

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

Present:

The Hon'ble Justice Aniruddha Roy

WPA 9253 of 2015

Ujjal Mandal

Vs.

The State of West Bengal & Ors.

For the petitioner:

**Mr. Indranath Mitra, Adv.,
Mr. Neil Basu, Adv.**

For the State:

**Ms. Chaitali Bhattacharjee, Adv.,
Mr. Kartik Chandra Kapas, Adv.**

For the respondent nos. 3 to 9:

Mr. Kanak Kiran Bandopadhyay, Adv.

Reserved on:

01.07.2022

Judgment on:

27.07.2022

ANIRUDDHA ROY, J:

Facts:

1. The writ petitioner as an intending candidate applied for the Post of Assistant Teacher in Bengali (Pass), pursuant to the Notification issued by the respondent authority. Provisional Admit Card was issued in favour of the petitioner by the third respondent and the petitioner was allowed to appear in the written test in Section A and Section B scheduled on July 29, 2012. The petitioner duly appeared in the said written examination. The third respondent uploaded the result of the said written examination in its official website and the petitioner had qualified in Section A (Part-II) examination as would be evident from **Annexure P-5** to the writ petition.

2. Despite qualifying in Part-II, Section A written examination, the petitioner did not receive any call for interview i.e. the personality test.
3. By a letter dated August 12, 2013 the petitioner under the provisions of Right to Information Act, 2005 (for short, the RTI Act) requested the seventh respondent to furnish him the informations regarding the marks awarded to the petitioner in subject test (Section B) and to make over his answers scripts to him. The petitioner also requested to intimate him the lowest marks of the candidate, who was called for personality test. By a letter dated August 14, 2013 the sixth respondent informed the petitioner that in a meeting of the third respondent held on July 04, 2013, it was decided that no information with regard to the said examination to be provided under the RTI Act until finalization of the merit list. The selection process had completed, without providing the necessary information as was sought for by the petitioner under the said application dated August 12, 2013. The petitioner then made another representation on March 03, 2014 requesting the seventh respondent for supplying all those informations as were sought for by the petitioner through his said letter dated August 12, 2013.
4. By a letter dated March 26, 2014 the ninth respondent requested the fifth respondent to provide the information sought for by the petitioner. By a letter dated August 21, 2014 the ninth respondent informed the petitioner that he had secured 16 marks in academic and 39 marks in the subject test aggregating to 55 marks, whereas the last candidate with the lowest marks who was called for the personality test secured 56 marks in aggregate. The petitioner was also asked to collect the photocopy of his answer scripts upon payment of the necessary charges. On September 02, 2014 upon deposit of the necessary charges the petitioner obtained photocopies of his answer scripts of his subject test, **Annexure P-11** to the writ petition, from the Office of the sixth respondent.

5. From such answer scripts it revealed that, the marks obtained by the petitioner against each question in respect of several questions, which were originally awarded by the examiner concerned had been scrolled through or over written and was changed or reduced to a lesser number without any comment, initial or signature of the examiner concerned. Against most of the answers the numbers were reduced by scrolling through the original number save and except in two answers the marks were increased in a similar manner. The entries on the top sheet had also been reduced and altered like wise. Originally the petitioner secured 43 marks out of 60, whereas, after alteration the total marks secured had come down to 39.
6. Being aggrieved by the said unilateral action on the part of the respondent authorities concerning the recruitment to the Post of Assistant Teacher under 12th **Regional Level Selection Test, 2011** (for short, RLST), the petitioner moved the previous writ petition WP No. 29012 (W) of 2014 before this Hon'ble Court. By an Order dated April 01, 2015 the said writ petition was allowed to be withdrawn with liberty to file afresh on the self-same cause of action including a challenge to the resolution adopted by the third respondent in its 396th Meeting held on December 31, 2009 permitting re-examination and/or review of answer of a candidate. Pursuant to the said leave granted by a coordinate bench of this court, the instant writ petition was filed. Pursuant to the leave granted by the said same coordinate bench of this court, on May 05, 2015 the prayers in the instant writ petition was amended incorporating a prayer for mandamus for setting aside and/or cancellation of the Agenda No. 10(a) of the meeting of the third respondent held on December 31, 2009. In the above facts and circumstances the instant amended writ petition was filed with the following reliefs:

“a) A Writ of and/or in the nature of Mandamus, commanding the respondents, each one of them, their servants, agents and/or assigns more particularly, the West Bengal Central School Service Commission to treat the

marks prior to changing as valid marks and to proceed on the basis of such marks, forthwith;

(ai) In terms of leave granted by His Lordship the Hon'ble Justice Dipankar Datta the prayer to amended/ appended below:

A writ of and/or in the nature of mandamus do issue setting aside and/or quashing the agenda 10(a) of Proceeding held on 31.12.2009.

(aia) A writ of and/or in the nature Mandamus do issue directing the respondents to rescind and/or cancel and/or withdraw the Agenda No. 10(a) of the Proceeding held on 31.12.2009.

b) A Writ of and/or in the nature of Mandamus, commanding the respondents, each one of them, their servants, agents and/or assigns to conduct personality test of the petitioner, considering that the petitioner had qualified in the subject test and take follow up action thereto, forthwith;

c) A Writ of and/or in the nature of Mandamus, each one of them, their servants, agents and/or assigns to issue appointment letter in favor of the petitioner for appointment and/or recruitment to the post of Assistant Teacher (Pass) in the event the W.B. Central School Service Commission fails to conduct personality test of the petitioner;

d) A writ in the nature of Certiorari do issue directing the respondents to transmit the entire records forming the basis of written test conducted for recruitment of Assistant Teacher under 12th Regional Level Selection Test, to this Hon'ble Court and to certify them and on being so certified, quash the same so that conscionable justice may be administered to the parties;

e) A writ in the nature of Prohibition do issue prohibiting the respondents from filling up any vacancy of Assistant Teacher in Bengali under West Bengal Regional School Service Commission, northern Region in any manner whatsoever;

f) Rule NISI in terms of prayer (a), (b), (c), (d) and (e) as above;

g) An order do issue restraining the respondents from filling up any vacancy of Assistant Teacher (Pass) in Bengali under West Bengal Regional School Service Commission, Northern Region;

h) An order do issue directing the respondents to keep one post of Assistant Teacher in Bengali vacant till the disposal of the writ petition.

i) Ad-interim order in terms of prayer (g) and (h) as above;

j) And to pass such further order or orders as to your Lordships may deem fit and proper;"

7. Pursuant to the directions made by the court the respondent nos. 3 to 9 filed its affidavit-in-opposition affirmed on November 22, 2016. Affidavit in-reply was filed by the writ petitioner affirmed on December 09, 2016. First supplementary affidavit was filed on behalf of respondent nos. 3 to 9 affirmed on January 27, 2020. Second supplementary affidavit was filed by respondent nos. 3 to 9 affirmed on March 16,

2020. Written notes were filed on behalf of the respondent nos. 3 to 9 and by the petitioner.

Submissions:

8. Mr. Indranath Mitra, learned counsel for the petitioner submitted that, under the Gazette Notification dated December 28, 2011, it was notified by the respondents that for primary section there was a vacancy for 5445 nos. and in the secondary section (including upper primary section) there was a vacancy for 39,510 nos. for the Post of Assistant Teachers. The petitioner applied for the **District: Malda**, where the vacancies were notified to be 698 and 3107 nos. respectively in both the categories. Immediately after the publication of the said Gazette Notification the School Service Commission published a **Brochure** stipulating the guidelines for appointment to the Post of Assistant teacher under the said 12th RLST. In the **Brochure**, it was clearly mentioned that, the appointment procedure shall be guided by the **West Bengal Central School Service Commission (Selection of person for Appointment to the Post of Teacher) Rules, 2007** (for short, the 2007 Rules). Upon due scrutiny of the application submitted by the petitioner the respondent authorities issued the admit card and allowed the petitioner to appear in the written examination. The petitioner duly appeared in the written examination. The petitioner had qualified in the written examination. However, the petitioner did not receive the call for the personality test, despite being eligible. The petitioner then exercised his right under the RTI Act and received the copies of the answer scripts and the mark sheet from the respondent authorities.
9. On perusal of the answer sheet it appeared that, against most of the answers the petitioner's original marks awarded by the examiner were scrolled through without any initial, signature or comment, except in two answers the marks were increased in the similar manner, which was not permissible in law.

10. On behalf of the petitioner it was submitted that, each question carried two marks and the model answers were provided to the examiner concerned.
11. In reply to the queries raised by the petitioner the authority informed the petitioner that pursuant to the power to review/re-examine the answers granted by the third respondent by way of a resolution adopted in its 39^{6th} Meeting held on December 31, 2009 the respondent authority had every right to make correction/review of the answers and in exercise of such power the answer script of the petitioner was assessed.
12. Referring to Rule 12 of the 2007 Rule, it was submitted that, the said Rule prescribed the provisions relating to selection of candidates and preparation of panel for the Post of Assistant Teacher, which did not provide for any such power for review or correction of any answer scripts as contemplated by the respondents. Referring to Section 7, 8, 16 and 17 of the **West Bengal School Service Commission Act, 1997** (for short, the 1997 Act), Mr. Mitra the learned counsel argued that, these were provisions governing the selection process for Teaching and Non-Teaching Staff. None of such provisions empowered the respondent authority to review or recheck or correct any answer scripts which had already been evaluated by the examiner. On the strength of the said provisions of both under the said Act of 1997 and the said Rule of 2007, he argued that, the resolution no.10(a) of the 39^{6th} meeting of the third respondent held on December 31, 2009 is clearly ultra vires to the statute and is liable to be set aside.
13. Learned counsel then submitted that, had there been no reduction of marks in the original answer scripts as had been done in an illegal, arbitrary and mala fide manner and without any authority of law, the petitioner originally secured 59 marks which was higher than the last candidate who was called for personality test with a marks 56, the petitioner could easily get the call for personality test.

- 14. Mr. Mitra further submitted that, the plea taken by the respondents in support of the resolution no.10(a) adopted in the 396th meeting of the third respondent held on December 31, 2009 was without any authority of law and dehorse the statutory provisions. He submitted that, the said resolution should be declared as illegal and be set aside and any act on the basis thereof consequently be declared as illegal, arbitrary and should be set aside. The petitioner should get her appointment as Assistant Teacher.
- 15. Mr. Kanak Kiran Bandopadhyay learned counsel appearing for the respondent nos. 3 to 9 submitted that, the writ petitioner was not eligible to get the call for the personality test. Referring to **Annexure P-5** to the writ petition he submitted that, the TET result relied upon by the petitioner was not genuine and is a manufactured document. The TET result was not published, as it was annexed to the writ petition. Relying upon paragraph 8 of the affidavit-in-opposition he submitted that, the document was a fabricated one and the same was never issued by the commission.
- 16. He then submitted that, the **Brochure** published by the commission was the general procedure for conducting the examination. The Resolution No. 10(a) of the Central School Service Commission adopted in its 396th Meeting (for short, the said meeting of the Central Commission) held on December 31, 2009 relates to the examination of the answer scripts, which was a guideline set up for the examiners only and not for the candidates. The specific case of the answering respondents in paragraph 5 of the affidavit-in-opposition, inter alia, runs as follows:

“5.
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I further say that the fifth sub-paragraph of paragraph 8 is also a meaningless allegation as the brochure is published by the commission for intimating the candidates as to the age, qualification, the Rule under which the selection process would be held etc. Review/re-examination is not permissible under the applicable Rules. The resolution No. 10 A of the

meeting of the Commission relates to examination of answer scripts. There also nothing has been said that there will be review and/or re-examination of answer scripts. What has been stated in the said resolution of the said meeting is for the purpose of the examination of the answer scripts which is for the examiners only. From the meaningless allegation made, it appears that the petitioner has failed to understand that the candidates are not examiners of the answer scripts. The resolution for the examination process of the answer script is only for the examiners and not for the candidates. As there was no provision at all for review and/or re-examination of answer scripts there was no question of any reflection as to review and/or re-examination of answer scripts in the brochure”.

17. Learned counsel submitted that, the petitioner in aggregate consisting of academic qualification and written examination secured (16+39) 55, whereas the last recommendee for personality test secured (20+37.50) 57.50 in aggregate and accordingly he came within the zone of consideration for personality test and in the personality test he secured 3.83 marks totaling to 61.33 marks. Both the said petitioner and the qualified candidate belong to the same category i.e. **OBC-B**. Call in the personality test depends upon the marks secured by a candidate and the number of vacancies declared whereas the vacancies of the recommendation comes after adding all the marks against written test, academic qualification and personality test.
18. It was submitted that, the signature of the scrutineer was clearly visible on the top sheet of the answer script. The scrutineer had a role to play in the examination of the answer script. The contention of the petitioner that the numbers were changed unilaterally by scrolling down the original answer without bearing any signature, initial or comment of the scrutineer was not tenable, as the signature was there on the top sheet of the answer script. The specific stand was taken by the answering respondents that there was no rule or power of review of answer script by the candidates. There was no manipulation while examining the answer script of the petitioner. There was no re-examination taken place as contended by the petitioner.
19. Referring to the Resolution 10(a) adopted in the said meeting of the Central Commission dated December 31, 2009, the learned counsel submitted that, checking of marks of each answer and its positing on the top sheet was done by the

scrutinizer and he or she was authorized to make correction for any over marking and under marking to any answer, if so required. Pursuant to such power and authority, the original marks of the petitioner were changed. There was no illegality or arbitrariness whatsoever.

20. The learned counsel for the answering respondents submitted that, this writ petition was misconceived. The examination procedure as established and framed by the councils are lawful and should not be interfered with. The writ petition should be dismissed.

Decision:

21. **Annexure P-5 to the writ petition** is the TET result showing the petitioner as qualified, was obtained by the petitioner from the website of the relevant school council. The representation of the petitioner dated August 12, 2013, March 03, 2014 being **Annexures P-6 and P-8** to the writ petition respectively, specifically mentioned that he had qualified the TET examination. The said representations were replied to by the Regional School Service Commission as would be evident from **Annexures P-7, P-9 and P-10** to the writ petition respectively. In none of these replies it was contended by the Regional School Service Commission that the petitioner had not qualified the TET and on the contrary the result of the petitioner, that he had qualified TET was accepted and admitted.
22. Pursuant to the RTI process the answer script of the petitioner was ultimately furnished, **Annexure P-11** to the writ petition. On a close scrutiny of the said answer script it appeared, to this court that, in most of the answers the original marks secured by the petitioner were scrolled through and were reduced, except a little few where the marks were increased and no comment, signature or initial of the examiner concerned was available. The original marks of the petitioner was 43 in the written examination as would appear from the top sheet, Bengali (pass), at page 54 of the writ petition, was reduced to 39 after scrolling out some of the

numbers. No signature or initial of either evaluator/examiner or scrutineer was available against such scrolled out entry. However, on the top sheet the signatures of the evaluator/examiner and the scrutineer were available in the places respectively year marked for the same. On a plain perusal and glance of the said answer script and the top sheet, to the mind of this court it came that, such scrolling out of the original number might be possible even after the signatures of the evaluator or examiner and the scrutineer were put in on the top sheet at the respective year marked places when the top sheet was filled up with the original numbers. Such a possibility, to the mind of this court, cannot be ruled out.

23. In the event, the original marks secured by the candidates would have been allowed to remain then the petitioners aggregate would have been (16+43) 59, higher than the marks obtained by the last candidate who secured 56 and received the call for personality test.
24. After the TET result was published, the petitioner repeatedly, from time to time, contemporaneously applied under the RTI Act seeking the necessary information and production of the answer scripts and the same was repeatedly avoided and/or denied by the relevant State authorities on one or the other flimsy and baseless grounds, though the petitioner was entitled for the same in law. Such a conduct on the part of the State authority and the stand taken for refusal was not fair or just as would be evident from the reasons for refusal provided by the relevant State authority. This also gave rise to a reasonable apprehension and doubt, to the mind of this court, as to the bona fide exercise of discretion by the relevant State authority. On a plain look of the answer scripts and the top sheet thereto of the petitioner coupled with the conduct of the respondent authorities, as discussed above, a reasonable doubt, presumption and apprehension was created, to the mind of this court, that a manifest injustice had taken place with the petitioner,

while evaluating his merit to the notice and knowledge of the School Council and all concerned with the selection process.

25. The relevant process of selection for the Post of Assistant Teacher was primarily under the control and authority of the both the School Councils, if any illegality, mala fide or arbitrariness were found to be there, the councils could not and cannot avoid its responsibility.
26. **Part III** of the Constitution of India provides for the **Fundamental Rights**, which the citizens enjoy. **Article 19 (1)(g)** which is an integral part of **Part III** of the Constitution of India, inter alia, gives a guarantee and constitutional mandate to a citizen to carry on and thereby to ensure any occupation. Such being a valuable Fundamental Right guaranteed under the constitution could not be taken away by the respondents State authorities without following the established procedure of law. Slightest illegality, unfairness, mala fide and arbitrary exercise of its authority by the State should be construed to be as an intolerable Act on the part of the State, if it infringes a fundamental right of a citizen. The primary duty of a constitutional court exercising power and jurisdiction under **article 226 of the Constitution of India** is to correct any error or illegality or mala fide and any arbitrary act committed by the state authority and in such regard it can be safely be said that, the constitutional court does so in exercise of its overwhelming plenary powers. This court is also not unmindful as to the proposition that, such plenary power of a constitutional court in exercise of its jurisdiction under Article 226 of the Constitution of India must be exercised judiciously, reasonably and of course within the four corners of law and equity.
27. The Hon'ble Supreme Court ***In the matter of: The Controller Auditor General of India vs. K.S. Jagannathan & Anr. reported at AIR 1987 Supreme Court 537,*** had observed as under:

"18. The first contention urged by learned Counsel for the Appellants was that the Division Bench of the High Court could not issue a writ of

mandamus to direct a public authority to exercise its discretion in a particular manner. There is a basic fallacy underlying this submission- both with respect to the order of the Division Bench and the purpose and scope of the writ of mandamus. The High Court had not issued a writ of mandamus. A writ of mandamus was the relief prayed for by the Respondents in their writ petition. What the Division bench did was to issue directions to the Appellants in the exercise of its jurisdictions under Article 226 of the Constitution of India. Under Article 226 of the Constitution, every High Court has the power to issue to any person or authority including in appropriate cases, any Government, throughout the territories in relation to which it exercises jurisdiction, directions, orders, or writs including writs in the nature of habeas corpus, mandamus, quo warranto and certiorari, or any of them, for the enforcement of the Fundamental Rights conferred by Part III of the Constitution or for any other purpose. In Dwarkanath v. Income-Tax Officer, Special Circle, Kanpur, (1965) 3 SCR 536, 540 (AIR 1966 SC 81 at P. 84) this Court pointed out that Article 226 is designedly couched in a wide language on order not to confine the power conferred by it only to the power to issue prerogative writs as understood in England, such wide language being used to enable the High Courts "to reach injustice wherever it is found" and "to mould the reliefs to meet the peculiar and complicated requirements of this country" In Hochtief Gammon v. State of Orissa 1976 1 SCR 667, 676 : (AIR 1975 SC 2226 at p. 2232) this Court held that the powers of the courts in England as regards the control which the Judiciary has over the executive indicate the minimum limit to which the courts in this country would be prepared to go in considering the validity of orders passed by the Government or its officers.

19. Even had the Division Bench issued a writ of mandamus giving the directions which it did, if circumstances of the case justified such directions, the High Court would have been entitled in law to do so for even the courts in England could have issued a writ of mandamus giving such direction. Almost a hundred and thirty years ago, Martin. B., in Mayor of Rochester v. Regina 1858 F B & F 1024, 1032 1084 said.

"But, were there no authority upon the subject, we should be prepared upon principle to affirm the judgment of the Court of Queen's Bench. That Court has power by the prerogative writ of mandamus, to amend all errors which trend to the oppression of the subject or other misgovernment, and ought to be used when the law has provided no specific remedy, and justice and good government require that there ought to be one for the execution of the common law or the provisions of a statute Comyn's Digest. Mandamus (A) Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable."

The principle enunciated in the above case was approved and followed in The King v Revising Barrister for the Borough of Hanley (1912) 3 KB 518, 528-9, 531. In Hochtief Gammon's Case (AIR 1975 SC 2226) this Court pointed out at page 675 that the powers of the Courts in relation to the orders of the Government or an officer of the Government who has been conferred any power under any statute, which apparently confers on them absolute discretionary powers, are not confined to cases where such power is exercised or refused to be exercised on irrelevant considerations or on erroneous ground or mala fide, and in such a case a party would be entitled to move the High Court for a writ of mandamus. In Padfield v. Minister of Agriculture Fisheries and Food, to appoint a committee of investigation so that it could be used to promote the policy and objects of the Agricultural Marketing Act, 1958, which were to be determined by the construction of the

Act which was a matter of law for the court and though there might be reasons which would justify the Minister in refusing to refer a complaint to a committee of investigation the Minister's discretion was not unlimited and if it appeared that the effect of his refusal to appoint a committee of investigation was to frustrate the policy of the Act, the court was entitled to interfere by an order of mandamus. In Halsbury's Laws of England, Fourth Edition Volume I, paragraph 89, it is stated that the purpose of an order of mandamus "is to remedy defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right, and it may issue in cases where, although there is an alternative legal remedy yet that mode of redress is less convenient beneficial and effectual."

20. There is thus no doubt that the High Court in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass order and give necessary directions where the Government or a public authority had failed to exercised or had wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion mala fide or on irrelevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can. In exercise of its jurisdiction under Article 226 issue a writ of mandamus or pass orders and give directions to compel the performance in proper and lawful manner of the discretion conferred upon the Government or a public authority and in a proper case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion".

28. The Hon'ble Supreme Court ***In the matter of: Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Ors., reported at (1998) 8 SCC 1***, had observed:

"14. The power to issue prerogative writs under Article 226 of the Constitution in plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".

29. The Hon'ble Supreme Court ***In the matter of: Secretary, Cannanore District Muslim Educational Association, Karimbam, reported at (2010) 6 SCC 373*** had observed as follows:

"35. In Dwarka Nath v. ITO a three-Judge Bench of this Court commenting on the High Court's jurisdiction under Article 226 opined that this article is deliberately couched in comprehensive language so that it confers wide power on the High Court to "reach injustice wherever it is found". Delivering

the judgment Justice Subha Rao (as His Lordship then was) held that the Constitution designedly used such wide language in describing the nature of the power. The Learned Judge further held that the High Court can issue writs in the nature of prerogative writs as understood in England; but the learned Judge added that the scope of these writs in India has been widened by the use of the expression "nature".

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

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

37. The same view was also expressed subsequently by this Court in *J.R. Raghupathy v. State of A.P.* Speaking for the Bench, Justice A.P. Sen, after an exhaustive analysis on the trend of Administrative Law in England, gave His Lordship's opinion in para 29 at p. 1697 thus:

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

39. This Court has also taken a very broad view of the writ of mandamus in several decisions. In *Comptroller and Auditor General of India v. K.S. Jagannathan* a three-Judge Bench of this Court referred to Halsbury's *Laws of England*, 4th Edn., Vol. I, para 89 to illustrate the range of this remedy and quoted with approval the following passage from Halsbury about the efficacy of mandamus:

"89. Nature of mandamus.- ... is to remedy defects of justice; and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy, for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

In *SCC* para 20, in the same page of the report, this Court further held: (*K.S. Jagannathan* case, p. 693)

"20. ... and in a proper case, in order to prevent injustice resulting to the parties concerned, the court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion."

40. In a subsequent judgment also in *Andi Mukta Sadguru Shree Muktojee Vandas Swami Swarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani* this

Court examined the development of the law of mandamus and held as under:

“22. ... mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor de Smith states: ‘To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract.’ (Judicial Review of Administrative Action, 4th Edn., P.540). We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements which must be easily available ‘to reach injustice wherever it is found’. Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition.”

30. Thus, it is clear that wherever and whenever an illegal, mala fide or arbitrary exercise of power and discretion by the State authority is discovered, the Constitutional Court in exercise of its high prerogative writ jurisdiction can and should intervene in a judicious manner, without usurping any statutory framework duly framed under the law.

31. **Resolution 10 (a) adopted by the Central School Service Commission in its 396th meeting held on December 31, 2009** is set out herein below:

10. a) To review on the process of examination conducted by WBCSSC due to the increasing complexity and demands of the candidates in the background of RTI Act, 2005.

With reference to the practice of the Public Service Commission, Railway Recruitment Board etc. regarding review of Answer scripts and also the view upheld by the Division Bench of Hon’ble Mr. V. S. Sirpurkar, Chief Justice and the Hon’ble Mr. Justice Soumitra Sen in their judgment (AST No. 329 of 2006) passed on 24.04.2006, it was resolved that

i) The Answer script of a candidate be examined by the Examiner as per model answer provide to him/her.

ii) Supervision over a set of examiners (as decided by the respective Regional Commission) during evaluation of Answer Scripts be conducted by the Co-cordinator and the points raised by the examiner, if any, be clarified by the Co-ordinator engaged for the purpose.

*iii) Checking of marks of each answer and its positing in the top sheet be done by the Scrutinizer and **he/she be authorized to make correction for any over-marking/under-marking to any answer, if so required”.***

32. The relevant selection process to the Post of Assistant Teacher in which the petitioner appeared, was governed under the provisions laid down under the said

1997 Act and the rules framed thereunder, being the said 2007 Rules. Section 17 of the said 1997 Act provides for the power to make rules by the State Government in the manner and mode as prescribed thereunder. Section 18 of the 1997 Act provides for the power to make regulations by the Central Commission with the previous approval of the State Government, subject to the statutory restriction that such regulation should not be inconsistent with the provisions of the said 1997 Act or the rules made thereunder, for discharging the functions of the Central Commission under the said 1997 Act. Pursuant to the power laid down under Section 17 of the said 1997 Act the said 2007 rules were framed in due compliance of the restrictions prescribed under the statute.

33. **Rule 12** of the said 2007 Rules laid down the provisions relating to ***selection of candidates and preparation of panel for the posts of Assistant Teachers.*** This is the relevant rule governing to the dispute in this writ petition.
34. From a close scrutiny of the relevant provisions under the said 1997 Act and the said 2007 rules, it is clear there was no provision **for exercise of power to review or re-examination or over-marking or under-marking of the answer script** of a candidate, **by an evaluator/examiner or a scrutineer**, who appeared in the written examination of the selection process. **The power to review or re-examination or over-marking and under-marking of an answer script** of a candidate who appeared in the written examination of the selection process is a **substantive power**. Such a **substantive power** must be specifically provided for in the relevant statute, namely, the said 1997 Act or in the relevant rules, namely, the 2007 Rules. In absence of such specific provision being laid down under the statute or the relevant Rule, as stated above, ***such substantive power cannot be inferred unless specifically conferred under the relevant statute.***
35. It was contended on behalf of the respondents School Council Authorities that, in exercise of the power and authority conferred under the said **Resolution 10 (a)**, the

relevant Examination Authority was empowered and authorized for checking of marks of each answer and its posting in the top sheet and the same would be done by the scrutineer and he/she was authorized to make correction for any over-marking/under-marking to any answer, if so, required. By exercising such power and authority, the scrutineer had altered and changed the original marks awarded to the petitioner in his answer script in the manner discussed above.

36. ***The said Resolution 10(a) adopted by the Central School Service Commission*** was of no statutory force and was devoid of any statutory sanction. The provisions laid down in the said resolution was adopted by the Central School Service Commission, an Article 12 authority, beyond the scope of the relevant statute i.e. the said 1997 Act and the 2007 Rules. The power and authority, sought to be granted to the scrutinizer under the said ***Resolution 10(a) authorizing to make correction for any answer, if so, required,*** being a substantive power and authority, was not permitted to be adopted by the Central School Service Commission. The said ***Resolution 10(a)*** could at the highest, be considered as an administrative instruction which could not be adopted or issued dehorse the law. A Rule is not only required to be made in conformity with the provisions of the act whereunder it is made, but the same must be in conformity with the provisions of any other act, as a subordinate legislation cannot be violative of any plenary legislation made by the State legislature, namely the said 1997 Act and the 2007 Rules, in the instant case. Therefore, this court is of the firm opinion, that the said ***Resolution 10(a)*** adopted by the Central School Service Commission in its 396th Meeting held on December 31, 2009 is ultra vires to the said 1997 Act and also 2007 Rules. Accordingly, ***the said Resolution 10(a) adopted by the Central School Service Commission in its 396th Meeting held on December 31, 2009 is declared, by this court, as ultra vires to the relevant statute and as such of no effect or further effect.***

37. In absence of any power for over marking or under marking of the answer script being conferred under the statute or in view of the said purported **Resolution 10-A** adopted by the Central School Counsel being declared as ultra vires hereinabove, the act and conduct on the part of the examination authority in changing and/or altering the original numbers of the petitioner unilaterally, in the manner as discussed above, was illegal, wrongful and in arbitrary exercise of power and discretion vested with the relevant respondent examination authority. **Such change/alteration of the original numbers in the answer script of the petitioner as mentioned above cannot sustain in law and accordingly the said changed/altere d numbers in the answer script of the petitioner stand set aside and quashed and consequently stand reversed to its original numbers.**
38. The petitioner to be treated and considered as if, he had secured the original number **(16+43=59)** and taking into account of the said **original number 59** the petitioner should be treated and considered to be eligible to receive the call for personality test for the relevant selection process for which the petitioner appeared in the written examination for the post of Assistant Teacher.
39. Since the said **original number 59** is hereby restored and affirmed, the rank of the petitioner would automatically become higher than the last selected candidate as an Assistant Teacher for the subject and district for which the petitioner had applied for. The petitioner is thus, eligible to get an appointment for the same.
40. Next comes the zone of equity.
41. From the discussions made above, to the mind of this court, it is clear that an injustice had infringed the right guaranteed to the petitioner under Article 19 (1)(g) of the Constitution of India. The Fundamental Right of the petitioner stood infringed by an action on the part of the State authorities which was lacking of transparency and smacks of illegal, mala fide and arbitrary exercise of power and discretion vested with it. The petitioner was victim of an illegal and arbitrary

exercise of discretion and power at the instance of the respondent State authorities and suffered grave injustice by not receiving a call for personality test in the selection process for the Assistant Teacher.

- 42. The reliefs granted by a constitutional court in exercise of its high prerogative writ jurisdiction under Article 226 of the constitution is **equitable** in nature. The writ court shall exercise such equitable jurisdiction judiciously, to afford complete justice to the parties. When a valuable constitutional right or a legal right alleged to be infringed by a citizen before a constitutional court alleging any arbitrary, illegal or wrongful act of an Article 12 authority or illegal, wrongful or arbitrary exercise of any discretion by an Article 12 authority, the writ court with its plenary jurisdiction and power in exercise of its equitable jurisdiction under Article 226 of the of the Constitution of India intervenes.
- 43. Under Article 226 of the Constitution of India, writ remedy is an equitable remedy and discretionary. Writ Court exercises equity jurisdiction. Though scope of power of Writ Court to undertake judicial review of administrative actions is very wide, its exercise is subjected to self imposed restraint. It will be exercised only in furtherance of manifest justice and not merely on the making out of a legal point. It must be exercised with great caution and only in furtherance of public interest **to set right grave illegality** and manifest injustice. It is equally true that, writ court may refuse to grant relief in a case where justice and larger public interest require denial of such relief as compared to grievance of an individual, even assuming there is breach of natural justice/statutory prescription and decision is arbitrary.
- 44. The Hon'ble Supreme Court ***In the matter of: A.P. State Financial Corporation vs. M/s Gar Re-Rolling Mills and Anr., reported at (1994) 2 SCC 647***, had observed as follows:

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A court of equity, when exercising its equitable jurisdiction under Article 226 of the Constitution must so act as to prevent perpetration of a legal fraud and the courts are obliged to do justice by promotion of good faith, as far as it lies within their power. Equity is always known to defend the law from crafty evasions and new subtleties invented to evade law”.

45. The equity and discretion must also be exercised in a judicious manner keeping in mind that, to render justice to a citizen who was a victim of a manifest injustice at the instance of the State authorities should not harm another by taking away his right already vested in the process. Equity must be balanced in such a situation. In the instant case by receiving an appointment as an Assistant Teacher a valuable right had already been created in favour of the last candidate who received the appointment. The selection process was of 2012. Thus, a right had already been vested in favour of the said last candidate who received the appointment 10 years back. Equity also does not demand such right already settled in favour of another should be taken away. Equally, this court is of the considered opinion that, the petitioner should also get justice as his right under Article 19(1)(g) of the Constitution had been infringed in view of the illegal and arbitrary exercise of discretion and power by the State authorities.
46. In view of the foregoing discussions and reasons the respondent authorities/the appointing authorities are, therefore, directed to carry-out the following directions:
- a. The petitioner shall receive an appointment to the Post of Assistant Teacher in the District at Malda, for the subject for which he had applied for.
 - b. The appointment shall be given to the petitioner w.e.f. the same day when the last candidate had received his/her appointment as an Assistant Teacher at the District Malda for the subject the petitioner applied for in the relevant selection process. Such appointment shall be made in accordance with law forthwith and positively within a period of

three months from the date of communication of this judgment and order.

- c. The petitioner must be granted all the service benefits w.e.f. his date of appointment in every respect and head attached with the service including all the arrear benefits in every respect relating to his service benefit taking into account that the appointment of the petitioner, as if, took place on and from the day when the last candidate was appointed as an Assistant Teacher for the subject at the District Malda under the relevant selection process for which the petitioner applied for.
- d. The entire arrear dues payable to the petitioner from the date of his appointment, as directed above, relating to his salary and allied monetary benefit with whatever enhancement, if any, took place from time to time till date as was applicable for the said last selected candidate in the said relevant selection process as stated above, shall be released and paid to the petitioner forthwith and positively within a further period of three months from the date of issuing the necessary appointment letter/confirmation to the petitioner.
- e. On account of any enhancement in respect of the financial benefits attached to the relevant service as was given to the said last candidate selected in the relevant selection process must be granted to the petitioner and must be reflected in his service record so that he becomes eligible to receive all such benefits and/or connected benefits at the time of his superannuation/retirement.
- f. The current salary and all other benefits as applicable to the petitioner following the directions made above shall be released and paid to the petitioner regularly after his appointment, in accordance with law. All the necessary formalities before the statutory authorities relating to the

employment of the petitioner connected with service, which are the responsibilities of the state employers shall immediately be carried out and completed simultaneously with his appointment.

- g. In the event no immediate vacancy is available in the District Malda at the Post of Assistant Teacher for the subject the petitioner applied for, the respondent authorities shall be at liberty to appoint the petitioner as an Assistant Teacher for the subject he had applied for in any other District of the State preferably adjacent to District Malda, subject to the directions made above.

47. With the above observations and on the aforesaid terms the present writ petition, **WPA 9253 of 2015** stands allowed and disposed of.
48. There shall, however, be no order as to costs.

(Aniruddha Roy, J.)