

20
18.05.2022
B.M.

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

W.P.A 6397 of 2021

**Debashree Ghosh
-versus-
State of West Bengal & Ors.**

**Mr. Uday Shankar Chattopadhyay,
Mr. Santanu Maji,
Ms. Snigdha Saha,
Mr. Pronay Basak,
Ms. Trisha Rakshit.
...For the Petitioner.**

**Mr. Tapan Kumar Mukherjee,
Ms. Saheli Mukherjee.
...For the State.**

**Mr. Prosenjit Mukherjee,
Ms. Madhurima Sarkar.
...For the Madrasah Service
Commission.**

The petitioner joined service of a Madrasah being successful in the 3rd SLST, 2009. She was appointed in a Madrasah in August, 2010 and her first date of joining is 12th February, 2011.

The petitioner thereafter again appeared in the 6th SLST in the year 2018 and being successful she was recommended by the West Bengal Madrasah Service Commission to join a separate Madrasah.

Appointment letter was issued in favour of the petitioner on 14th July, 2018 and her service was approved on 31st August, 2018.

A notice was published by the Madrasah Service Commission for submission of application online for transfer. The last date for making the application was 31st March, 2021 which was thereafter extended till 30th June, 2021.

In serial No. 6 of the said notice, it was mentioned as follows:- “Seniority for general transfer will be considered from the date of joining of the present serving Madrasah of the applicant”.

According to the petitioner, the said provision is contrary to Regulation 33 of the West Bengal Madrasah Service Commission (Recruitment/Selection and Recommendation of persons for appointment and Transfer to the post of Teacher and non-teaching Staff) Rules, 2010.

The note appended to Rule 33 (f) of the aforesaid Rules mentions that an applicant may not exercise choice if none of the available vacancies is convenient to him/her and wait for future vacancy.

Note (a) appended to Rule 33(i) mentions that if there are more than one candidate (applicant) for a particular vacancy, the senior most candidate in service shall get preference.

Note (b) of Rule 33(i) mentions that if two or more applicants having same length of service, the female candidate, if any, shall get preference. Among the female candidates, the unmarried one shall get priority over the married one.

33(i)(c) mentions that if the service length of more than one candidate of the same sex (subject to note b) be the same, the person having seniority in age shall get preference and 33(i)(d) mentions that if the service length and age of more than one candidate be the same, the person having better/higher academic qualification shall get preference.

The aforesaid provision lays down the mode of giving priority to the candidates while selecting one for transfer.

None of the aforesaid provisions mentions that the service of the candidate is required to be considered only in respect of a particular institution.

All the aforesaid provisions mention that seniority will be on the basis of the length of service.

After the petitioner left the previous Madrasah to join the next Madrasah being successful in the 6th SLST, there was no break in her service.

The staff details in respect of the petitioner as prepared by the Department of School Education, Government of West Bengal mentions the first date of joining in service of the petitioner as 30th September, 2010.

The petitioner has mentioned that all her pay benefits are disbursed taking into consideration her date of first joining in service in the year 2010 and not from the date of first joining in the present Madrasah in the year 2018.

The District Inspector of Schools, Secondary Education, Hooghly, has filed a report before this Court on 20th April, 2022 relying upon paragraph 33 of the West Bengal Madrasah Service Commission Recruitment (Selection & Recommendation of Persons for Appointment and Transfer to the Post of Teaching and Non-teaching Staff) Rules, 2010 which mentions that if there are more than one candidate/applicant for a particular vacancy, the senior most candidate in service shall get preference.

The Director of Madrasah Education, West Bengal, has forwarded instruction to the learned advocate representing the State respondents wherein it has been mentioned that the protection of pay/service benefit of the last drawn pay of the candidates will be protected provided the candidates are recruited/recommended for the same post of service.

In the present case, there has indeed been protection of pay and service benefit in favour of the petitioner as the post in question in both the two Madrasahs is the same.

The Secretary of the West Bengal Madrasah Service Commission has filed an affidavit wherein it has been mentioned that as per Clause 6 of the notice dated 5th February, 2021 seeking application for transfer, seniority for general transfer will be considered from the date of joining the present serving Madrasah of the applicant.

The learned advocate representing the Madrasah Service Commission has relied upon an order dated 7th January, 2021 passed by a Coordinate Bench of this Court in WPA 11807 of 2020 in the matter of Nasim Khan vs. State of West Bengal & Ors., wherein the Court observed that the change of Madrasah in the year 2018 from one Madrasah to the other would automatically invalidate the original application.

On perusal of the order passed in Nasim Khan (supra) it appears that, the petitioner joined one Sekh Para Junior High Madrasah in the year 2008 and applied for transfer in the year 2011. As the petitioner did not get place or posting of his choice he did not accept any of the option given to him and his case was deferred for being considered under the next transfer scheme. Thereafter, the petitioner participated in the next selection test and was successful and he was recommended to join Jamalpur High Madrasah in the year 2018. The petitioner was called for counselling in the year 2020 based on the application which he filed when he was at Sekh Para Junior High Madrasah. It is under such circumstances, the Court was of the opinion that as there was a change of Madrasah in the year 2018, the earlier application filed by the petitioner in 2011 automatically became invalid.

In the present case, the petitioner applied for transfer in the year 2021 in response to the notice given by the West Bengal Madrasah Service Commission. It is not the case of the petitioner that application for transfer was filed prior to joining the present Madrasah in the year 2018. Accordingly, the ratio laid down by the Court in the matter of Nasim Khan (supra) will not be applicable in the present facts and circumstances of the case.

In the case at hand the seniority of the petitioner is required to be considered strictly in accordance with Rules framed by the Madrasah Service Commission, which mentions about "seniority in service" and not seniority in the present surviving Madrasah.

It is settled law that the provision of the Act and the Rules prevails over any notice which is published by an authority contrary to the law framed by the said authority.

Accordingly, in the present facts and circumstances of the case, the Madrasah Service Commission is directed to consider the seniority of the petitioner from her first date of joining of service in the year 2011 and not from 2018 when she joined a separate Madrasah on being successful in a subsequent selection process.

The writ petition stands disposed of.

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

(Amrita Sinha, J.)