

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

**Present:
The Hon'ble Justice Protik Prakash Banerjee**

W.P. No. 17914 (W) of 2018

**The Managing Committee,
Lalbandh Hossainia Sr. High Madrasah & Anr.
Vs.
State of West Bengal & Ors.**

For the petitioners : Mr. Atarup Banerjee, Adv.
Mr.Abu Sohel, Adv.

For the Port State : Mr. T.M. Siddique, Adv.
Mr. Nilotpai Chatterjee, Adv.

Heard on : November 26, 2018

Judgement on : November 30, 2018

PROTIK PRAKASH BANERJEE, J.:

1. This petition under Article 226 of the Constitution of India is directed against the Memo dated August 29, 2018 (Annexure P/6) issued by the respondent no. 7. The respondent no. 7 contended by it that the authorities of the Madrasah, the petitioners, were in violation of the order of the Hon'ble Supreme Court by attempting to recruit anyone to the post of teaching or non-teaching staff as on August 21, 2018. He said so, among other things, on the basis of a memo no: 852/0/5M-2019 dated April 18, 2017 issued by the Minority Affairs and Madrasah Education Department of the respondent no. 1, and also the order dated May 17, 2018 passed by the Hon'ble Supreme Court in SLP (C) No.66661 of 2016, Civil Appeal No.5808 of 2017 and interlocutory applications made therein. The petitioners contend that by this act, the respondent no. 7, a

part of the secular State, is trying to interfere with the fundamental right guaranteed under Articles 25 to 30 of the Constitution of India, particularly under Articles 29 and 30, relating to religious minority institutions, for administering such institutions including by appointment of their own staff for inter alia, giving religious instructions.

2. The history of this case, like all matters which travel to the Apex Court, is chequered, and bears a brief narration. The West Bengal Madrasah Service Commission Act, 2008 was enacted. Immediately prior thereto, appointments to Madrasahs were made by the School Service Commission constituted under the West Bengal School Service Commission Act, 1997. After the enactment of the Act of 2002, the West Bengal Madrasah Service Commission Recruitment (Selection and Recommendation of persons for Appointment and Transfer to the Posts of Teacher and Non-Teaching Staff) Rules, 2010 were framed. Under the provisions of the Act of 2008 and the Act of 2002, the entire power of appointment of teaching and non-teaching staff in Madrasahs, became dependent solely on the recommendation of the said Madrasah Service Commission. While the appointment was still to be made by the Managing Committee, the recommendation of the Service Commission was binding on the Managing Committee. It is nobody's case that the said Madrasah Service Commission was constituted or operated on money remitted by Wakfs under Islamic law. It operates on funds provided by the public exchequer that is to say, the State of West Bengal. The State of West Bengal as a federating state in India, is secular and not an Islamic State. Therefore, an agency or instrumentality of the secular state, ultimately decided who would be appointed as a teaching or non-teaching staff in a religious minority educational institution where inter alia religious instruction is also given.

3. This was challenged in several writ petitions. Ultimately, in the judgment rendered by a coordinate bench in the case of **Contai Rahmania High Madrasah and Another—v—The State of West Bengal and Others**, reported in **(2014) 2 Cal LT 332** equivalent to **2014 SCC Online Cal 5787**, the said Act of 2008 and the Rules made thereunder were held to be ultra vires. This was carried in appeal by way of MAT No.473 of 2014 by the State of West Bengal, and the said appeal was dismissed by a speaking order dated March 10, 2016 by an Hon'ble Division Bench of this Hon'ble Court, which upheld the opinion of the coordinate bench that the said Act was a violation of Articles 29 and 30 of the Constitution of India. Thus, with the Act being held to be ultra vires, and the appeal being dismissed, the rules made thereunder and also held to be ultra vires could not survive.

4. During the pendency of the said Appeal, the State of West Bengal had obtained interim directions from the Hon'ble Division Bench on December 9, 2015, to the following effect: -

“Since appointment of teachers etc. is very relevant so far as the quality of education is concerned, if there are any mala fides statutory infirmities brought to the notice of the State Government as it is completely funded by the State Government, it is open to the State Government to withdraw financial support if mala fides/ illegalities are found in such process of selection of teaching staffs etc. Such right is always with the State Government irrespective of minority institutions or other institutions.”

5. After the coordinate bench had been pleased to declare the Act of 2008 and the rules of 2010 made thereunder ultra vires, as aforesaid and during the pendency of the said appeal before the Hon'ble Division Bench and pursuant to an interim order passed therein on December 9, 2015, as appears from the Recitals to the Rules, the State of West Bengal by Notification dated March 3, 2016, framed the Recruitment Procedures for the Non-government recognized aided Madrasah (Primary, Junior

High, High, Higher Secondary and Senior) Rules, 2016. These were published on March 4, 2016. The three recitals referred to above are as follows: -

“AND WHEREAS, the Hon’ble Division Bench of the Calcutta High Court by a Judgement dated 09.12.15 appeals (M.A.T of 2014 & AST 130 of 2014) against the judgement of the single Judge of the Calcutta High Court in W.P. No. 20650 (W) of 2013 inter-alia held that The West Bengal Madrasah Service Commission Act, 2008 (West Bengal Act XXV of 2008) to be unconstitutional.

WHEREAS the Hon’ble Division Bench of the Calcutta High Court by a Judgement dated 09.12.15 inter-alia had given liberty to provide appointment to the candidates who are empaneled by the West Bengal Madrasah Service Commission awaiting such appointment.

NOW, THEREFORE, the Governor is pleased to order that since a substantial portion of the financial obligations of all non-government recognized aided Madrasahs is met from the grants of the State Government, it is essential that all the Madrasahs should follow an open, rational, and transparent norms and procedures to maintain overall quality of education in the Madrasahs strictly in the matter of recruitment of teaching and non-teaching staff in their respective institution.“

6. Therefore, on any interpretation of the matter, the State of West Bengal framed the above rules to only ensure that a Madrasah which obtained aid from the grants of the respondent no. 1, and was recognized by it, followed open, rational and transparent norms and procedures and purported that the Rules of 2016 were such norms and procedures in case of Madrasahs. It could have been argued that the said Rules of 2016 were an interim measure which would be only effective till the disposal of the appeal and subject to its result – however, in view of the blanket nature of the last sentence of the directions in the order dated December 9, 2015, as extracted in paragraph 4 above, perhaps it will be safer to conclude that as long as the declaration of the

unconstitutionality of the Act of 2008 and the rules of 2010 made thereunder subsisted, the non-government Madrasahs which were recognized and aided by the grants made by the respondent no. 1, were bound to follow the Rules of 2016, unless any order of the Hon'ble Division Bench or the Hon'ble Supreme Court supervened.

7. Initially, the Hon'ble Supreme Court by an order passed in the special leave petition was pleased inter alia to restrain the declaration of results with respect to the recruitment process initiated in the year 2014 through the mechanism of selection and recommendation by the Madrasah Service Commission. However, on consideration of the difficulties faced by the acute shortage of teachers in Madrasahs and the imbroglio created thereby, the Hon'ble Supreme Court was pleased, by an order dated May 17, 2018 passed in the said civil appeals/special leave petitions, to inter alia direct as follows: -

Paragraph 3: "...It appears that pursuant to the order passed by the Division Bench of 4 the High Court, the State Government has come up with a Notification dated 3.3.2016, prescribing the eligibility conditions for appointment containing education qualification for the teachers to be appointed by the Madrasahs."

Paragraph 4: "In view of Notification dated 3.3.2016, we order that in case incumbents, who are working, are possessing the qualification, as prescribed by the State Government in its aforesaid Notification, the payment shall be made to them and they shall not be deprived of their dues. Let this order be complied with respect to the payment of salaries also within a period of two months from today, as assured in all fairness by Mr. Mohan Parasaran appearing for the State of West Bengal. Even if the teachers had not been paid for the period prior to 3.3.2016, they shall be paid their dues for the period they have served. It is made clear that all the incumbents shall be paid their dues in terms of this order whether they have approached this Court or not and this order to be applied to all similarly situated incumbents."

Paragraph 5: "As there are large number of vacancies existing in the various Madrasahs, we permit the declaration of the result for the recruitment process of the year 2014. However, no further recruitment process shall be undertaken. It is also stated by the State Government and Commission that only those Madrasahs who want to take the incumbents from the list of 2014 process, the Commission shall sponsor the names only to such Madrasahs, not to others. The process shall be

done strictly and in accordance with the merit list of the candidates and the appointment so made, shall be subject to the final outcome of the case.”

Paragraph 6: “It was stated that there are certain incumbents, who were selected in the recruitment process of 2013 also, are also awaiting their appointments. Let the appointment be made in the institutions which are willing to take such teachers, however, strictly in order of merit and that shall be subject to the final outcome of these matters.”

Paragraph 7: “No equity shall be claimed on the basis of the appointment so made on stop-gap arrangement. Let such conditions be also mentioned in the order and that would be subject to the final outcome of these matters, and that may also be specifically incorporated in the order.”

8. The words of the Hon'ble Supreme Court are clear, unambiguous and do not permit more than one interpretation. There shall be no further recruitment process. Not just through the process of recommendation of the Madrasah Service Commission but by anyone whatsoever. In fact, no appointment can be made also, except that results for the recruitment process of the year 2014 could be declared, and those Madrasahs who want to take incumbents from the list of the 2014 process were permitted to act on the recommendation of the Madrasah Service Commission who are to sponsor the names only to such Madrasahs who express their willingness to do so. There is another exception for the incumbents selected in the recruitment process of 2013 also, and they were permitted to be appointed strictly in order of merit by those institutions (Madrasahs) willing to take such teachers, naturally on the recommendation of the said Madrasah Service Commission. However, all these appointments were strictly a stop-gap arrangement and no equity could be claimed on their basis, and moreover, would abide by the final outcome of the case before the Hon'ble Supreme Court. Interestingly, the Hon'ble Supreme Court had noted the rules of 2016 notified by the notification dated March 3, 2016. Still it had not been

pleased to allow further recruitment to be initiated thereunder. It had been pleased only to ensure that payment of salary was made to those who had already been appointed under the said Rules of 2016 and rendered service.

9. Now, finally perhaps I am equipped to deal with the matter at issue – a current topic, as it were, after having recounted the immediate history. Yet, as someone wiser has said, unless we take our lessons from history, we are condemned to repeat it, so that history had to be recounted. Even though there is a provision in the Rules of 2016 (Rule 17) that if any appointment is made in violation of the 2016 Rules, then the respondent no. 1 or its authorities shall not take any financial responsibility for any appointment thus made, it is also correct that the said Rules of 2016 clearly indicate at Rule 10, that no prior permission is required under the Rules of 2016 for the issuance of an advertisement and starting the process to fill up any vacant post duly sanctioned by the State Government or the Director of Madrasah Education provided the term and conditions as stated in the said procedures (Rules) are fulfilled.

10. Mr. Atarup Banerjee, learned Advocate for the petitioners, submits that the terms and conditions mentioned in the procedures have all been fulfilled and therefore his client did not need any prior permission to issue the advertisement at pages 38 and 39 are concerned. He submits that the Hon'ble Supreme Court expressly allows appointment to be made by Madrasahs and has referred to the rules of 2016 (notification dated March 3, 2016) and has not stayed its operation. These advertisements are collectively Annexure P/4 to the writ petition. I have read the advertisement carefully. He who commits a crime, often leaves a rather broad clue in his eagerness to be too clever by half. Thus, it has

happened in the case of Mr. Banerjee's client. I refer to the Special Note which has been included in the advertisement and to which attention of all and sundry has been drawn by an asterisk. For the sake of convenience, it is extracted hereinbelow: -

“Special Note: - In pursuance of the Hon'ble Supreme Court order 17.05.2018 in Civil Appeal No. 5808 of 2017 it is clear that (a) Government's Notification dated 03.03.2016 is in force (b) No further recruitment process by the commission after the result of 2014.”

11. It does not require special genius to compare paragraph 5 of the Order dated May 17, 2018 with the Special Note to see that the petitioners (Managing Committee of the Madrasah and its Secretary) have deliberately added words to the order of the Hon'ble Supreme Court, at clause (b) of the special note. The Hon'ble Supreme Court never said “no further recruitment process by the commission after the result of 2014”. It was an absolute bar against any further recruitment process, by anyone whatsoever as I have held in paragraph 8 of this judgment. Again, as I have already held in paragraph 8 of this judgment, the Hon'ble Supreme Court did not allow any recruitment to be done in terms of the Rules of 2016 notified by the notification dated March 3, 2016 but only payment of salary to be made to those already appointed thereunder, possessing the requisite qualifications and who have rendered service. This does not mean that the Hon'ble Supreme Court has been pleased to hold that said Rules of 2016 are still in force.

12. Accordingly, the said advertisement is deceptive and makes a false representation to the public at large, and cannot be given effect to by the Madrasah authorities and the respondent no. 7 rightly decided by way of Annexure P/6 that the petitioners are in violation of the order of the Hon'ble Supreme Court. The decision-making process of the respondent no. 7 has not considered anything irrelevant and has considered

everything which was relevant and is not unreasonable. In fact, it gives effect to the order of the Hon'ble Supreme Court as every civil authority must and which the petitioners sought to overreach. As a result, any recruitment process sought to be initiated by the Madrasah authorities concerned, in terms of the notification dated March 3, 2016 after May 17, 2018, is wholly without jurisdiction and in conscious and fraudulent violation of the order of the Hon'ble Supreme Court. That it is a deliberate attempt to commit fraud appears from the addition of the words "by the commission" to the order of the Hon'ble Supreme Court in special note B.

13. As a result, the writ petition is dismissed with exemplary costs of Rs.1 lakh to be paid by the writ petitioners to the respondent no.1 whose instrumentality the respondent no. 7 is.

(Protik Prakash Banerjee, J.)