the then ruling Government. Several schools were set up by such philanthropist, educationalist and the resourceful person with the avowed object of providing education to the children considering their future and their tremendous contribution in shaping the society in most articulate and organized manner. Even after the independence, the aforesaid schools continued rendering services without

any intervention of the Government and thus played a very important role in shaping the country in most dynamic manner depending upon the needs of the society.

The Constitution of India was adopted by the people of the nation and came into force on and from 26th January, 1950 containing Article 45 in Part–IV as an obligation of the State to impart free and compulsory education to the children up to 14 years of age. Though there were several schools set up by the Government under the Constitutional obligation yet the importance and the necessity of the educational institutions set up by such philanthropist, educationalist continued to render services to the society having an autonomy on economical, administration and management. It was subsequently felt that there must be a uniform standard of the curriculum in the education system and all the educational institutions within the respective States must adhere the same system so that the children may have the same curriculum and in same way to abrogate the understanding of the subject in a different manner.

This led to the promulgation of the West Bengal School of Secondary Education, 1950 by the State. The aforesaid Act was promulgated for the simple reason to imparting elementary and basic education as Constitutional obligation of the State in establishing the educational institution and also seeks to achieve the standard of education so that the uniform education is provided to the children to admit them into a higher educational institution. Even after the introduction of the said Act, no fetter was put to the system introduced by the individual or the collective society

establishing a free passage of entry to the weak or marginalised section of the society. It has a further avowed object of giving a quality education to our children under the constitutional obligation. The aforesaid obligation of the State under Part-IV of the Constitution not only cast an obligation on the State to establish the educational institutions within the State affordable to the reach of every common people but also to make a uniform standard form of education to such children to compete with the rest in specialised degrees or the professional courses in order to eradicate disparity on the ground of economical, cultural and social background. The preamble of the Act throwing light on the object and purpose for its enactment is to regulate, control and develop the secondary education in the State of West Bengal. The significant change manifest from the said Act is the establishment of the Board of Secondary Education to take adequate measures deemed necessary for making suitable provisions for secondary education throughout the State. The Board was also empowered to constitute the executive Council and the various committees including the Syllabus Committee having duty to make recommendation to the Executive Councils about the curriculum and syllabus of studies to be followed in recognised high school and for examinations. Since the common examination at secondary level is the obligation of the Board to conduct the same, the affiliation of the independent education not set up by the State Government are also obliged to have affiliation and recognition by the Board. Though the autonomy in relation to the curriculum, syllabus, text books and the examinations is brindled and taken away on the establishment of the Board under the said

Act, yet the autonomy in relation to the administration, management and appointment of the teachers remained with such respective institutions as they were not under the direct or pervasive control of the Board economically.

The Act of 1950 was subsequently repealed by the West Bengal Board of Secondary Education, 1963 incorporating the robust provisions relating to the functions, controls and to regulate the different educational institutions within the well-defined parameters together with the statutory obligation. The powers and duties of the Board is succinctly laid down in Section 27 of the Act of 1963 to direct, supervise and control the secondary education and lay down the general policy for the development of the secondary education in West Bengal. The Board was further obligated to conduct the periodical survey to assess the educational need of the West Bengal more particularly, in relation to a marginalised section of the society to make regulations relating to the conduct and the discipline in respect of a teacher and a non teaching staff of the recognised institution under the Board. The State retained power to suspend the executive or any resolution or order of the Board or any committee or a Council and prohibit the doing of any act provided the State Government is of the opinion that such resolution, order or act is in exercise of power conferred by or under the said Act upon the respective bodies. It is seemingly the control of the State over the Board, Councils and Committees in the event there is any transgression of their powers entrusted thereunder. The Board cannot enjoy unfettered and unbrindled right in relation to the development and/or establishment of the

educational institution within the State and all such actions are subservient to the decision of the State.

Despite the constitutional obligations entrusted upon the Government, adequate numbers of educational institutions could not be set up under the direct control and management of the Government, the recognised institutions set up by the individuals, philanthropists, philosophers and the notable persons of the society were enjoying an autonomy in relation to the appointment of the teachers and non-teaching staffs and there was a large disparity in this regard perceived by the Government which led to the management of recognised Non-Government Institutions (Aided and Non-aided) Rules, 1969 to come in place. The promulgation of the said Rule sublime its incorporation was in respect of such private institutions which had a complete economic autonomy but was unable to provide adequate economical support by passage of time. The Government took a conscious stand to provide economic support to such institutions which have been recognised under the Act of 1963 or even prior thereto under the Act of 1950 by way of a grant or aid. Because of the economic support having been extended to such private institutions, the aforesaid rule was framed to have and control over the functioning as well as the respective duties of the Committees to be constituted. The Committee was empowered under Rule 28 of the said Rules not only to adhere the directions or guidelines issued by the State Government but also to appoint the teachers specifying the terms and conditions of such appointment.

Contemporaneous with the power to issue a letter of appointment or appoint a teacher the power to suspend the teacher or any employee is also vested upon the Committee subject to the approval of the Board. It is noteworthy that the State Government reserved power upon itself to take any action against the member of the Committee in relation to a financial irregularities or any act against the interest of the institution.

Subsequent to the introduction of the said Rules it was felt that the teaching and non-teaching employees of the different educational institutions who received the grant-in-aid from the Government were deprived of the death-cum-retiral benefits admissible to the teachers of the Government school. By virtue of a memorandum dated 15.5.1985 on recommendation of the Second Pay Commission set up by the Government of West Bengal, The West Bengal Recognised Non-Government Educational Institution Employees (Death-cum-Retirement Benefit) Scheme, 1981 was framed. The said scheme is aimed to provide a death-cum-retirement benefits to the teachers and non-teaching staff of the recognised Non-Government educational institution so that their right to have a retiral benefit as well as the pension after attainment of superannuation is extended to them. It was a benevolent and beneficial piece of legislation incorporated by the Government to protect the interest of the teachers and non-teaching staffs of the aided educational institutions who have the complete autonomy in relation to an administration and management as well as the appointment of the teachers.

Since there was a complete disparity in the appointment of the teachers in several aided educational institutions, it was felt to introduce a better method of recruitment of teachers as such recruitment was done by the respective school authorities on the basis of sponsorship by the local employment exchange which obviously was subject to the approval of the District Inspector of School. It was further noticed that the members of the managing committees were indulged in different kinds of malpractices including financial and non-academic consideration while making such selection of the teachers and non-teaching staffs and in order to remove and eradicate such malpractices and also to improve the quality of teachers, the State Government decided to establish a Central School Service Commission and four Regional School Service Commission in relation to an appointment of teachers in the schools.

The West Bengal School Service Commission Ordinance, 1995 was promulgated as the Legislative Assembly was not in session and, thereafter the West Bengal School Service Commission Bill, 1997 was laid in the assembly and was passed with majority. The said Bill was later on reduced into a full-fledged West Bengal School Service Commission Act, 1997 and after receiving the consent/approval of the Governor the same was published in the Calcutta Gazette (Extraordinary) on 1st April, 1997. The definition of 'School' given under Section 2(l) of the Act means a recognised non-Government aided secondary school or the educational institutions, higher secondary school or educational institution other than the college and Madrasah. Explanation 2 thereto explains the meaning of the "aided" to

be used with reference to a school aided by the State Government in the shape of financial assistance towards the basic pay of the teachers of that school. Section 7 of the said Act postulates that it is a duty of the regional commission to select persons for admission to a post of a teacher in a school within its territorial jurisdiction and the manner in the scope of selection of persons for appointment for the post of the teacher shall be such as may be prescribed. Section 9 of the Act starting with the non-obstante clause however, reserved the right of appointment to the post of a teacher in a school upon the managing committee but on the recommendation of the regional commission exercising territorial jurisdiction.

Broadly speaking, the object and purpose for promulgation of the School Service Commission Act is not only to curb the malpractices of the members of the managing committee but also the standard of eligibility and appointment of the teachers to provide a better education to the children and above all to avoid any discriminatory action of the managing committee or the nepotism and favouritism. Though the power of the managing committee to issue a letter of appointment or to appoint a teacher is a still recognised and retained with the managing committee but subject to the recommendation of the regional commission within whose territorial jurisdiction the said school is established. Section 10 of the Act, which is a centre of debate in all these spate of litigations before us contained a provision in relation to a protection of the teachers employed before the commencement of the said Act. The said section starts with non-obstante clause that the condition of service of the teachers employed in a school

before the commencement of the said Act shall not be varied to the disadvantage of such teacher, so far as such terms and conditions relate to the appointment of such teachers to the post held by them immediately before commencement of the said Act.

Obviously, the said Section start with the non-obstante clause as manifest from the expression "notwithstanding anything contained elsewhere in this Act" which according to the respective Counsels of the petitioners overrides all other provisions of the said Act and, therefore, to be regarded as a parent section coined in the expression "head of the family". The Act of 1997 is not challenged in any of the writ petition either by the respective teachers or the aided educational institutions taking away the right to select the teachers in the respective schools and, therefore, we can safely proceed on the constitutional validity of the said Act. The Said Act received an amendment by virtue of the West Bengal School Service Commission (2nd Amendment) Act, 2010 wherein Section 10A was inserted recognising the right of the teachers and non-teaching staffs of mutual transfer. Subsequently, the object and reasons for incorporation of Section 10A Act of 1997 can be seen from the object and the reasons enumerated in the Bill introduced by the State Government to empowering the Central School Service Commission to make recommendations for mutual transfers of the teacher and non-teaching staffs in the school as defined in Section 2 of the said Act. Subsequently, another amendment Bill of 2013 was introduced empowering the Central School Service Commission to make recommendation for general transfers of the teachers and non-teaching

staffs which was subsequently replaced by an amendment Act of 2013 duly notified in the official gazette on 11th July, 2013.

The State Government thereafter decide to further amend the said Act of 1997 by inserting Section 10C for the purpose of empowering the Board i.e., the West Bengal Board of Secondary Education in place of the managing committee or the ad-hoc committee or not administrator if any, in relation to the schools coming within the purview of the said Act to appoint teachers and non-teaching staffs on the basis of the recommendations made by the West Bengal School Service Commission and to effect transfer of teachers and non-teaching staffs in order to rationalise pupil-teacher ratio in such schools for maintaining quality education and to ensure healthy educational environment in the State by the amendment Act of 2017. Section 10C was inserted in the Act of 1997 in the following:

> ***"10C. Notwithstanding anything contained in any other law for the time being in force or in any contract to the contrary, the State Government in the interest of education or in the interest of public service for administrative reasons may direct the Commission through guidelines or general instructions to make recommendation for placing the service of any teacher including the Assistant Headmaster or the Assistant Headmistress or any non-teaching staff from one school to another school against any sanctioned post."***

Simultaneously with the insertion of 10C in the Act of 1997, the West Bengal Board of Secondary Education Act, 1963 was further amended taking away the power of the managing committee to issue a letter of appointment or to appoint a teacher on the recommendations of the SSC

and vested upon the Board by inserting a Clause (j) in Section 27 (2) of the said Act.

The narration as aforesaid could not be completed without noticing an Act introduced by the Government for control of the expenditure in the school within the State of West Bengal. The West Bengal Schools (Control of Expenditure) Act, 2005 was promulgated w.e.f., 19th August, 2005 to apply to the schools getting a financial assistance from the State Government as well as the Government schools. The school authority defined in Section 2(n) to mean the governing body, managing committee, ad-hoc committee or administrator or any other body which is charged with the management of the affairs of the schools, who shall not create any teaching and non-teaching post involving financial liability of the State Exchequer and not to appoint or engage any teacher or non-teaching staff. Section 4 of the said Act creates a brindled on the school authorities, any power to regularise the service of any persons nor revised pay or allowances of a teacher or non-teaching staff or incur, except as prescribed the expenses for any development scheme without the prior sanction of the State Government. Section 12 of the Act of 2005 bestowed power upon the State Government if they have a reason to belief that a number of students studying in the particular school has fallen below the prescribed strength or the school authority has failed to take actions as directed by the Government by directing the Board or a Council or any such authority to recognise by school or abolish the teaching and non-teaching posts of such school or shifting all the teaching and non-teaching staff from such school to another

school within the region or to take any such action as it appears to the State Governments to be necessary and proper. However, Section 16 of the Act of 2005 is the replica of Section 10 of Act of 1997 providing a protection in relation to terms and conditions of service of the teachers and non-teaching staff in employment of the school immediately before the commencement of the said Act not to be varied to their disadvantage.

The aforesaid laws have been enacted by the State Government in relation to the education as entrusted upon it under the Constitution of India and to control, regulate and supervise the functioning of the various aided educational institutions established within its territorial jurisdiction. The aforesaid Acts further aimed to promote the quality in education which obviously cannot be achieved without regulating the quality of teachers in relation to a selection and/or appointment in such educational institutions receiving a grant or financial assistance or a financial aid from the State Government.

The large number of writ petitions are filed by the respective teachers of the aided educational institutions challenging the *vires* of Section 10C of the West Bengal School Service Commission Act, 1997 not only violative of the constitutional provisions i.e. Article 14, 19 and 21 of the Constitution but also opposed to the object and purpose more particularly, offending Section 10 of the said Act which provides a protection to the teachers and non-teaching staff in relation to their service condition. All the writ petitions have been assigned to us to decide the constitutional validity of Section 10C of the Act of 1997 and, therefore, our consideration would be limited to that

extent. However, all the Counsels have also argued on the operation of the said Section whether respectively or prospectively to which we feel that in the event the said provision is held *intra vires* to the constitution, the said point is engrained within our consideration.

Mr. Sanyal, the learned Advocate appearing for a batch of writ petitions vociferously submits that the appointment of teachers in the respective aided schools are distinct from the other services of the Government. According to Mr. Sanyal the teachers appointed in the respective schools by the managing committee is not a cadre based service but such appointment is restricted to a respective school and, therefore, the transfer cannot be considered as an incident of service. Mr. Sanyal vehemently submits that since the establishment of schools by an individual or the society, the appointment of teacher was always considered to be an appointment in a respective school without any concept of transfer as distinct from the other Government services. Mr. Sanyal, would submit that the appointment letters issued to the respective teachers do not include the condition as to the transfer and therefore, such being not the condition incorporated as condition of service, the State Government cannot usurp the power of such transfer which is unknown and unrecognised in the educational system. As per Mr. Sanyal, the condition of service includes transfer but must be expressly incorporated therein as the absence of such condition cannot be assumed to have been impliedly incorporated as a condition of service. The appointment of teacher in a particular school is not a state based service as it is always regarded as school specific appointment

which implies that it is opposed to a transfer from that school to another. Mr. Sanyal ardently submits that Section 10 of the Act of 1997 gives protection to such teachers in relation to their service condition which cannot be varied to their disadvantages nor unilaterally incorporate such condition which is conspicuously absent in the appointment letter. Mr. Sanyal further submits that insertion of section 10C violates the basic tenet of Section 10 of the Act as it runs counter to it and, therefore, it is against the ethos, spirit, object and the purpose behind promulgation of the Act of 1997 and, therefore, to be declared as *ultra vires*. Mr. Sanyal is very much critical on the existence of Section 10C of the Act of 1997 for the reason that till the time immemorial the appointment of teacher was school centric which is distinct and different from the Government service and therefore, the introduction of Section 10C by way of an amendment in the said Act of 1997 is opposed to the very fabric of the Act and to be declared as *ultra vires*. Mr. Sanyal relied upon the judgment of the Allahabad High Court reported in ***Prem Beharilal Saksena vs. Director of Medical & Health Services, Lucknow & Ors***., reported in ***AIR 1959 All 629*** in support of his contention that the moment the appointment is made to a specific post which is to be performed in a particular place only, the employee cannot be transferred to any other post as it is inconsistent with the appointment. To buttress the submission that the transfer cannot be effected unless it is a cadre service, the reliance is placed upon the judgment of the SC in case of ***Kavi Raj & Ors. vs. State of Jammu & Kashmir & Ors.*** reported in ***(2013) 3 SCC 526.*** Mr. Sanyal vehemently submits that all the aided

educational institutions have an independent existence and/or footing and cannot be brought in a broader sense of common educational institutions as all such educational institutions are managed, administered and run by an independent managing committee although they are common in the sense that they received the financial grant or aid from the State Government since the appointment is a school specific under the different management. The provision for transfer of a teacher from one autonomous educational institution to another is illegal and offends the Section 10 of the Act of 1997 and placed reliance upon a judgment of the Apex Court in case of ***General Officer Commanding-in-Chief & Anr. Vs. Dr. Subhash Chandra Yadav & Anr.,*** reported in ***(1988) 2 SCC 351***. Mr. Sanyal would further submit that the duties of the teacher is not to impart education only but also build trust in shaping the character, morality and discipline of the student and precisely for such reason such appointment was a school based appointment as the bonding which is established between the student and the teacher has an important role which cannot be undermined or taken away by inserting Section 10C in the Act of 1997. Mr. Sanyal arduously submits that the moment the State Government divested its power by constituting a Board through a competent legislation, usurpation of the power *de horse* such legislation is always regarded as a colourable legislation and the Court can declare such legislation invalid or opposed to the constitution provisions and relied upon a Constitutional Bench decision rendered in case of ***K. C. Gajapati Narayan Deo & Ors. vs. State of Orissa***, reported in ***AIR 1953 SC 375 .***

Alternatively, Mr. Sanyal argued that in the event the Court uphold the Constitutional validity of Section 10C of the Act of 1997, such provision cannot apply retrospectively but at best cannot be applied after its insertion that is prospectively. In respect of his contention that the Act should always be considered to operate prospectively unless intended to operate retrospectively, Mr. Sanyal relies upon a judgment of the Apex Court in case of ***Monnet Ispat & Energy Ltd. vs. Union of India & Ors.,*** reported in ***(2012) 11 SCC 1.***

Mr. Sanyal further submits that there are instances that the said Section 10C is being misused or applied to the detriment of the interest of the teachers as in the several writ petitions, a teacher who was benefited under Section 10A has been transferred within a span of 2 months to a school at the distance of 150 kms. Mr. Sanyal further submits that subsequently by virtue of an amendment in the Act and the Rules framed thereunder the State Government introduced the counselling system based upon the merit and the rank of the respective aspiring teachers to choose a particular school of his choice which lead to an inescapable conclusion that the appointment was a school based appointment and the concept of transfer from one school to another was conspicuously absent. According to Mr. Sanyal a meritorious aspiring teacher may choose a school in a close proximity of his residence in the counselling conducted by the SSC and if Section 10C is applied which, in fact, has been done in the instant case it would completely destroy the concept of counselling which would be mere farcical.

Mr. Jayanta Kumar Mitra, learned Senior Advocate appearing for some of the writ petitioners while adopting the argument of Mr. Sanyal on the various facets of the provisions contained under Section 10C of the Act of 1997 submits that the matter may be viewed from a different angle. According to Mr. Mitra, the appointment of teachers in a school based manner impliedly engrained the concept of non-transferability. Mr. Mitra further submits that the condition of service, which in most of the cases indicates that it is not transferable, imbibed the concept of right to life to the extent that the mental stability, avoidance of stress and creation of a congenial atmosphere in an education system is engrained within the right to life and envisaged by the founders of the constitution under Article 21 of the Constitution of India. Mr. Mitra further submits that the introduction of the law which deprives the right conferred under Article 21 should always be regarded as *ultra vires* as held by the Apex Court in case of ***Olga Tellis & Ors. vs. Bombay Municipal Corporation & Ors.***, reported in ***AIR 1986 SC 180***.

Mr. Mitra further submits that every individual has a right to a standard of living adequate for their health both mentally and physically and if by introduction of any law, the ultimate object offends such basic principles, it cannot be said to be constitutionally valid and placed reliance upon a judgment of the Supreme Court in case of ***Chameli Singh & Ors. vs. State of U.P. & Anr.,*** reported in ***(1996) 2 SCC 549*** and ***Dr. Ashok vs. Union of India & Ors.,*** reported in ***(1997) 5 SCC 10.***

Mr. Mitra further submits that even the aided educational institution managed, administered and controlled by the managing committee consisting of a private individuals yet it discharged a solemn functions of the public functionaries and, therefore, a writ under Article 226 of the Constitution is maintainable and relied upon a judgment of the Supreme Court in case of ***Federal Bank Ltd. vs. Sagar Thomas & Ors.***, reported in ***AIR 2003 SC 4325.***

Mr. Dhar, the learned Senior Advocate concededly submits in his usual fairness that though his clients have challenged the *vires* of Section 10C but he does not find any lack of power in the State Government to legislate in this regard. However, he submits that all the subsequently inserted provision namely, Section 10A, 10B and 10C are required to be harmonised so as to operate in a particular sphere without transgressing their limits over the other. He succinctly submits that all the provisions contained under Sections 10A, 10B and 10C starts with the non-obstante Clause but a significant difference can be seen while harmonising the operation of the respective sections to the extent that the word ‘transfer’ though used in Section 10A and 10B but conspicuously absent in Section 10C. According to him, Section 10C does not contain the word ‘transfer’ but ‘placing of service’ and therefore, the moment the court find that different expressions or words are used in a same statute, it will not carry the same meaning and rely upon the judgment of the Supreme Court in case of ***kerala Sate beverages Manufacturing & Marketing Corporation Ltd. vs. Assistan Commissioner of Income Tax Circle 1(1),*** reported in ***(2022)***

***4 SCC 240.*** Mr. Dhar, the learned Senior Advocate further placed reliance upon a judgment of the Supreme Court in case of ***Sunil Kumar Kori & Anr. vs. Gopal Das Kabra & Ors.,*** reported in **(2016) 10 SCC 467** for the proposition that when two different words are used, having practically synonymous in ordinary or grammatical sense, in the same legislation dealing with the same kind of topic, the different meaning should be assigned. According to Mr. Dhar, the learned Senior Advocate, the insertion of 10A, 10B and 10C are always subservient to Section 10 of the Act of 1997 and therefore, the earlier section being the head of the family cannot be subsumed into the subsequently inserted sections within the same family and therefore, any action of the authority which runs counter to the sprit and the soul of Section 10 should not be retained in the statute as mutually destructive provisions are always avoided.

Mr. Dhar, the learned Senior Advocate further submits that language employed in Section 10 overrides all other provisions of the Act of 1997 whereas subsequently inserted Sections within the same family having no such overriding clause cannot control or override the parent section i.e., the head of the family. Mr. Dhar would submit that even if 10C is held constitutionally valid within the competence of the legislature to legislate, the harmonious interpretation which can be assigned is that the said provisions cannot be regarded as separate and distinct to Section 10, 10A and 10B but to be construed as a consequential part and complementary to the aforesaid provisions. Mr. Dhar, the learned Senior Advocate further submits that the transfer of a teacher in a school constitute a unique nature

of service and the concept of transfer was not a phenomenon earlier and therefore, in order to bring such concept, which was conspicuously absent through a indirect way is impermissible and placed reliance upon a judgment of the Apex Court in ***Shiv Kumar Sharma vs. Santosh Kumari,* reported** in **(2007) 8 SCC 600.** According to Mr. Dhar, there is no lack of competence on the part of the legislature to omit or repeal Section 10 of the Act of 1997 while introducing Section 10C but having not done so, such introduction and/or insertion is an indirect way of destroying the earlier Sections. He further submits that even if Section 10C can co-exist with the earlier provisions namely, 10, 10A and 10B it should always be construed prospectively unless it is expressed to operate retrospectively or by necessary implication as the law always look forward and not backward by placing reliance upon a judgment of the Supreme Court in case of earlier of ***Controller of Estate Duty, Gujarat I, Ahmedabad vs. M.A. Merchant, & Ors.,*** reported in ***(1989) supp (1) SCC 499*** and ***G.J. Raja vs. Tejraj Surana,*** reported in ***(2019) 19 SCC 469***.

Mr. Dhar further submits that amendment in a legislation can never be permitted to have retrospective operation if it takes away the benefit already available to the employee under the existing Rule and therefore any action affecting the vested or accrued right is violative of Articles 14 and 16 of the Constitution and placed reliance upon a judgment of the Supreme Court in case of ***Punjab State Cooperative Agricultural Development Bank Ltd. vs. Registrar, Cooperative Societies & Ors.***, reported in ***(2022) 4 SCC 363.*** Mr. Dhar, the learned Senior Advocate submits that if there is a

two possible interpretations, the Court must adopt such interpretation which is just, fair, reasonable and sensible to the subject and placed reliance upon a judgment of the Apex Court in case of ***Indian Administrative Service (S.C.S) Association, U.P. & Ors. vs. Union of India & Ors.***, reported in ***(1993) supp (1) SCC 730*** . Mr. Dhar, the learned Senior Advocate further placed reliance upon a judgment of the Supreme Court in case of ***ITO vs. M.C. Ponnoose*** reported in ***(1969) 2 SCC 351.*** for the proposition that the moment the new law affects the right of a person without any expressed words of its retrospective operation or necessary implication, the Court should not held such law to operate retrospectively. Mr. Dhar, the learned Senior Advocate further submits that it is a duty of the Court to avoid any construction which would render the other part of the statute meaningless as the sole object behind the adoption of harmonious construction is not to destroy but to make it workable as held by the Supreme Court in case of ***Rao Shiv Bahadur Singh & Anr. vs. State of Vindhya Pradesh***, reported in **AIR 1953 SC 394** and ***J. K. Cotton Spinning & Weaving Mills Co. Ltd. vs. State of Uttar Pradesh & Ors.***, reported in ***AIR 1961 SC 1170.***

Lastly, he submits that even if Section 10C is held as constitutionally valid, its operation cannot be made with retrospective effect but should apply to the candidates have been appointed as teacher, post such amendment.

Mr. Arun Maity, learned Senior Advocate appearing for some of the writ petitioners echoed with the submission advanced by Mr. Sanyal and Mr.

Mitra and did not adopt the submission advanced by Mr. Dhar. According to Mr. Maity the insertion of Section 10C to the Act of 1997 is arbitrary and involves the negation of equality. According to Mr. Maity the action of legislature can always be judged on the parameter of reasonableness and rationality as departure therefrom would offends the right guaranteed under Article 14 of the Constitution of India and placed reliance upon the judgment of the Supreme Court in case of ***A. P. Dairy Development Corporation Federation vs. B. Narasimha Reddy & Ors.,*** reported in ***2011 AIR (SC) 3298***. According to Mr. Maity insertion of Section 10C has completely destroyed the existence of Sections 10, 10A and 10B which are rendered practically redundant. Mr. Maity vociferously submits that Section 10C operates in a disadvantageous manner in relation to a service condition of teachers employed in the aided school and, therefore, offends Section 10 of the said Act.

Mr. Ujjal Roy, learned Advocate appearing for some of the writ petitioners submits that the insertion of Section 10C is an Act of mala fide and imbibed the concept of anarchy as enjoyed in the test of monarchy. Any legislation brought by the legislature has to pass the test of reasonability as held in the King's Bench decision rendered in ***Associated Provincial Picture Houses, Ld. Vs. Wednesbury Corporation.,*** reported in ***1947 (2) All E R 680 CA***. Mr. Roy is very much critical that the mala fide intention behind the incorporation of Section 10C can be seen that there are large number of vacancies in the different schools both aided and the Government schools and to cover up such lapses, such provision is inserted. According to

him, the basic feature of Section 10 is sought to be destroyed or rendered nugatory by inserting Section 10C and, therefore, it can be impinged as a colourable legislature.

Learned Advocate General appearing for the State-respondent submits that it is apposite to consider the nature of the service of the teachers in aided school and the role of the Government in relation to the service of such teachers before the Court proceeds to interpret various provisions of the Act and the power of the Government to incorporate a provision not only in exercise of the Constitutional power but within the field of legislation. Learned Advocate General further submits that the Constitution has obligated the State Government to legislate in the field of education and the moment the legislation is promulgated, the amendment in the said legislation is within the competence of the State and in absence of any legislative incompetence or transgression of the power and the field of legislation, the court shall not presume such legislation *ultra vires* to the Constitution.

Learned Advocate General vociferously submits that a legislation cannot be impinged as constitutionally invalid merely on a possibility of any abuse to the provisions but is restricted to a case where such amendment having brought in the legislation alters the very basic structure of the Constitution or offends the object and purpose for which it is incorporated. He further submits that there are broad principles within the contour thereof the legislation can be held violative of the Constitutional provision if such legislation is made beyond the competence of the legislature, violative

of Article 13 of the Constitution, ignoring the prohibitions incorporated in the Constitution and such legislation is made without following the procedure laid down in the Constitution and placed reliance upon a Constitution Bench judgment of the Supreme Court rendered in case of ***Supreme Court Advocates-on-Record Association & Anr. vs. Union of India,*** reported in ***(2016) 5 SCC 1.*** According to the learned Advocate General, different parameters are required to be considered in a case where the parent Act is challenged being violative of the constitutional provision and the subordinate legislation. In latter case, the scope is more wider in the sense that apart from the legislative competence and offending any constitutional provision, it can further be impinged if the same is not in conformity with the statute under which the same is made or in excess of the limits of the authority provided in the enabling Act or on manifest arbitrariness or unreasonableness.

Learned Advocate General further submits that all the judgments cited by the petitioners relate to the constitutional validity of the subordinate legislation and is not relatable to a case where a parent legislation is sought to be challenged and the distinction in this regard has been succinctly laid down by the Supreme Court in case of ***State of T. N. & Anr. vs. P. Krishnamurthy & Ors.*** reported in ***(2006) 4 SCC 517***. Learned Advocate General vehemently submits that the parent legislation must withstand on the constitutional provisions, the competence of the State to legislate the same and such legislation does not violate any fundamental rights guaranteed under Part-III of the Constitution. By referring Entry 25 in

Schedule 7 of the Constitution, Learned Advocate General submits that legislative competence can be seen therefrom and any legislation made by the State cannot be impinged on the ground of legislative competence, in view of such constitutional obligation, as the Entry 25 to Schedule 7 obligated the State to legislate the law relating to education. It further cast an obligation to protect the interest of the teaching and non-teaching staffs and to regulate the service in relation to an aided school getting a financial assistance and a support from the Government. According to him, large number of educational institutions set up by the individuals or the notable person in the society is supported by the State by extending the financial assistance and, therefore, no fetter can be put on the Government to regulate the selection, appointment and condition of service of the teachers in the aided school and in that sense, the autonomy enjoined by the unaided school cannot be enjoined by the aided school and placed reliance upon a Constitutional Bench decision of the Supreme Court in case of ***T.M.A Pai Foundation & Ors. vs. State of Karnataka and Ors.***, reported in ***(2002) 8 SCC 481***.

Learned Advocate General vociferously submits that Article 45 of the Constitution creates an obligation on the State to provide early child care and education to all the children below the age of 6 years but subsequently by virtue of the 86$^{th}$ Amendment the right to get free and compulsory education to all the children between the age of 6 to 14 years has been brought in Part III upon introduction of article 21A and therefore, right to free and compulsory education between the said age group is recognised as

a fundamental right and correspondingly imposed a constitutional obligation upon the State in this regard. According to the Learned Advocate General, Article 21 of the Constitution which deals with a fundamental right to life cannot be stretched nor expanded to cover the condition of service of a teacher in an aided school that non-transferability imbibed within the right to life, even such fundamental right is subject to the procedure established by law and therefore it cannot be considered as an inadequate and/or absolute right in the sense of service in the educational institution. Learned Advocate General further submits that the education system in the State of West Bengal has to be understood before the Court impinges upon the amendment having brought in the Act of 1997; more particularly, in relation to a schools getting aided and/or grant by way of financial assistance. Learned Advocate General vociferously submits that the West Bengal School Service Commission Act, 1997 was promulgated containing a provision i.e. Section 10 to protect the service condition of the teachers appointed immediately before the commencement in the said Act which does not include any condition as to transfer in any form and this spate of litigations came to be filed before the High Court by several teachers appointed in the aided school seeking mutual transfer from one school to another. In case of ***Ramapada Das & Anr. vs. State of West Bengal & Ors.*** reported in ***(2008) 2 CHN 994***, the Division Bench of this Court held that the State should evolve a policy for recommending the candidates to the respective post of the teachers for appointments in the schools and should also make suitable amendments in relation to a mutual transfer based upon the

suffering of the teachers and the difficulties which they faced. Another Division Bench in case of ***State of West Bengal & Ors. vs. Smritikana Maity & Ors.*** reported in ***(2008) 1 CHN 582*** also held that the State is within its competence to control the aided educational institutions getting a financial assistance including the teachers appointed in such institutions which is always regarded as a public employment. It is thus submitted that the appointment of teacher or their posting in a school or the services cannot be said to be beyond the purview of public employment and, therefore, it is within the competence of the State to legislate over the service conditions and the transfer being an incidence of service can also be regulated and/or controlled by the State. According to the learned Advocate General the moment the service of the teachers in an aided educational institutions is regarded as a public employment even if such employment is initially contractual having created on acceptance of the offer, the service condition after such appointment can be regulated by a statute or a statutory rules framed by the Government unilaterally and, therefore, it cannot be presumed that it remained as contractual having impact on the conditions of service and placed reliance upon a judgment the Constitution Bench decision of the Supreme Court in case of ***Roshan Lal Tandon & Anr. vs. Union of India,*** reported in ***AIR 1967 SC 1889***. Learned Advocate General vociferously submits that after the introduction of Article 21A of the Constitution of Right to Education Act, 2009 was promulgated with the avowed object that the activity of education is neither a trade or a profession and, therefore, there is no fetter on the part of the Government to put a

reasonable restrictions in the interest of the general public and placed reliance upon a judgment of the Supreme Court delivered in case of ***Christian Medical College Vellore Association vs. Union of India & Ors.,*** reported in ***(2020) 8 SCC 705***. Learned Advocate General vociferously submits that the identical provisions contained in Section 10 of the West Bengal School Service Commission Act, 1997 was also incorporated in the West Bengal Madrasah Service Commission Act, 2008 promulgated by the State which was a subject matter challenged before this Court. The managing committee of a Madrasah challenged the said Act of 2008 to be *ultra viers* as it transgress the constitutional protection provided to a linguistic minority in an educational institution in exercising of the autonomy in selection and appointment and the service of the teachers in Madrasah. According to the Learned Advocate General the matter travelled to the Supreme Court wherein it is held that the recommendation and the nomination of the teachers made by the commission is binding of the managing committee and, therefore, the promulgation of the enactment is within the legislative competence of the State and does not transgress or offends any constitutional rights in ***Sk. Mohd. Rafique vs. Managing ommittee, Contai Rahamania High Madrasah & Ors.,*** reported in ***(2020) 6 SCC 689.***

The Learned Advocate General further submits that the submission of the petitioners that by virtue of an amendment in the legislation cannot take away the vested right is fallacious as the transfer is always regarded as an incident of service and freedom is enjoined by the State in relation to a

posting of its employees necessitated by the exigencies of service and, therefore, no fundamental right or a vested right can be claimed against a transfer or a posting of a choice and placed reliance upon the judgment of the Apex Court in case of ***Sk. Nausad Rahaman & Ors. vs. Union of India & Ors.***, reported in ***(2022) 12 SCC 1***. Learned Advocate General further submits that since the adoption of the Constitution of India by the people of the country, several legislations relating to education was promulgated by the State and the statutory rules were also framed in relation to the service of the teachers. It is further submitted that the State felt the necessity of various unaided schools operating in a different parts of the State and extending the quality education to its citizenry and decided to grant a physical assistance and recognised such schools as aided institutions. Subsequently, the Government noticed several malpractices and/or anomalies in utilisation of financial aid and in order to control the same the West Bengal School Service Commission Act, 1997 was introduced. It is further submitted that from time to time the amendments have been brought into the said Act and the object and purpose for insertion of Section 10C is laudable that it can be activated by the State in the interest of education or in the interest of public service. Since the employment of the teachers in an aided school is regarded as a public employment, there is no fetter on the part of the State to take decision under the provision of Section 10C in the interest of the education or a public service.

Mr. Advocate General vehemently submits that the legislative competence of the State is not under challenge but the challenge to Section

10C of the said Act is founded on unreasonableness, arbitrary and a colourable exercise of power which does not appear to be so nor the Constitutional Court should transgress its power enshrined in the Constitution in holding that the said Section 10C is unconstitutional. Mr. Advocate General further submits that Section 10C was inserted with an avowed object of realising disparity in the teacher-pupil ratio in different aided schools which cannot be said to be arbitrary, mala fide and/or beyond the competence of the State. It is further submitted that mere apprehension to abuse the provision of the newly inserted Section cannot be a ground to render such provision unconstitutional. The Learned Advocate General further submits that even upon the introduction of the West Bengal School Service Commission (State Level Selection Test for Appointment of Teachers) Rules, 2015, the Concept of counselling is to bring a fare and transparent way of the appointment which does not create any contractual or a statutory right into the teachers to be immuned from transfer under Section 10C of the said Act. Learned Advocate General further submits that the introduction of West Bengal School (Control of Expenditure) Act, 2015 have no nexus on the condition of service of the teachers in an aided school but is aimed to restrict the expenditures of the aided school getting a financial assistance from the State and to prevent the misuse thereof. The Learned Advocate General thus submits that the moment the Supreme Court has held that it is within the legislative competence of the State to enact the Commission Act, it therefore has the legislative competence to insert a

provision within the said Act and, therefore, the contention of the petitioners is unsustainable.

The Learned Advocate General further submits that a distinction must be drawn between a vested right and an existing right and the operation of the statute whether retrospectively and/or prospectively has to be judged in such perspective and placed upon a judgment of the Supreme Court in case of ***Trimbak Damodhar Raipurkar vs. Assaram Hiraman Patil & Ors.***, reported in ***AIR 1966 SC 1758*** and ***M/s. New India Sugar Works vs. State of U.P. & Ors.,*** reported in ***(1981) 2 SCC 293***. To sum up, the Learned Advocate General submits that there is no legislative incompetence in the State to insert Section 10C in the said Act nor it can be said that the said provision cannot be reconciled nor co-exist with Section 10, 10A and 10B of the Act as all the aforesaid provisions operate in a specific zone and therefore the writ petition deserves dismissal.

Before we proceed to decide the core issue as to whether Section 10C of the West Bengal School Service Commission, 1997 is *ultra vires* to the Constitution or offends the basic fabric of the said Act or rendering the Section 10, 10A and 10B nugatory, the origin of several legislations promulgated by the State in relation to education is required to be recapitulated.

After the adoption of the Constitution of India and the federal structures i.e. the Union of States, the legislative powers of the State was recognised upon introduction of Schedule 7 thereto. Though Schedule 7

cannot be regarded as a source of power as such power emanates from the enabling provision contained in the constitution but operates in a field of legislation. The earliest Act promulgated in the field of education by the State was the West Bengal Secondary Education Act, 1950 for regulation, control and the development of the secondary education in the West Bengal. The said Act received the consent of the Governor and published in the Calcutta Gazette on 18th May, 1950. The salient feature of the said Act discerned from Section 3 thereof is that the State shall establish a Board for such avowed purpose which would be regarded as a body corroborate with perpetual succession. The said Act not only contained the provisions relating to the composition of the Board but the several committees to be constituted to operate in a sphere of education within the State of West Bengal. The fundamental powers of the Board is enshrined in Section 36 of the Said Act reproducing the object and purpose incorporated in the preamble of the said Act and also to do all Acts as may be necessary for the purpose of direction, supervision, development and the control of the different educational institutions within the State of West Bengal. The said Act was subsequently repealed by the West Bengal Board of Secondary Education Act, 1963. The subsequent Act of 1963 contained a chapter dealing with the powers and duties of the Board and the President of the said Board in the following:

***"Powers and duties of the Board –***

***27. (1) It shall be the duty of the Board to advise the State Government on all matters relating to Secondary Education referred to it by The State Government.***

***(2) Subject to any general or special orders of the State Government, the provisions of this Act and any rules made thereunder, the Board shall have generally the power to direct , supervise and control Secondary Education, and in particular the power –***

***(a) to lay down the general policy for development of Secondary Education in West Bengal;***

***(b) to conduct periodical survey to assess the educational needs of West Bengal with particular reference to such needs of the Scheduled castes, the Scheduled Tribes and other backward communities and of the hill areas in West Bengal;***

***(c) omitted;***

***(d) to institute Secondary Examinations and such other examinations as it may think fit and to make regulations in this behalf [***];***

***(e) to administer the West Bengal Board of Secondary Education Fund;***

***(f) to institute and administer such Provident Funds as may be prescribed;***

***(g) to make regulations relating to the conduct, discipline and appeal in respect of the members of the staff;***

***(gg) to make regulations relating to the conduct, discipline and appeal in respect of teachers and non-teaching staff of recognised institutions under the Board;***

***(h) to decide any appeal preferred against any decision of the Executive Committee or, subject to the provisions of this Act, any other Committee constituted under this Act; and***

***(i) to award diplomas, certificates, prizes and scholarships in respect of any examinations instituted by the Board.***

***(3) Subject to the provisions of sub-section (2), the Board may, if it thinks necessary, make regulations in respect of any matter for the proper exercise of its powers under this Act :***

***Provided that any decision or action taken or any order made by the Board in exercise of its power under this Act shall not be invalid merely on the ground that no regulation has been made under this sub-section.***

***(4) No regulation shall be valid unless it is approved by the State Government and the State Government may, in accordance to such approval, make such additions, alterations and modifications therein as it thinks fit and also specify the date or dates from which the regulations shall come into force or shall be deemed to have come into force :***

***Provided that before making any such addition, alteration and modification the State Government shall give the Board an opportunity to express its views thereon within such period not exceeding one month as may be specified by the State Government.***

***(5) All regulations approved by the State Government, shall be published in the Official Gazette.***

***(6) Subject to the provisions of sub-sections (2) and (3), the Board shall have the power to require the Executive Committee, from time to time, to submit reports, returns, statements and other information on any matter relating to the duties of the Executive Committee referred to in sub-sections (3) and (4) of Section 19A."***

Several amendments were brought in the Act of 1963 which are relatable to the composition of the Board and the various committees and the powers and the functions thereof to which we do not think necessary for the present purposes. Neither the Act of 1950 nor the Act of 1963 supersedes the committee of the various aided institutions so for as the autonomy in relation to a selection and/or appointment of the teachers or the non-teaching staffs. However, all such appointments were subject to the approval of the District Inspector of School that is how one can perceive the pervasive control of the State over the aforesaid aided institutions.

Several institutions set up by the individuals, philanthropists and the resourceful persons towards the education to be imparted to the children

within the State of West Bengal were facing difficulties in meeting the expenditures because of the growing needs. The Government decided to give a financial assistance to such educational institutions and also considered the necessity of protecting the interest of the teaching and non-teaching staffs though appointed by the managing committee but upon an approval of the District Inspector of School. Even the Government found that the teachers appointed in an aided and unaided school have no protection at the post retiral stage and decided to frame a scheme namely West Bengal recognized Non-Government Institutions Employees (Death cum Retiral Benefits) Scheme, 1981 where several benefits were extended to such teachers of the aided and unaided schools as a beneficial piece of legislation w.e.f., 1.4.1981.

Subsequently, a Bill was introduced in the West Bengal Legislative Assembly called West Bengal School Service Commission Bill, 1997 as the State Government thought it fit to introduce some better method of recruitment of teachers in the aided non-Government sponsored Secondary and Higher Secondary School including Madrasah as the appointment was made in such schools by the School Authorities on the sponsorship of the local employment exchange. It was also found by the Government that the members of the managing committees of several schools were indulged in different kinds of malpractices including financial and non-academic consideration in making the selection of the teachers and therefore, in order to remove such malpractices in the system of recruitment of the teachers and also to raise the quality of the teachers, there should be an

establishment of the Central School Service Commission and four Regional School Service Commission to supervise, control and coordinate the activities in relation to a selection of the person for appointment of the teacher in the school. The said Bill was passed by the Legislative Assembly and the West Bengal School Service Commission Act, 1997 received assent of the Governor and published in the Calcutta Gazette on 1st April, 1997. The definition of the school is given under Section 2 (n) in the following:

***"Section 2 (n). 'School 'means a recognised non-government aided-***

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

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

***(iii) Madrasah,***

***and includes a sponsored school.***

***Explanation I.- 'Recognised' with its grammatical variations, used with reference to a school, shall mean-***

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

***(b) Recognised under the West Bengal Council of Higher Secondary education Act, 1975, or***

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

***Explanation II.- 'Aided' with its grammatical variations, used with reference to a school, shall mean aided by the State Government in the***

***shape of financial assistance towards the basic pay f the teachers of that school.***

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

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

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

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

Section 3 of the said Act deals with the appointment and the constitution of the Commissions by the State Government and the Section 4 thereof relates to the appointment of the Chairman and the other members and their respective terms in that following:

***"3. (1) The State Government shall, with effect from such date as it may, by notification, appoint, constitute –***

***(a) a Central Commission by the name of the West Bengal Central School Service Commission, and***
***(b) a Regional Commission by the name of the West Bengal Regional School Service Commission, in respect of each of the regions referred to sub-section (2)***

***(2) For the purposes of clause (b) of sub-section (1), the territory of the State of West Bengal shall comprise four regions to be called the Eastern Region, the Southern Region, the Western Region and the Northern Region;***

*each such region shall comprise such district or districts or part of a district as the State Government may, by notification, determine, and the territorial jurisdiction of a Regional Commission shall be construed accordingly.*

*Explanation I. –Calcutta as defined in Clause (9) of Section 2 of the Calcutta Municipal Corporation Act, 1980, shall, for the purposes of this Act, be deemed to be a district.*

*Explanation II. –Part of a district shall ordinarily mean a sub-division, or two or more, but not all, sub-divisions taken together, of that district as may be specified in the notification under this sub-section:*

*Provided that if the area of a district, or any part of a district, other than Calcutta, overlaps any part of the area included in Calcutta, such overlapping area shall be excluded from the territorial jurisdiction of the Regional Commission in respect of such district and shall be included within the territorial jurisdiction of the Regional Commission in respect of Calcutta.*

*(3) The State Government may, at any time, by notification enlarge or reduce the territorial jurisdiction of a Regional Commission constituted under clause (b) of sub-section (1).*

*(4) (a) The Commission shall consist of five members of whom one shall be the Chairman.*

*(b) Of the five members as aforesaid, one shall be a person who, not being an educationist, occupies or has occupied, in the opinion of the State Government, a position of eminence in public life or in judicial or administrative service, and the others shall have teaching experience, either as a Teacher of a University or as a Principal of a School for a period of not less than ten years, or as a teacher, other than Principal of a college, or as a Headmaster or Headmistress, for a period of not less than fifteen years.*

*(4) (1) (a) The Chairman and other members shall be appointed by the State Government.*

*(b) The Chairman and other members shall hold office for a term of four years.*

*Provided that a person who has held office as Chairman or other member shall, on the expiration of the term of his office, be eligible for further appointment as Chairman or other member:*

*Provided further that no person who has attained the age of sixty-two years shall be eligible to hold office as Chairman or other member.*

*(2) If the office of the Chairman or any other member becomes vacant by reason of resignation or otherwise of if the Chairman is, by reason of absence or for any other reason, unable to perform the duties to his office, then, until a Chairman or other member is appointed under sub-section (1) or until the Chairman resumes his duties, as the case may be, the duties of the Chairman or the other member, as the case may be, shall be performed by such other member as the State Government may appoint in this behalf.*

*(3) The Chairman or any other member may resign his office by writing under his hand addressed to the State Government, but he shall continue in office until his resignation is accepted by the State Government.*

*(4) (a) The office of the Chairman shall be whole-time; the other members shall be honorary.*

*(b) The salary of the Chairman and the honorarium of the other members shall be such as may be determined by the State Government.*

*(c) Subject to the foregoing provisions of this sub-section, the other terms and conditions of service of the Chairman and other members shall be such as may be prescribed."*

Despite the selection and the mode thereof has been taken away from the managing committee of the respective schools yet the power of appointment of such teacher was retained with the managing committee subject, however, on the recommendation of the regional commission having jurisdiction over the said school under Section 9 of the said Act which runs thus :

> ***"Section 9. (1) Notwithstanding anything contained in any other law for the time being in force or in any contract, custom or usage to the contrary, appointments to the posts to Teachers in a school shall be made by the managing committee, by whatever name called, or by the ad hoc committee, or by the administrator, if any (where there is no managing committee), of that school on the recommendation of the Regional Commission having jurisdiction.***
>
> ***(2) Any appointment of a Teacher made on or after the commencement of this Act in contravention of the provisions of this Act shall be invalid and shall have no effect and the Teacher so appointed shall not be a Teacher within the meaning of clause (p) of Section 2."***

Section 10 which relates to the protection of the teacher is quoted below:

> ***"Section 10.Notwithstanding anything contained elsewhere in this Act, the terms and conditions of service of Teachers in the employment of a school immediately before the commencement of this Act shall not be varied to the disadvantage of such Teachers in so far as such terms and conditions relate to the appointment of such Teachers to the posts held by them immediately before the commencement of this Act."***

None of the petitioners have challenged vires of the said West Bengal School Service Commission Act, 1997 nor the managing committee of the respective schools have filed their writ petition before this Court in the batch of the writ petitions under consideration. The first important amendment in the said Act can be seen when the Bill was introduced in the West Bengal Legislative Assembly to incorporate Section 10A therein with a view to empower the West Bengal Central School Service Commission to make recommendation for mutual transfer which was conspicuously absent in the Act of 1997. Though the statement and objects enumerated in the Bill does not reveal the basis for inserting the Section 10A but it can be reasonably perceived that the same was necessitated by a Division Bench judgment of this Court rendered in ***Ramapada Das & Anr. Vs. State of West Bengal & Ors.,*** reported in ***(2008) 2 CHN 994*** dealing with a case of mutual transfer of the teachers appointed in the aided school. The Division Bench held:

> ***"19. It is true that the relevant rules guiding the service conditions of the teachers in the secondary schools do not expressly provide for mutual transfer. It is also true that mutual transfer is not prohibited under the rules or by any statute. When the grievances are not unlawful and unjustified Courts of Law are not helpless in granting equitable relief in a writ petition under Article 226 of the Constitution of India and, therefore, cannot refuse to consider the grievances of the teachers for the purpose of granting appropriate relief. The grievances of the petitioners herein are not at all unlawful and unjustified. The mutual transfer will benefit the petitioners as they will be in a position to serve the respective institutions with more vigour and peace of mind and obviously not being haunted by the hazards of***

***attending school from their distant houses sacrificing peace in family life. The teachers concerned will get peaceful and proper atmosphere to teach the students and the students would thus be more benefited. So not only in the interest of the teachers but also in the interest of proper educations in the schools concerned the claim for mutual transfer must be accepted especially when other teachers of different schools would not suffer any prejudice on account of such mutual transfer of the appellants herein. The State Government also will not suffer in any way as such transfer will not be burdened with extra financial liability. Therefore, in order to do substantial justice to the cause of the teachers who are engaged in building the nation by imparting education to the students and also in the interest of education as a whole and further considering the principles of equity and fair, we are of the firm opinion that the, competent authority namely, the Director of School Education, West Bengal should have accorded formal approval to the mutual transfer of the teachers concerned namely the appellants herein specially when the respective employers namely, the Managing Committees of the concerned schools are agreeable to accommodate them in their respective schools on accepting such mutual transfer. The State Exchequer will not be taxed also as petitioners will not be entitled to claim any T.A. or expenses from the Government of such mutual transfer."***

Thus, despite the existence of Section 10 in the said Act, the concept of mutual transfer was recognised and brought by way of an amendment which gives birth to insertion of Section 10A in the said statute. The second important amendment brought in the said Act is on introduction of the West Bengal School Service Commission (Amendment) Bill, 2013 empowering the commission to make recommendation for general transfer of the teachers and non-teaching staffs of the schools coming within the ambit of the

definition of school under Section 2(n) of the said Act. On receiving the assent of the Governor and published in the Calcutta Gazette, the amending Act was passed which gives birth to an insertion of Section 10B. The position before the insertion of Section 10C stood as follows:

***"Protection of Teachers and non-teaching staff –***

***10. Notwithstanding anything contained elsewhere in this Acts the terms and conditions of service of Teachers and non-teaching staff in the employment in a school immediately before the commencement of this Act shall not varied to the disadvantage of such Teachers or non-teaching staff in so far as such terms and conditions relate to the appointment of such Teachers or non-teaching staff to the posts held by them immediately before the commencement of this Act.***

***Mutual transfer on joint application :***

***10.(A) (1) Notwithstanding anything contained in any other law for the time being in force or in any contract to the contrary, the Central Commission may, on the basis of joint application made to it in the prescribed proforma by two confirmed Teachers of same category, make recommendation for placing their services from one school to another on mutual transfer basis, in such manner, on such condition and within such period, as may be prescribed;***

***Provided that only the two Teachers who have been appointed against the same category of vacancies, holding the same category of post and teaching same subject shall be eligible for such transfer.***

***(2) Notwithstanding anything contained in any other law for the time being in force or in any contract to the contrary, the Central Commission may, on the basis of joint application made to it in the prescribed proforma***

***by two confirmed non-teaching staff, make recommendation for placing their services from one school to another on mutual transfer basis, in such manner, or such condition and within such period, as may be prescribed;***

***Provided that only the two non-teaching staff who have been appointed against the same category of vacancies and holding the same category of post shall be eligible for such transfer.***

***General transfer on application :***

***10.(B) (1) Notwithstanding anything contained in any other law for the time being in force or in any contract to the contrary, the Central Commission may, on the basis of application made to it in the prescribed proforma by an eligible Teacher, make recommendation for placing his service from one school to another school having same category of vacant post, on general transfer basis, in such manner, on such condition and within such period, as may be prescribed :***

***Provided that such general transfer of an eligible teacher shall be made between two posts of same category of vacancies, posts and subjects in schools with same medium of instruction.***

***(2) Notwithstanding anything contained in any other law for the time being in force or in any contract to the contrary, the Central Government may, on the basis of application made to it in the prescribed proforma by an eligible non-teaching staff, make recommendation for placing his service from one school to another having same category of vacant post, on general transfer basis, in such manner, on such condition and within such period, as may be prescribed:***

***Provided that such general transfer of an eligible non-teaching staff shall be made between two posts of same category of vacancies and posts in schools with same medium of instruction.***

***Explanation : For the purpose of this section, the expression "an eligible teacher or an eligible non-teaching staff" means a confirmed Teacher, or a confirmed non-teaching staff, who have completed five years satisfactory serviced in the post of teacher or non-teaching staff, as the case may be, and does not include a Teacher or non-teaching staff who shall avail mutual transfer under section 10A after coming into force of this section."***

Subsequently, the West Bengal School Service Commission (Amendment) Bill, 2017 was introduced in the West Bengal State Legislative Assembly containing the statements of objects and the reasons as follows:

***"It is considered necessary and expedient to amend the West Bengal School Service Commission Act, 1997 (West Ben. Act IV of 1997), for the purpose of empowering the Board, namely, the West Bengal Board of Secondary Education in place of the Managing Committee or the ad-hoc committee or by the administrator, if any (where there is no managing committee), in relation to a school under the Act, with the powers-***

***(a) to appointment Teachers and non-teaching staff on the basis of recommendation made by the West Bengal School Service Commission; and***

***(b) to effect transfer of teachers and non-teaching staff,***

***in order to rationalise Pupil-Teacher-Ratio in such schools for maintaining quality education with a view to enabling the State Government to take appropriate action as it may thing fit and proper to ensure healthy educational environment in the State.***

***2. The Bill has been framed with the above objects in view.***

***3. There is no financial implication involved in the Bill."***

The said Bill was passed in the Legislative Assembly and transformed into the West Bengal School Service Commission (Amendment) Act, 2017 and received the consent of Governor and published in Calcutta Gazette on 17th April, 2017. The said Section 10C of the said Act is reproduced as under:

***"10C. Notwithstanding anything contained in any other law for the time being in force or in any contract to the contrary, the State Government in the interest of education or in the interest of public service for administrative reasons may direct the Commission through guidelines or general instructions to make recommendation for placing the service of any teacher including the Assistant Headmaster or the Assistant Headmistress or any non-teaching staff from one school to another school against any sanctioned post."***

Contemporaneously, the amendment was also made in the West Bengal Board of Secondary Education with the same object and reasons taking away the power of the managing committee to appoint the teacher and non-teaching staffs of the school and vested upon the Board. The significant change which can be seen upon the amendment of the West Bengal Board of Secondary Education is that the autonomy in appointing the teacher on the recommendation of the service commission was taken away and vested upon the Board as a resultant effect the power to select and make recommendation by the Service Commission though retained but the power to appoint such teachers and non-teaching staffs on recommendation of the Commission is vested upon the Board and therefore, the Board took a direct control over the appointment of the teaching and the non-teaching staffs in the aided schools. Although Mr. Sanyal was taking a

stand that despite the West Bengal Board of Secondary Education (Amendment) Act, 2017 receiving the consent of the Governor but the same has not been given effect to and therefore, the power of the managing Committee is still retained, does not appear to be factually correct as a subsequent notification published in the official gazette indicate its effect. The cumulative effect of the aforesaid amendments introduced in the parent Act i.e. the West Bengal School Service Commission Act, 1997 is laudable that not only the selection and the mode thereof is vested upon the School Service Commission but the appointment is also done by the Board on the recommendation made by the aforesaid commissions. The power of the managing committee is restricted to manage, control and regulate the schools economically subject to the pervasive control of the State or the Board as the case may be.

There is another significant facet which cannot be overlooked as the State Government promulgated the West Bengal Schools (Control of Expenditure) Act, 2005 for control of expenditures in the school in the West Bengal. This is another significant step taken by the State in restricting the autonomy of the aided school in relation to the expenditures made by them on the financial assistance or the grant provided by the State Government. The salient Sections of the said Act are reproduced as under:

***"11. (1) The State Government may, if it considers necessary so to do, by general or special order, authorize the Director or any other officer not below the rank of a Sub-Inspector of schools in this behalf to-***

*(a) inspect any school, its buildings, laboratories, libraries, records and equipments;*

*(b) make an enquiry into any financial irregularities by any school;*

*(c) make an enquiry into the income, expenditure, properties, assets and liabilities of any school.*

*(2) The State Government may, after considering the report of such inspection or inquiry, direct the school authority to take such action in the matter concerned, as may, in the opinion of the State Government, be necessary.*

*(3) If the school authority omits or fails to comply with the direction of the State Government, as stated in sub-section (2), the State Government may take action against such school authority in accordance with the provisions of Section 12.*

*12. If the State Government has reason to believe that the number of students studying in a particular school has fallen below the prescribed number, or the school authority has failed to take action as directed by the State Government under section 11, it may, after giving the concerned school authority an opportunity of being heard and for the reasons to be recorded in writing,-*

*(a) Direct the Board, West Bengal Board of Primary Education, Council, Board of Madrasah, or such other authority to derecognise the school; or*

*(b) Abolish any teaching or non-teaching post of such school; or*

*(c) Order shifting of teaching and non-teaching staff from such school to any other school within the region; or*

*(d) Take such action as may appear to the State Government to be necessary and proper.*

*13. The State Government may, -*

*(a) Determine and approve the case of fixation of pay of the teacher or non-teaching staff of a school in the manner, as may be prescribed;*

***(b) Determine the age of superannuation and the benefits payable after superannuation to the teachers and non-teaching staff of a school in the manner as may be prescribed.***

***14. (1) Every teacher of a school shall, if appointed in the post of Undergraduate teacher category, be entitled to draw pay in the scale of pay in which he is appointed and shall not be entitled to claim any additional increment or higher scale of pay for acquiring any qualification other than the qualifications specified for such post.***

***(2) Every teacher of a school shall, if appointed in the post of Graduate teacher category, be entitled to draw pay in the scale of pay in which he is appointed and shall not be entitled to claim any additional increment or higher scale of pay for acquiring any qualification other than the qualifications specified for such post.***

***(3) Every teacher of a school shall, if appointed in the Honours Graduate or Post-graduate teacher category, be entitled to draw pay of Post-graduate teacher category, upon acquiring Post-graduate degree, in the manner as may be specified by order.***

***16. Notwithstanding anything contained elsewhere in this Act, the terms and conditions of service of a teacher or a non-teaching staff in the employment of a school, immediately before the commencement of this Act, shall not be varied to his disadvantage in so far as such terms and conditions relate to the appointment of such teachers and non-teaching staff to the post held by them immediately before the commencement of this Act."***

The troubles started when the State Government introduced Section 10C in the said Act and directed the respective School Service Commission to recommend for placement of teachers from one school to another. For the purpose of the record it is hereby made clear that till date such recommendation has not been given effect to and in course of hearing our

attention is drawn to a notification issued by the State Government that they are actively reviewing the placement.

It admits no ambiguity to the settled proposition of law that a statutory provision can be interfered with if it offends the fundamental rights of the people and can also be tested on the parameter of arbitrariness affecting the very concept of equality enshrined under Article 14 of the Constitution of India.

Apart from the same the legislation can further be impinged if it is beyond the competence of the constitution; violates the tenet of Article 13 of the Constitution or contrary to the prohibition imposed in the constitution and enacted without following the procedure provided in the constitution. The enabling Act cannot be held or rendered unconstitutional on the ground of the possibility of being abused or misused as it is within the domain of the judicial review to correct the measures taken by the administrative authorities invoking the provisions of the enabling Act. The enlightening observation of the Constitution Bench in case of ***Supreme Court Advocates-on-Record Association & Anr. Vs. Union of India,*** reported in ***(2016) 5 SCC 1*** can be placed in action wherein it is held:

> ***"857. Strictly speaking, therefore, an amendment to the Constitution can be challenged only if it alters the basic structure of the Constitution and a law can be challenged if:***
>
> ***(1) It is beyond the competence of the Legislature;***
>
> ***(2) It violates Article 13 of the Constitution;***
>
> ***(3) It is enacted contrary to a prohibition in the Constitution; and***

*(4) It is enacted without following the procedure laid down in the Constitution.*

*858. At the same time, it has been emphasised by this Court that the possibility of abuse of a provision of a statute is not a ground for striking it down. An abuse of power can always be checked through judicial review of the action complained of. In D.K. Trivedi & Sons v. State of Gujarat it was said: (SCC pp. 60-61)*

*'50. Where a statute confers discretionary powers upon the executive or an administrative authority, the validity or constitutionality of such power cannot be judged on the assumption that the executive or such authority will act in an arbitrary manner in the exercise of the discretion conferred upon it. If the executive or the administrative authority acts in an arbitrary manner, its action would be bad in law and liable to be struck down by the courts but the possibility of abuse of power or arbitrary exercise of power cannot invalidate the statute conferring the power of the power which has been conferred by it.'*

*859. Similarly, B.P. Jeevan Reddy, J. (speaking for J.S. Verma, S.C. Agrawal, A.S. Anand, B.N. Kirpal, JJ. And himself) held in Mofatlal Industries Ltd. v. Union of India. (SCC p. 619)*

*'88. .... It is equally well settled that mere possibility of abuse of a provision by those in charge of administering it cannot be a ground for holding the provision procedurally or substantively unreasonable. In Collector of Customs v. Nathella Sampathu Chetty, this Court observed:*

*33. .... The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity.'*

*It was said in State of Rajasthan v. Union of India,*

*'It must be remembered that merely because power may sometimes be abused, it is no ground for denying the existence of power. The wisdom*

***of man has not yet been able to conceive of a Government with power sufficient to answer all its legitimate needs and at the same time incapable of mischief"***

In **AP Dairy Development Corporation Federation** *(Supra)* the Apex Court was considering a case where certain provisions were brought into the parent legislation by an amending Act of **Andhra Pradesh Mutual Cooperative Societies (Amendment) Act, 2006** as unconstitutional. The test of arbitrariness in the perspective of Article 14 of the Constitution was considered by the Apex Court in juxtaposition with the class legislation classifying one group of person with the another without any tangible differentia creating a hardship on them in the following:

***"17. It is a settled legal proposition that Article 14 of the Constitution strikes at arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. This doctrine of arbitrariness is not restricted only to executive actions, but also applies to legislature. Thus, a party has to satisfy that the action was reasonable, not done in unreasonable manner or capriciously or at pleasure without adequate determining principle, rational and has been done according to reason or judgment, and certainly does not depend on the will alone. However, the action of legislature, violative of Article 14 of the Constitution, should ordinarily be manifestly arbitrary. There must be a case of substantive unreasonableness in the statute itself for declaring the act ultra vires of Article 14 of the Constitution. (Vide: Ajay Hasia etc. V. Khalid Mujib Sehravardi & Ors., etc. AIR 1981 SC 487; Reliance Airport Developers (P) Ltd. v. Airports Authority of India &Ors. (2006) 10 SCC 1; Bidhannagar (Salt Lake) Welfare Assn. v. Central Valuation Board&Ors. AIR 2007 SC 2376;***

***Grand Kakatiya Sheraton Hotel and Towers Employees and Workers Union v. Srinivasa Resorts Limited &Ors. AIR 2009 SC 2337; and State of Tamil Nadu & Ors.v. K. Shyam Sunder &Ors. (2011) 8 SCALE 474)***

On the ground of equality principles enshrined under Article 14 of the Constitution, the land was allotted to certain organization without making any advertisement or inviting the applications from the similarly situated organizations/institutions having impact on modification of the Bhopal Development Plant and permitting the change of land use, the Apex Court in case of **Akhil Bharatiya Upbhokta Congress vs. State of Madhya Pradesh & Ors reported in (2011) 5 SCC 29** held that the laws enacted by the Parliament and/or State should not be ordinarily impinged as *ultra vires* as such act of the Government is intended to be used in a larger public interests and public good provided it is done in a more rational and judicious manner eradicating the arbitrary discretion amongst the equals in the following:

***"18. For achieving the goals of Justice and Equality set out in the Preamble, the State and its agencies/instrumentalities have to function through political entities and officers/officials at different levels. The laws enacted by Parliament and State Legislatures bestow upon them powers for effective implementation of the laws enacted for creation of an egalitarian society. The exercise of power by political entities and officers/officials for providing different kinds of services and benefits to the people always has an element of discretion, which is required to be used in larger public interest and for public good. In principle, no exception can be taken to the use of discretion by the political functionaries and officers of the State and/or its***

***agencies/instrumentalities provided that this is done in a rational and judicious manner without any discrimination against anyone. In our constitutional structure, no functionary of the State or public authority has an absolute or unfettered discretion. The very idea of unfettered discretion is totally incompatible with the doctrine of equality enshrined in the Constitution and is an antithesis to the concept of rule of law."***

At the same breath, the Apex Court held that the action or the decision of the Government in adopting a policy must be founded on a sound, transparent and the well-defined policy to the notice of the public:

***"31. What needs to be emphasized is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well defined policy, which shall be made known to the public by publication in the Official Gazette and other recognised modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory or non-arbitrary method irrespective of the class or category of persons proposed to be benefitted by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State."***

In ***General Officer Commanding-in-Chief & Anr. (Supra)*** the_Rule introducing the Rule 5C was a subject matter of challenge before the High Court which ultimately reached to the Supreme Court and the Apex Court after taking into account the power of the Central Government to make rules held that though the condition of service of employee in a Cantonment Board imbibed within itself the transfer of such employee but the Cantonment Board is an independent body under the Cantonments Act and exercise its power within its limited jurisdiction. Therefore, the service of such employee cannot be regarded as a centralised service as the Board is an appointing authority of its employee and therefore, the transfer of an employee from one Board to another would tantamount to an implied termination of an employee in one Cantonment Board and a fresh appointment in other which is beyond the rule making power in the following:

> ***"15. It is not disputed that the Cantonment Boards are statutory and autonomous bodies controlled entirely by the Cantonments Act. Each Cantonment Board is an independent body functioning within its limited jurisdiction. The Board is the appointing authority of its employees. The service under the Cantonment Board is not a centralised service nor is it a service at the State level.***
>
> ***16. There is much force in the contention of the respondent that as service under the Cantonment Board is not a centralised service or a service at the State level, the transfer of an employee from one Cantonment Board to another would mean the termination of appointment of the employee in the Cantonment Board from which he is transferred and a fresh appointment in the Board where he is so***

***transferred. The GOC-in-Chief, Central Command , is not the appointing authority of the respondent or the employees of the Cantonment Board, and so transfer of the respondent by the GOC-in-Chief is not permissible. In any event, one autonomous body cannot transfer its employee to another autonomous body even within the same State, unless the services of the employees of these two bodies are under a centralised or a State level service. In this connection, we may refer to a decision of this Court in Om Prakash Rana V. Swarup Singh Tomar. Pathak, J. (as His Lordship then was) speaking for the court observed as follows: [SCC p. 126 : SCC (L & S) p. 406, para 9]***

> ***As is clear by now, the fundamental basis of the contention that the power of transfer under the Education Act and its Regulations continues in force even after the enactment of the Services Commission Act rests on the assumption that the power of appointment does not include the power of transfer. In our opinion, the assumption is unsustainable. The scheme under the Education Act envisages the appointment of a Principal in relation to a specific college. The appointment is in relation to that college and to no other. Moreover, different colleges may be owned by different bodies or organisations, so that each principal serves a different employer. Therefore, on filling the office of a Principal to a college, a new contract of employment with a particular comes into existence. There is no State level service to which Principals are appointed. Had that been so, it would have been possible to say that when a Principal is transferred from one college to another no fresh appointment is involved. But when a principal is appointed in respect of a particular college and is thereafter transferred as a Principal of another college it can hardly be doubted that a new***

> ***appointment comes into existence. Although the process of transfer may be governed by considerations and move through a machinery different from the considerations governing the appointment of a person ab initio as Principal, the nature of the transaction is the same, namely, that of appointment, and that is so whether the appointment be through direct recruitment, through promotion from the teaching staff of the same institution or by transfer from another institution.***

***17. The observation extracted above clearly supports the contention made on behalf of the respondent that the employees of one Cantonment Board cannot be transferred to another Cantonment Board inasmuch as the service under the Cantonment Board is not a centralised service or a service at the State level.***

***19. The question, however, is whether the Central Government is entitled to frame rules for transfer of the employees of the Cantonment Boards under the substituted clause (c) of sub-section (2) of Section 280 of the Cantonments Act. It is true that under clause (c), as it now stands, the Central Government can frame rules pertaining to conditions of service of the Cantonment Board employees. But, in our opinion, even in spite of substituted clause (c), the Central Government will not be entitled to frame rules for transfer of an employee from one Cantonment Board to another within the State for the reasons stated already namely, (1) the Cantonment Boards are autonomous bodies; (2) the service under the Cantonment Board is neither a centralised service nor is it a service at the State level; and (3) any such transfer of an employee will mean termination of service of the employee in the Cantonment Board from where he is transferred and a fresh***

> ***appointment by the Cantonment Board which he joins on such transfer."***

Another judgment of the Supreme Court relied by the Advocate General in relation to ***State of T. N. & Anr. (Supra)*** on the proposition that the different parameters are required for the purpose of considering the legislation as *ultra vires* in relation to a provision contained in the parent statute and the Rules framed thereunder. According to the Advocate General, the grounds on which the Rules can be declared *ultra vires* is more expensive than the provisions contained in the parent Act or the Act framed by the legislatures.

It is no doubt true that the parameters or the grounds of validity or the constitutionality of a subordinate legislations is wider than the substantive act as the provisions of the subordinate legislation and can further be impinged apart from the ground of violation of any provisions of the Constitution or manifest, arbitrariness or unreasonableness, on the failure of being repugnant to the soul and spirit of the parent Act and/or exceeding the powers and the limits set forth therein which has been succinctly highlighted in the above noted report in these words:

> ***"15. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognised that a subordinate legislation can be challenged under any of the following grounds:***
>
> ***(a) Lack of legislative competence to make the subordinate legislation.***

***(b) Violation of fundamental rights guaranteed under the Constitution of India.***
***(c) Violation of any provision of the Constitution of India.***
***(d) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.***
***(e) Repugnancy to the laws of the land, that is, any enactment.***
***(f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules.)***

***16. The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity.***

***17. In Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India this Court referred to several grounds on which a subordinate legislation can be challenged as follows: (SCC p.689, para 75)***

> ***"75. A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, but in the sense that it is manifestly arbitrary."***

*(emphasis supplied)*

*18. In Supreme Court Employees' Welfare Assn. v. Union of India this Could held that the validity of a subordinate legislation is open to question if it is ultra vires the Constitution or the governing Act or repugnant to the general principles of the laws of the land or is so arbitrary or unreasonable that no fairminded authority could ever have made it. It was further held that the Rules are liable to be declared invalid if they are manifestly unjust or oppressive or outrageous or directed to be unauthorised and/or violative of the general principles of law of the land or so vague that it cannot be predicted with certainty as to what is prohibited or so unreasonable that they cannot be attributed to the power delegated or otherwise disclose bad faith.*

*19. In Shri Sitaram Sugar Co. Ltd. v. Union of India a Constitution Bench of this Court reiterated: (SCC pp. 251-52, para 47)*

> *"47. Power delegated by statute is limited by its terms and subordinate to its objects. The delegate must act in good faith, reasonably, intra vires the power granted, and on relevant consideration of material facts. All his decisions, whether characterised as legislative or administrative or quasi-judicial, must be in harmony with the Constitution and other laws of the land. They must be 'reasonably related to the purposes of the enabling legislation'. See Leila Mourning v. Family Publications Service. If they are manifestly unjust or oppressive or outrageous or directed to an unauthorised end or do not tend in some degree to the accomplishment of the objects of delegation, court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires': per Lord Russel of Killowen,C.J. in Kruse v. Johnson."*

What emerged from the aforesaid judgment that though there is a commonality to certain extent on upholding the substantive Act and the subordinate legislation, but in case of a subordinate legislation the challenge can further be founded upon on failure to confirm to the statute or exceeding the limits set forth therein or in case of any repugnancy between the provisions contained in the parent Act and the subordinate legislation and/or on manifest, arbitrariness or unreasonableness in the perspective of the object and purpose of the enabling Act. The present case concerned with the validity or constitutionality of the provisions contained in the enabling act and therefore, the parameter set forth in case of subordinate legislation may not apply in its entirety but should be restricted on the ground whether the legislature bringing the amended provision in the enabling provision is denuded of any legislative competence or such amended provisions violates any of the fundamental rights guaranteed under Part-III of the Constitution as held in a recent judgment rendered by the Supreme Court in **Ashwini Kumar Upadhyay vs. Union of India & Anr., reported in (2023) 5 SCC 668**.

> ***"11. A statutory provision can be challenged before the Court either on the ground that it has been made by a legislature which lacks legislative competence to enact a law or on the ground that there is a violation of a fundamental right in Part III of the Constitution. The former is not in issue."***

The impetus can further be seen from the judgment of the Supreme Court rendered in ***Sk. Mohd. Rafique (Supra)*** where the Managing Committee of the said Madrasah challenged the validity of Sections 8, 10, 11

and 12 of the West Bengal Madrasah Service Commission Act, 2008 on the ground of its constitutional validity. A little background of the acts regulating, controlling and/or administering the affairs of the Madrasah within the State of West Bengal is also required to be recapitulated. Apart from the various schools (aided and non-aided) within the State of West Bengal large number of Madrasahs were set up incorporating a system of education in which the instruction is imparted in Arabic, Islamic history and culture and theology at various levels. The State Government adopted a policy to regulate, control and administer the Madrasahs established within the State by enacting the West Bengal Board of Madrasah Education Act, 1994. The said Act of 1994 contains somewhat identical provisions that of the West Bengal Board of Secondary Education Act, containing the powers and the functions of the Board so established. Correspondingly, the West Bengal Minorities Commission Act, 1996 was promulgated to constitute the Minority Commission to improve the education system in the Madrasah on extensive studies and/or suggestions with the primary object to improve the social, economic and educational and cultural requirements of the religious, minorities, linguistic educational institutions with the paramount object to preserve the secular tradition within the State and to promote the national integration. Section 9 of the said Commission Act contained an exhaustive provision relating to the recommendation to be made by the Commission for appointment for the post of teacher and non-teaching staff and sub-Section 2 therein makes any appointment of a teacher or a non-teaching staff after the commencement of the said Act to be invalid. Section 13 thereof

contained the identical languages relating to the protection of the teachers and their service conditions in the employment of the Madrasah immediately before the commencement of the said Act to the extent that it will not be varied to their disadvantages in the following:

> ***"13. Protection of teachers. – Notwithstanding anything contained elsewhere in this Act, the terms and conditions of service of teachers in the employment of a Madrasah immediately before the commencement of this Act, shall not be varied to the disadvantage of such teachers insofar as such terms and conditions relate to the appointment of such teachers to the posts held by them immediately before the commencement of this Act."***

By virtue of the Rule making powers conferred under Section 18 of the said Commission Act, West Bengal Madrasah Service Commission Recruitment (Selection and Recommendation of Persons for Appointment and Transfer to the Post of Teaching and non-Teaching Staff) Rules, 2010 was framed dealing with the amendment of selection and the recommendation by the Commission for appointment to the post of a teaching and non-teaching staff in various madrasah receiving financial aid and/or grant from the State. The argument was advanced by the said managing committee before the Supreme Court that by virtue of Section 10 of the Commission Act, 2008, the managing committee is entitled to select and appoint the teachers of their choice which cannot be taken away. The Apex Court repealed the aforesaid contention holding succinctly that the minority institutions cannot assume of the right conferred under Article 30 (1) of the Constitution on the merit based selection of the students nor the power of the State to make legislation relating to the selection and the

appointment of the teaching and non-teaching staff can be impinged on the parameters of the Constitution in the following:

> ***"56. It is true that the recommendations or nominations of teachers made by the Commission are otherwise binding on the Managing Committees of Madrasahs concerned, but, in terms of the second proviso to Section 10 of the Commission Act, 2008 if there be any error, it is open to the Managing Committee of the Madrasah concerned to bring it to the notice of the Commission for removal of such error. The concept of 'error' as contemplated must also include cases where the Madrasah concerned could appoint a better qualified teacher than the one nominated by the commission. if any such error is pointed out, the Commission will certainly have to rectify and remove the error. The further protection is afforded by Section 12 of the Commission Act, 2008 under which the Madrasah concerned could be within its rights to refuse to issue appointment letter to the candidate recommended by the Commission if any better qualified candidate is otherwise available with the managing committee of the Madrasah concerned. Such refusal may also come within the expression 'any reasonable ground' as contemplated in Section 12 (i) of the Act.***
>
> ***57. The legislature has thus taken due care that the interest of a minority institution will always be taken care of by ensuring that (i) in normal circumstances, the best qualified and suitable candidates will be nominated by the Commission; (ii) and in case here be any error on the part of the Commission, the managing committee concerned could not only point out the error which would then be rectified by the Commission but the managing committee may also be within its rights in terms of Section 12 (i) to refuse the nomination on a reasonable ground.***

***58. The regime put in place by the State Legislature thus ensures that the Commission comprising of experts in the field would screen the talent all across the State; will adopt a fair selection procedure and select the best available talent purely on merit basis; and even while nominating, the interest of the minority institution will also be given die weightage and taken care of. The statutory provisions thus week to achieve 'excellence' in education and also seek to promote the interest of the minority institutions. The provisions satisfy the test as culled out in the decision of this Court in T.M.A. Pai Foundation case.***

***59. In our considered view going by the principles laid down in the decision in T.M.A. Pai Foundation case, the provisions concerned cannot, therefore, be said to be transgressing the rights of the minority institutions. The selection of the teachers and their nomination by the Commission constituted under the provisions of the Commission Act, 2008 would satisfy the national interest as well as the interest of the minority educational institutions and the said provisions are not violative of the rights o the minority educational institutions.***

***62. We, therefore, have no hesitation in going by the test culled out in T.M.A. Pai Foundation and hold that the provisions of the Commission Act, 2008 are not violative of the rights of the minority educational institutions on any count."***

The source of powers and the field of legislation has not been disputed by either of the Counsels appearing for the respective parties. It has not been argued before us that the State lacks constitutional incompetence to legislate in the field of education nor an argument is advanced that the enactment concerning the education is beyond the field of legislation enshrined in the Constitution. The arguments appear to have been confined

to the power of the State to incorporate Section 10C of the said Act either violative of the fundamental rights guaranteed under Part-III of the Constitution or such amended Section destroys the very fabric of Section 10, 10A and 10B of the said Act. We, therefore, are not considering whether the State lacks constitutional incompetence to enact the enabling provision nor we find any substance in the argument that there is a complete lack of powers in bringing the amendment into the enabling Act.

In our previous discussion, we have succinctly narrated the concept of establishment of the various educational institutions within the State of West Bengal by the individual, philanthropist and the resourceful persons for improvement into the education system and making it affordable to the lowest strata of the society who are socially and economically weak. The role of the teacher in an educational system is always regarded as a mentor, guide and harbingers in shaping the mind of the children and excelling the knowledge in the field of education in order to compete with the most privilege class of the children within the State. The teachers are always regarded as a person of high degree, knowledge and builds the character of a children to make them a most responsible citizen of the country. The service of teacher is always regarded as a service to the society for their upliftment both socially and culturally and economically. The conduct and the behaviour of the teacher is minutely judged by the children which inculcate the corresponding responsibility amongst them which is distinct from a common man. Their conduct must be above board as the children look up the teachers and imitates them in achieving the goal aspired with the tender

mind. The teacher creates a bonding with the children which does not mean that such bonding is inflexible or inseparable as the life is dynamic and always seek changes with the change of mind and the knowledge gained in pursuit of the future aspiration. The teachers as a homogenous class bears the equal and common responsibilities and percolate their knowledge and experience gained by them by passage of time. The State Government from time to time enacted statutes, Rules and Regulations relating to the condition of service and advancement can be seen by incorporating the system of selection of the teachers with an avowed object of common standard in the field of education. The concept of appointment in school in perpetuity has been gradually eroded and as held in the above noted decision; such employment is a public employment though not a cadre based employment. The concept of transfer is engrained and inbuilt into a service under the public employment being indicative of the fact that despite the retention of Section 10, Section 10A and 10B were introduced which are not the subject matter of challenge in the above cases. We thus do not find any element of arbitrariness or unreasonableness in bringing 10C by way of an amendment in the said Act keeping the Section 10, 10A and 10B untouched. A section of the Counsels have argued that Section 10C has conferred an unbrindled and uncontrollable right into the State to transfer teachers from one school to another and is being abused and/or misused to a great extent. The enlightening observation of the Constitution Bench of the Supreme Court in **Supreme Court Advocates-on-Record Association & Anr. (Supra)** are relevant in this regard wherein it is held:

*"857. Strictly speaking, therefore, an amendment to the Constitution can be challenged only if it alters the basic structure of the Constitution and a law can be challenged if:*

*(5) It is beyond the competence of the Legislature;*

*(6) It violates Article 13 of the Constitution;*

*(7) It is enacted contrary to a prohibition in the Constitution; and*

*(8) It is enacted without following the procedure laid down in the Constitution.*

*858. At the same time, it has been emphasised by this Court that the possibility of abuse of a provision of a statute is not a ground for striking it down. An abuse of power can always be checked through judicial review of the action complained of. In D.K. Trivedi & Sons v. State of Gujarat it was said: (SCC pp. 60-61)*

*'50. Where a statute confers discretionary powers upon the executive or an administrative authority, the validity or constitutionality of such power cannot be judged on the assumption that the executive or such authority will act in an arbitrary manner in the exercise of the discretion conferred upon it. If the executive or the administrative authority acts in an arbitrary manner, its action would be bad in law and liable to be struck down by the courts but the possibility of abuse of power or arbitrary exercise of power cannot invalidate the statute conferring the power of the power which has been conferred by it.'*

*859. Similarly, B.P. Jeevan Reddy, J. (speaking for J.S. Verma, S.C. Agrawal, A.S. Anand, B.N. Kirpal, JJ. And himself) held in Mofatlal Industries Ltd. v. Union of India. (SCC p. 619)*

*'88. .... It is equally well settled that mere possibility of abuse of a provision by those in charge of administering it cannot be a ground for*

***holding the provision procedurally or substantively unreasonable. In Collector of Customs v. Nathella Sampathu Chetty, this Court observed:***

***33. .... The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity.'***

***It was said in State of Rajasthan v. Union of India,***

***'It must be remembered that merely because power may sometimes be abused, it is no ground for denying the existence of power. The wisdom of man has not yet been able to conceive of a Government with power sufficient to answer all its legitimate needs and at the same time incapable of mischief'"***

While upholding the vires of the Act we hasten to add that mere assumption as to misuse of the power cannot invalidate the said Section as every action of the State under the said Section would be subject to pass the master of arbitrariness and/or unreasonableness depending upon the facts of each case. Since we have been assigned to determine the validity of the Act in conformity with the constitutional provision, we do not make any comment on the exercise of discretion of the powers under the aforesaid section as it largely depends upon the special facts pleaded in a given case which would be decided by the Single Bench in the abovementioned writ petition.

A second line of argument was advanced by the Counsel that the said Section 10C can be impinged as a colourable legislation which also does not appear to us having any application in the instant case. The Constitution Bench of the Supreme Court in ***K. C. Gajapati Narayan Deo (Supra)*** have

articulately explained the concept of colourable legislation which sees birth as a common law doctrine and basically founded upon a bona fide or the mala fide. It has been held that the motive to bring a law is irrelevant if the legislature is competent to pass a particular law.

The colourable legislation can be presumed when the State enacts law transgressing its sphere marked in specific legislative entries or crosses the border of limitations set forth therein by an indirect mechanism. In such case it can be regarded as a colourable legislation which is based on common principle that what cannot be done directly cannot be achieved indirectly. The relevant excerpts from the above noted report is extracted below:

> ***"9. It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of 'bona fides' or 'mala fides' on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power vide Cooley's Constitutional Limitations, vol. 1, p. 379. A distinction, however, exists between a legislature which is legally omnipotent like the British Parliament and the laws promulgated by which could not be challenged or the ground of incompetency, and a legislature which enjoys only a limited or a qualified jurisdiction.***
>
> ***If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres***

***marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, convert and indirect and it is to this latter class of cases that the expression 'colourable legislation; has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise. As was said by Duff, J. In – 'Attorney-General for Ontario v. Reciprocal Insurers', 1924 A C 328 at p. 337 (B):***

> ***'Where the law making authority is of a limited or qualified character it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what is that the legislature is really doing'***

***In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the powers of that legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The legislature cannot violate the constitutional prohibitions by employing an indirect method. In cases like these, the enquiry must always be as to the true nature and character of the challenged legislation and it is the result of such investigation and not the form alone that will determine as to whether or not it relates to a subject which is within the power of the legislative authority – 'Vide 1924 A C 328 at p. 337 (B)'. For the***

***purpose of this investigation the court could certainly examine the effect of the legislation and take into consideration its object, purpose or design – 'Vide Attorney-General for Alberta v. Attorney-General for Canada', 1939 A C 117 at p. 130 (c). But these are only relevant for the purpose of ascertaining the true character and substance of the enactment and the class of subjects of legislation to which it really belongs and not for finding out the motives which induced the legislature to exercise its powers.***

***It is said by Lefroy in his well-known work on Canadian Constitution that even if the legislature avow on the face of an Act that it intends thereby to legislate in reference to a subject over which it has no jurisdiction, yet if the enacting clauses of the Act bring the legislation within its powers, the Act cannot be considered 'ultra vires' See Lefroy on Canadian Constitution, page 75."***

The concept of harmonising the various sections within the broad section argued by Mr. Dhar admits no ambiguity. The statute does not bring any provisions therein which is repugnant to and/or inconsistent with the other provisions of the Act. It is a paramount duty of the Court to uphold the applicability of the various provisions of a statute to make it workable than to render it otios.

In ***Rao Shiv Bahadur Singh & Anr. Vs. State of Vindhya Pradesh,*** reported in ***AIR 1953 SC 394***, the Apex Court held that it is a paramount duty of the Court to interpret the various provisions of the Act in such a manner that such provisions compliments each other and avoidance to such construction is a hallmark of such duty as such provision cannot be rendered futile in the following:

***"5. Learned counsel strongly relied on Attorney-General v. Herman James Sillem to show that a provision such as the above was meant only to regulate the proceedings in a case within the four walls or limits of the court. The statutory provision which came up for construction in that case was however very differently worded, and was meant to regulate 'the process, practice, and mode of pleading' i.e. the procedure in the court and not 'the proceedings' of the court. While, no doubt, it is not permissible to supply a clear and obvious lacuna in a statute and imply a right of appeal, it is incumbent on the court to avoid a construction, if reasonably permissible on the language, which would render a part of the statute devoid of any meaning or application. The construction urged for the appellant renders Section 6 futile and leaves even a convicted person without appeal. We have no hesitation in rejecting it."***

In ***J.K. Cotton Spinning & Weaving Mills Co. Ltd. vs. State Uttar Pradesh & Ors.,*** reported in ***AIR 1961 SC 1170*** the same proposition has been reiterated in the following:

***"7. To remove this incongruity, says the learned Attorney-General, apply the rule of harmonious construction and hold that clause 23 of the order has no application when an order is made on an application under clause 5 (a). On the assumption that under clause 5 (a) an employer can raise a dispute sought to be created by his own proposed order of dismissal of workmen there is clearly this disharmony as pointed out above between two provisions viz. Clause 5 (a) and clause 23; and undoubtedly we have to apply the rule of harmonious construction. In applying the rule, however, we have to remember that to harmonise is not to destroy. In the interpretation of statutes the court, always presumes that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. These presumptions will have to be made in the***

***case of rule-making authority also. On the construction suggested by the learned Attorney-General it is obvious that by merely making an application under clause (5) on the allegation that a dispute has arisen about the proposed action to dismiss workmen the employer can in every case escape the requirements of clause 23 and if for one reason or other every employer when proposing a dismissal prefers to proceed under clause 5 (a) instead of making an application under clause 23, clause 23 will be a dead letter. A construction like this which defeats the intention of the rule-making authority in clause 23 must, if possible, be avoided. "***

We do not find incongruity nor any difficulty into the existence of Section 10C simultaneously with Sections 10, 10A and 10B of the Act. Section 10 deals with the protection of the teachers in relation to their service condition not to be varied to their disadvantages; whereas Section 10A and 10B introduced subsequently by way of amendments to some extent varies the condition of service. If the argument of the various Counsels appearing for the petitioners is accepted that the appointment of the teachers brings a concept of non-transferability as a condition of service, Section 10A and 10B is a teacher-centric provision and a right is recognised seeking transfer from one school to another on mutual basis or a general transfer. Though the appointment was initially made by the respective managing committee of the aided school but upon introduction of the said Act the selection and the mode of appointment has gradually changed and cannot be regarded as a school-centric appointment which is immuned of transfer from one school to another. The teachers who have been selected upon undergoing a rigorous provision of selection conducted by the School

Service Commission cannot claim that such appointment on the basis of the recommendation of the said Commission brings the concept of non-transferability as such recommendation is inflexible and/or absolute.

It brings a another ancillary point in relation to the expression "condition of service" embodied in Section 10 of the said Act not to be varied to the advantages. Every employment in public originates on contract but the moment they are put into a system their service conditions are governed by the statute or the Rules framed in this regard. It is incongruous to suggest that in absence of any express indication in the appointment letter that the post is transferable, it automatically brings such service as non-transferable. After the appointment, the relevant statute and the regulations, if enacted, relating to the condition of service becomes applicable and such teachers cannot claim immunity against transfer under the archaic notion of appointment in the specific school.

The object and purpose of incorporating 10C by way of an amendment is laudable to the extent that the State felt either the excess teachers in commensurate with the number of pupils or insufficient teachers on the basis of a teacher-pupil ratio. The State cannot lack constitutional competence in bringing the Act by way of an amendment to rationalise the teacher-pupil ratio within the State in the interest of the education or in the interest of public service. We are unable to accept the submission of the Counsel for the petitioner that the protection given under Section 10 of the Act has been varied to the disadvantage of the teachers as we find that such protection is extendable to a class of the teachers appointed immediately

before the commencement of the said Act. The segregation and/or culling out the words or expressions from a section leaving the other words or expressions having significant impact should be avoided. The expression "after commencement of this Act" conveys the intention of the legislature that the teachers who were appointed prior to coming into force of the said Act are kept outside the purview thereof provided the condition of service varied to their disadvantage. The reason is exposit that prior to the advent of the said Act, the selection and the appointment of the teachers were within the exclusive domain and/or power of the managing committee of the aided school. The several writ petitions which we perceived from the language employed in Section 10 is that the teachers who are appointed prior to 1997 i.e., the date of the giving effect to the said Act cannot come within the mischief of Section 10C but the teachers who have been appointed thereafter cannot claim any immunity against the transfer recommended by the Commission on the instructions have been given by the State.

There is another significant fact which cannot be overlooked for the present purpose when the State enacted the Expenditure Act, 2005 which also contained the identical provision that of Section 10 of the said Act relatable to the protection of the teachers and/or their service condition. The point is sought to be taken that the moment the Expenditure Act, 2005 contained the identical provision and the similar languages it would be presumed that the State have impliedly accepted the concept of non-transferability into the service condition of the teachers employed in the several aided educational institutions. The primary object of the Expenditure

Act, 2005 was, as would appear from preamble, to control the expenditure in the schools in the West Bengal and the matter connected therewith and/or incidentally thereto. The statement of the objects of the Expenditure Act, 2005 is further fortified in Section 11 thereof wherein the State Government may authorise any director or the officer not below the rank of sub-inspector to inspect any school, building, laboratories, libraries, records, equipments and make an enquiry into the financial irregularity of such school and also enquire into the income, expenditures, properties, assets and liabilities of any school. Section 12 of the Expenditure Act, 2005 is a repository of the powers or the action on the basis of under Section 11 which appears thus:

> ***"12. If the State Government has reason to believe that the number of students studying in a particular school has fallen below the prescribed number, or the school authority has failed to take action as directed by the State Government under Section 11, it may, after giving the concerned school authority an opportunity of being heard and for the reasons to be recorded in writing, -***
>
> ***(a) Direct the Board, West Bengal Board of Primary education, Council, Board of Madrasah, or such other authority to derecognise the school;***
> ***(b) Abolish any teaching or non-teaching post of such school; or***
> ***(c) Order shifting of teaching and non-teaching staff from such school to any other school within the region; or***
> ***(d) Take such action as may appear to the State Government to be necessary and proper."***

Though Section 16 contained the identical provisions but cannot be made applicable in relation to a transfer of a teacher from one school to

another in exercise of power under Section 12(c) of the Expenditure Act, 2005. The non-obstante clause appearing in Section 16 though overrides the other provision of the Expenditure Act, 2005 yet, one cannot overlook that it applies in a specific sphere concerning the expenditures of a respective school. The Expenditure Act, 2005 neither overrides the said Act nor transgresses its applicability as both Acts are intended to operate in their respective fields. It would be improper for us to hold that the Expenditure Act, 2005 have an overriding effect on the said Act i.e. Act of 1997.

It is important to note that the Section 12 (c) of the Expenditure Act, 2005 contained the power of the State Government to shift any teaching and non-teaching staff from a school to another school within the region subject however, on derecognition of the school. Section 16 of the Expenditure Act, 2005 in our opinion has to be construed in the perspective of varying any terms and conditions relating to appointment of the teaching and non-teaching staff to their disadvantages in relation to monetary reliefs and not in relation to the other terms and conditions of the appointment. The logical inference can be drawn in harmonising the provisions contained in Section 16 is that it has restricted applicability to those terms and conditions of the service of the teachers which are monetary and does not impinge upon the other terms and conditions of service.

Another incidental point is argued by the Counsels appearing for the respective petitioners that when different words are used within the various provisions of the same statute it carries a different meaning. The aforesaid point is urged for the reason that Section 10A and 10B of the said Act

contained the word "transfer" which is conspicuously absent in Section 10C wherein the expression "Placement in service" have been used. It is sought to be contended that the meaning of the word "transfer" sand "placement in service" are two distinct features and, therefore, cannot be equated nor can be termed as synonymous. The cardinal principle of interpretation of the statute is that when the different words are used in the same statute, they are assigned a different meaning. Even we noticed that in Section 12(c) of the Expenditure Act, 2005 the word "shifting" from one school to another has been used, the expression is not defined in the statute nor "placing the service". The word "transfer" is used in the perspective of a mutual and the general transfer on an application of the teacher. The word "placing in service" is exercised by the Commission by making recommendation on the direction of the State Government. In order to interpret the words used in the Section the statement of objects and reasons incorporated in the Bill can be used as a toll for introduction or a guiding factor. The statement of objects and reasons for introduction of Section 10C as quoted hereinabove leaves no ambiguity that in order to rationalise the pupil-teacher ratio in the schools for maintaining the quality education, the Commission may recommend the transfer of a teacher or a teaching staff on the direction of the State Government even though the "transfer" has not been used in Section 10C yet, the expression "placing the service" has to be construed synonymous to the word "transfer". Neither the "transfer" nor "placing the service" both effects any rights nor varies the conditions of service and, therefore, we do not find any substance in the submission advanced in this

regard; even the case of placing the service has to be viewed in the perspective of transfer more particularly on the parameter of varying the terms and conditions of the service to the disadvantage of the teachers and non-teaching staff. In both the cases in the event it varies the terms and conditions of the service to the disadvantage of the teachers and non-teaching staff appointed immediately before the commencement of the said Act the petitioner may claim protection under Section 10 thereof.

In order to harmonise the Section 10, 10A, 10B and 10C of the said Act and its applicability in a specific sphere, Section 9 of the said Act may throw light thereupon relating to the appointments of the teachers in the aided educational institutions. The aforesaid Section starts with the non-obstante clause and creates an absolute embargo in appointment of the teachers and non-teaching staffs in the school by the managing committee after the promulgation of the said Act. The said section postulates that the appointment to the post of the teachers and non-teaching staffs in a school shall be made by the Board or the ad-hoc committee or the administrator of the Board on the recommendation of the Commission having jurisdiction and any appointment made after coming into force of the said Act shall be deemed to be an appointment in contravention to the provision of the said Act and shall not be given effect to. The conjoint reading of the aforesaid provision is exposit and conveys the definite intention of the legislatures that the appointments to the post of the teachers and non-teaching staffs in the aided school can only be made on the recommendation of the Commission in a case where such appointments are after the commencement of the said Act

but the appointment made by the managing committee prior in time i.e. before the advent of the said Act, the protection was given with regard to the service condition which should not be varied to their disadvantages. Therefore, in our opinion, there is no consistency and/or incongruity in operation of Section 10, 10A, 10B and 10C concurrently as they do not override each other in the fields of its operation.

The another seminal point emerged in course of hearing relates to the operation of Section 10C of the said Act brought by way of an amendment subsequently. The Counsel for the petitioners are unison on the proposition of law that every legislation enacted by the legislatures is intended to operate prospectively unless the legislatures intended it to operate retrospectively or seemingly to be so by necessary implication. It is sought to be contended by all the Counsels that the operation of Section 10C shall be from the date when it is brought into a substantive act and cannot operate retrospectively to vary the terms and conditions of service to the disadvantage of the teachers.

The aforesaid arguments are advanced with the pre-conceived notion that the service of the teachers within the State of West Bengal was always regarded as a non-transferable service and, therefore, its operation should be restricted to such appointments made after the introduction of Section 10C. The position of law with regard to the operation of the Act retrospectively or prospectively has been succinctly highlighted by a Three-Judge Bench of the Supreme Court in case of ***Income Tax Officer, Allepply vs. M.C. Ponnoose & Ors.,*** reported in ***(1969) 2 SCC 351*** in the following:

***"5. Now it is open to a sovereign Legislature to enact laws which have retrospective operation. Even when the Parliament enacts retrospective laws such laws are – in the words of Villes, J., in Phillips v. Eyre – 'no doubt prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced fro the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.' The courts will not, therefore, ascribe retrospectively to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the Legislature. Parliament can delegate its legislative power within the recognised limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the Legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in to statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found it has been held by the courts that the person or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect; (see Subha Rao, J., in Dr. Indramani Pyarelal Gupta v. W.R. Nathu, the majority not having expressed any different opinion on the point; Modi Food Products Ltd. V. Commissioner of Sales Tax. U.P.; India Sugar Refineries Ltd. v. State of Mysore and General S. Shivdev Singh v. State of Pubjab.)"***

In case of ***Indian Administrative Service (S.C.S) Association, U.P. & Ors. vs. Union of India & Ors.,*** reported in ***1993 Supp. (1) SCC 730***. It is held:

***"7. No statute shall be construed so as to have retrospective operation unless its language is such as plainly to require such a construction. The Legislature, as its policy, gives effect to the statute or statutory rule from a specified time or from the date of its publication in the State Gazette. It is equally settled law that Court***

***would issue no mandamus to the Legislature to make law much less retrospectively. It is the settled canons of construction that every word, phrase or sentence in the statute and all the provisions read together shall be given full force and effect and no provision shall be rendered surplusage or nugatory. It is equally settled law that the mere fact that the result of a statute may be unjust, does not entitle the court to refuse to give effect to it. However, if two reasonable interpretations are possible, the court would adopt that construction which is just, reasonable or sensible. Courts cannot substitute the words or phrases or supply casus omissus. The court could in an appropriate case iron out the creases to remove ambiguity to give full force and effect to the legislative intention. But the intention must be gathered by putting up fair construction of all the provisions reading together. This endeavour would be to avoid absurdity or unintended unjust results by applying the doctrine of purposive construction."***

The origin, concept and the principles relating to the applicability of any legislation from a prospective or the retrospective date has been elaborately discussed in a subsequent decision of the Supreme Court rendered in case of ***Commissioner of Income Tax (Central)-I, New Delhi vs. Vatika Township Private Limited,*** reported in **(*2015) 1 SCC 1*** in the following:

> ***"28. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his***

***affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit: law looks forward not backward. As was observed in Phillips v. Eyre, a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.***

***29. The obvious basis of the principle against retrospectively is the principle of 'fairness', which must be the basis of every legal rule as was observed in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless he legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later."***

The same principles have been reiterated in a subsequent judgment of the Supreme Court in ***G.J. Raja vs. Tejraj Surana,*** reported in ***(2019) 19 SCC 469*** to the effect that one of the cardinal principles of determining whether the Act operates prospectively or retrospectively is the intention of the legislature. If the intention is laudable, manifest and clearly discernable from the language employed therein that the said legislation would operate

retrospectively it would do so. In absence of such intention it is always presumed that the Act would operate prospectively as held:

> ***"14. While considering general principles concerning 'retrospectively of legislation' in the context of Section 158-BE inserted in the Income Tax Act, 1961, it was observed by this Court in CIT v. Vatika Township (p) Ltd. as under:***
>
> > ***28. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The Idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as Lex prospicit non respicit: law looks forward not backward. As was observed in Phillips v. Eyre, a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not be change the character of past transactions carried on upon the faith of the then existing law. "***

The law enacted by the competent authority is always presumed to operate prospectively unless expressly intended to operate retrospectively or by necessary implication. The concept of prospective operation is to avoid the things done in the past to be rendered undone. It is also based on the

common notion that the law must always look forward and not back forward and the things which are settled in the past within the framework of legislative provision should not ordinarily be taken away or rendered illegal or unsettled except on the competing circumstances. We are ad idem to the law enunciated in the above-noted decisions touching upon the principles relating to the applicability of the legislative provision prospectively or retrospectively. Though the aforesaid points was perceived to be of seminal importance yet, in view of the findings made in the preceding paragraphs, it loses its significance and becomes mere academic. The said point was argued for the reason that even if this Court finds that the condition of service of a teacher can be varied to their disadvantage such variation would operate after finding a birth in the said substantive Act and not otherwise. We have already held in the preceding paragraph that Section 10 of the said Act applies within the limited contour i.e. the condition of service of a teacher appointed prior to coming into force of the Act of 1997 and not in respect of the appointments made after coming into force of the said Act, the further reason can be supplied in support of the aforesaid discussion that every employment in a public service are contractual but such service conditions are governed by the statutory Act or the Rules framed in this regard and the concept of contractual service loses its existence. Obviously, Section 10C cannot be operated retrospectively to the extent that it cannot impinge upon the terms and conditions of the service of the teachers appointed prior to the promulgation of the School Service Commission Act.

The argument was advanced on behalf of the petitioner that once the appointment of the teachers are considered to be non-transferable it is regarded as a vested right or at best to be said to be an existing right which cannot be whittled down nor robbed away by virtue of the bringing a suitable amendments in the legislation. In order to ascertain the distinguishing features of the vested right and the existing right the judgment rendered by the Supreme Court in case of ***Trimbak Damodhar Raipurkar vs. Assaram Hiraman Patil & Ors.,*** reported in ***AIR 1966 SC 1758*** may be relevant wherein it is held:

> ***"9. In this connection it is relevant to distinguish between an existing right and a vested right. Where a statute operates in future it cannot be said to be retrospective merely because within the sweep ;of its operation all existing rights are included. As observed by Buckley, L.J. in West v. Gwynne retrospective operation is one matter and interference with existing rights is another. 'If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law'. These observations were made in dealing with the question as to the retrospective construction of Section 3 of the Conveyancing and Law of Property Act, 1892 (55 &56 Vict. C. 13). In substance Section 3 provided that in all leases containing a covenant, condition or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition or***

***agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent. It was held that the provisions of the said Section applied to all leases whether executed before or after the commencement of the Act; and, according to Buckley, L.J., this construction did not make the Act retrospective in operation; it merely affected in future existing rights under all leases whether executed before or after the date of the Act. The position in regard to the operation of Section 5 (1) of the amending Act with which we are concerned appears to us to be substantially similar. "***

It has been held in ***New India Sugar Works Etc. vs. State of U.P & Ors.***, reported in ***(1981) 2 SCC 293*** that almost every statute affects right which would have been in existence but for the statute. It is no doubt true that the moment it is perceived that the statute operates in future it cannot be said to operate retrospectively despite the fact that it engulf within its sweep all existing rights.

In ***Controller of Estate Duty, Gujarat I, Ahmedabad vs. M.A. Merchant*** reported in ***(1989) 1 SCC 499*** the Apex Court held:

***"8. The new Section 59 came into force from July 1, 1960. Much earlier, on February 26, 1960 the assessment on the accountable person had already been completed. There is a well settled principle against interference with vested rights by subsequent legislation unless the legislation has been made retrospective expressly or by necessary implication. If an assessment has already been made and completed. The assessee cannot be subjected to re-assessment unless the statute permits that to be done. Reference may be made to Controller of Estate Duty, West Bengal v. Smt. Ila Das, where an***

***attempt to reopen the estate duty assessment consequent upon the insertion of the new Section 59 of the Estate Duty Act was held infructuous."***

A distinction was sought to be made between a vested right and the existing right as it is a uniform stand of the petitioner that the moment the right is vested into teachers against any transfer from one school to another, such right cannot be taken away upon the introduction of the amendments in the enabling Act to operate retrospectively. At best we find that a right is created into teachers appointed prior to coming into force of the School Service Commission Act and such right has been protected under Section 10 of the said Act provided it varies the terms and conditions of service to their disadvantages. After the promulgation of the School Service Commission Act the concept of school-centric appointment has gradually eroded as the selection and appointment of the teachers in the aided school can only be made by the Board on the recommendation of the Commission. The teachers cannot claim a vested right on transfer in a public employment which is always regarded as a incident of service. We thus do not find that the teachers appointed after coming into force of the School Service Commission Act can claim a vested right or the existing right *vis-a-vis* the terms and conditions of the service.

It takes to another facet of arguments advanced at the behest of the petitioners on the West Bengal School Service Commission (State level Test for Appointment to the post of the Teachers) Rules, 2015 bringing the concept of the counselling for the purpose of recommending the name of the teacher to be appointed to such posts in a school. It is sought to be

contended that the corollary effect of Rule 17 of the said Rule would indicate that the candidate who secure merit in the examination is extended the right to choose a particular school for his appointment and therefore, it is implicit that the appointment of the teachers in the aided school was always school-centric.

The said Rules provided for the counselling at the selection level to recognise the meritorious candidate to choose the school for his initial appointment but it would be inappropriate to accept the contention that it brings a notion of non-transferability in the said service. It is a mere recognition of the merit secured by each candidate to be appointed in a school of his choice but the moment he joined the post, his service condition would be guided by the statutory Act and the Rules framed thereunder.

We do not find any justification in the stand of the petitioner that once they are appointed in the school of their choice in the counselling they are immuned from being transferred to any other school. However for the argument sake it is accepted that the counselling brings the notion of school-centric appointment yet such teacher may seek for mutual transfer and/or general transfer which in a way erodes the concept of non-transferability. It is inconceivable that a teacher appointed in a school would remain in such school eternally and the Government would not place such teacher from such school to another in a larger interest of the education or in public service. The beneficiary of the education system cannot be deprived of their fundamental right to education enshrined under Article 21A of the Constitution because of the dearth of the teacher or the apathy towards the

timely appointments. The appointment of the teacher in a public employment neither have a vested right nor an existing right to claim their services to be placed in a school even if there is a gross disparity in a teacher-pupil ratio by passage of time.

It leads to an another argument advanced by Mr. Mitra, the learned Senior Advocate conceptualising the right to life ingrained within the service jurisprudence and argument is advanced that every teacher in public employment has a right to life and by virtue of the provision to transfer, it would have a serious impact thereupon. According to Mr. Mitra, a teacher is entitled to have not only peaceful environment but a peace in mind free from any stress as the transfer may disturb the teacher mentally having an impact on his/her life. Mr. Mitra further submits that right to life includes right to peaceful life with dignity and the courts are always inclined to upholding the fundamental right which by passage of time expanded its horizon to a greater extent.

It is no doubt true that the right to life recognised under Article 21 of the Constitution can be visualised as a radical transformative character of the Constitution and includes the various complexities of life but subject to the procedure established by law first of the advancement can be seen from the judgment of the Constitution Bench rendered in case of ***Maneka Gandhi vs. Union of India reported in (1978) 1 SCC 248*** giving a new dimension on the right to life and imposed a limitation on making any law which impact such fundamental right. It is held that right to life engulfed within itself the right to life with human dignity and should not be restricted

to a mere survival or the animal existence. It, therefore, includes all the aspects of the life to make it meaningful, complete and worth living. The deprivation of a right conferred under Article 21 of the Constitution by a prescribed procedure of law must with stand on the principle of fairness, justness and reasonableness and must confirmed to the norm of justice and fairplay.

The aforesaid principle has been accepted and laid down in a Constitution Bench decision rendered in case of ***Olga Tellis & Ors. vs. Bombay Municipal Corporation & Ors. reported in AIR 1986 SC 180*** in the following:

> ***"39. It is far too well settled to admit of any argument that the procedure prescribed by law for the deprivation of right conferred by Article 21 must be fair, just and reasonable.***
>
> ***40. Just as mala fide act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his Fundamental Rights in this case the right to life, must conform to the norms of justice and fair play. Procedure, which is unjust or unfair in the circumstances of a case attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it. Any action taken by a public authority which is invested with statutory power has, therefore, to be tested by the application of two standards: the action must be within the scope of the authority conferred by law and secondly, it must be reasonable. If any action within the scope of the authority conferred by law, is found to be unreasonable, it must mean that the procedure established by law under which that action is taken***

***is itself unreasonable. The substance of the law cannot be divorced from the procedure which it prescribes for, how reasonable the law is depends upon how fair is the procedure prescribed by it. Sir. Raymond Evershed says that ' The Influence of Remedies on Rights' ICurrent Legal Problems 1953,, Volume 6.), " from the point of view of the ordinary citizen, it is the procedure that will most strongly weigh with him. He will tend to form his judgment of the excellence or otherwise of the legal system from his personal knowledge and experience in seeing the legal machine at work". Therefore, " He that takes the procedural sword shall perish with the sword" Per Frankfurter J. In Vitarelli v. Seaton, (1959) 3 Law ED 2d 1012."***

Anything which is forbidden by the Constitution if adopted can be struck down even under the expressions "procedure established by law" as the legislatures cannot enact a law which is prohibited by the Constitution.

In ***Chameli Singh & Ors. vs. State of U.P. & Anr. reported in (1996) 2 SCC 549*** the Apex Court held that the protection of life guaranteed under Article 21 encompasses within its sweet right to shelter to enjoy the meaningful life and the ultimate object of making a man equipped with the right of dignity and equality in status may make him develop in a character and atmosphere. The aforesaid principle is further reiterated in a subsequent decision in Supreme Court in ***Dr. Ashok vs. Union of India & Ors. reported in (1997) 5 SCC 10*** wherein the Apex Court held that the right to life enshrined under Article 21 of the Constitution includes all those aspects of life which would make a man's life meaningful, complete and worth living.

We do not find any quarrel to the proposition that right to life as recognised under Article 21 of the Constitution of India cannot be squeezed within the bracket but is always regarded as dynamic and anything which impinges upon the development, the concept of equality, dignity and other facets of the human life can always be viewed seriously and any legislative action not founded upon the principle of fairness, justness and reasonableness are liable to struck down as it offends the very fabric of the Constitution and the fundamental rights guaranteed thereunder. In the perspective of the service in a public employment, the transfer is an incident of service and if the transfer is made in accordance with the procedure established by law, we do not find any justification that it infringes the fundamental right to life. Every service in the public employment unless forbidden by law is transferable. A teacher which is placed in a school if transferred to another school, it does not affect the right to life as he or she is conscious that the service is transferable. In every transferable service, if a person is transferred from one place to another he may contend that his dignity is impaired as steadiness and he is entitled to live a life in stress-free atmosphere; and in such event none of the employee in the public employment would be transferred from one place to another. We do not find any substance in the stand that the transfer of teacher from one school to another offends the constitutional guarantee of right to life under Article 21 of the Constitution.

We, thus, do not find that Section 10C can be declared *ultra vires* to the constitution.

Having held so, we direct the Registry to place each of the writ petitions before the respective Benches having determination in this regard to decide the writ petitions on merit.

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.)**

**(Prasenjit Biswas, J.)**