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30.11.2021.
d.p.

**In The High Court At Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

**W.P.A 11672 of 2021
IA No. CAN 1 of 2021
(Via Video Conference)**

**Jahangir Hossain
-versus
State of West Bengal & Ors.**

**Mr. Md. Mokaram Hossain,
Mr. Md. Anwarullah,
Mr. Sandipan Maity.
...For the Petitioner.**

**Mr. Murari Chakraborty,
Mr. Munshi Ashiq Elohi.
...For the Respondent No.6.**

**Mr. Anirban Ray, Ld. G.P.,
Mr. Prosenjit Mukherjee,
Ms. Madhurima Sarkar.
...For the Madrasah Service
Commission.**

**Mr. Bhaskar Prosad Vaisya,
Mr. Ranjan Saha.
...For the State.**

Assigned

The petitioner is aggrieved by the order of transfer dated 9th July, 2021 whereby he has been transferred by the West Bengal Madrasah Service Commission from Balaramgarh High Madrasah, P.O. Rathipur, District- Paschim Medinipur to Rahatpur High Madrasah (HS), P.O.-Domohona, Uttar Dinajpur as Assistant Teacher, Education (H/PG) with immediate effect.

According to the petitioner, he made an online application for general transfer on 5th March, 2021.

The petitioner is a confirmed approved Assistant Teacher of Balarampur High Madrasah, Paschim Medinipur and has sought transfer in any other Madrasah in the District of Paschim Medinipur, Howrah, Hooghly and Kolkata.

The specific contention of the petitioner is that the order of transfer was passed contrary to the provisions of law.

The petitioner has relied upon Rule 33 of the West Bengal Madrasah Service Commission Rules, 2010 relating to transfer in Madrasah.

Rule 33(1)(c) mentions that an approved teacher or non-teaching staff shall be eligible to apply for transfer only after the confirmation of his/her service.

Rule 33(2)(a) mentions that the teacher/non-teaching staff seeking transfer shall have to apply in the prescribed format (with an advance copy direct) to the District Inspector of Schools (SE) in case of transfer within the District or to the Director of Madrasah Education, West Bengal in case of transfer from one district to another, through proper channel with necessary document(s).

Rule 33(2)(e) lays down that the Commission shall recommend the name of the candidate to the vacancy applied for, if suitable or to suitable available vacancy in order of preference of the candidate after counselling.

The petitioner asserts that the counselling as required under the aforesaid provisions was not conducted at all.

The petitioner submits that he has been illegally directed to join the transferred place of posting at Uttar Dinajpur which is very far from his place.

The petitioner has averred in the writ petition that he is the only Assistant Teacher of education subject in the Madrasah from where he has been transferred.

The petitioner prays for setting aside the order of transfer.

Learned Government Pleader appearing for the Madrasah Service Commission submits that transfer is an incidence of service and there is no law barring transfer of teacher from one Madrasah to the other.

Section 8 of the West Bengal Madrasah Service Commission Act of 2008 has been relied upon.

It has been submitted that one of the functions of the Commission is to select and recommend persons to be appointed to the vacant posts of teachers and also to recommend transfer including mutual transfer of the teachers in accordance with the provisions of the Act and the Rules made thereunder.

Rule 33(1)(c) has been relied upon. It has been submitted that the functions of the Commission as mentioned in the Act is inclusive of the powers of the Commission to transfer a teacher from one Madrasah to

the other irrespective of the fact whether the teacher makes an application or not.

The main contention is that it is open for the Commission to transfer any teacher from one Madrasah to the other at any point of time keeping public interest in mind.

The communication dated 2nd July, 2021 issued by the Director of Madrasah Education to the Secretary of the West Bengal Madrasah Service Commission has been placed in Court. It has been submitted that the petitioner has been transferred in the interest of the students of the transferee Madrasah.

It has further been submitted that the petitioner has not challenged the release order and has accepted the same.

The learned Government Pleader relies upon the judgment of the Hon'ble Supreme Court in the matter of Gujarat Electricity Board –vs- Atmaram Sungomal Poshani reported in (1989) 2 SCC 602 paragraph 4.

Reliance has also been placed on the decision delivered by the Hon'ble Supreme Court in the matter of K.B. Sukla & Ors. –vs- Union of India & Ors. reported in AIR 1979 SC 1136 paragraphs 27 and 28.

Prayer has been made for dismissal of the writ petition.

The learned advocate appearing for the Madrasah submits that apart from the petitioner there is no other teacher in the subject education in the said Madrasah.

It has been submitted that in the event the petitioner is being transferred from the present Madrasah then students of the said Madrasah will suffer.

I have heard and considered the submissions made on behalf of both the parties.

Law relating to transfer as appearing from the Act and the Rules is that a transfer can be effected only after an application is made by the teacher seeking transfer.

One of the functions of the Commission is to recommend transfer including mutual transfer in accordance with the provisions of the Act and the Rules.

The Rules lay down that an approved teacher is eligible to apply for transfer. The same implies that a formal application for transfer is a precondition for an approved teacher to seek transfer from one Madrasah to the other.

Rule 33(2)(a) clearly lays down that the teacher seeking transfer shall have to apply in the prescribed format. The Rule clearly mentions that transfer can be made only upon an application being made by the teacher seeking transfer.

Rule 33(2)(e) specifies that the Commission shall recommend the names of the candidates to the vacancy applied for in order of preference of the candidate after counselling. The same also indicates that an application has to be made in respect of the vacancy which is there and the application will be considered in

the order of preference given by the candidate after counselling.

Admittedly, in the instant case no counselling was held prior to passing the order of transfer. The vacancy where the petitioner has been transferred was also not mentioned in the list of preferences which the petitioner mentioned in his application for transfer.

The note appended to Rule 33(2)(f) mentions that the applicant may not exercise choice if none of the available vacancies is convenient to him/her and wait for future vacancy. The same implies that the preference of a candidate seeking transfer is required to be taken into consideration prior to transferring him from one Madrasah to the other.

The convenience of the candidate is to be looked into prior to passing the order of transfer. The candidate has the option to wait for future vacancy in the event the available vacancy is not convenient to him.

In the present case, convenience of the petitioner was not taken into consideration at all by the Commission. No option was provided to the petitioner so that he could choose from the vacancies as per his preference and convenience.

The Commission has simply cherry picked the petitioner and transferred him from the Madrasah at Paschim Medinipur to the Madrasah at Uttar Dinajpur.

It does not appear that the transfer has been made in public interest. The petitioner who is the sole education teacher in the Madrasah at Paschim

Medinipur ought not to have been transferred to a separate Madrasah without providing for a substitute education teacher in the Madrasah from where he has been transferred. The students of the Madrasah from where the petitioner has been transferred will certainly face difficulty in their studies on account of non-availability of the subject teacher.

The submission of the learned Advocate General that transfer being an incidence of service the employer had the authority to transfer a teacher from one Madrasah to the other in public interest is not supported by law governing the service condition of the petitioner.

In the case at hand, there is a specific law in the form of Act and the supporting Rules which clearly lays down the mode and procedure according to which teacher of Madrasah may be transferred. The same not being followed, the decision relied upon by the learned Government Pleader will not come to the aid of the Commission.

It is settled law that when law requires an act to be done in a particular manner, the act is to be done in that manner or not at all.

Service of a teacher in a Madrasah is not transferable without an application being made by the teacher seeking transfer. Transfer is permissible only when the conditions as mentioned in Rule 33(1) and the procedures prescribed in Rule 33(2) are followed.

Rules not being followed in the present case, the order of transfer cannot be supported in law and liable to be set aside.

The submission of the learned Government Pleader that the petitioner has not challenged the order of release will not change the fate of the instant writ application because the petitioner has filed a supplementary affidavit challenging the subsequent order of release. If the initial order of transfer is held to be illegal, then the consequential order releasing the petitioner from the Madrasah certainly falls flat and is liable to be set aside.

The impugned order of transfer and the order of release are accordingly set aside.

The writ petition stands allowed.

The application for vacating filed by the Commission is dismissed.

No costs.

Urgent photostat certified copy of this order be supplied to the parties, if applied for, as early as possible.

(Amrita Sinha, J.)