

19 28.01.2022
tkm Ct.No.4.

**M.A.T.1032 of 2021
With
CAN 1 of 2021
With
CAN 2 of 2021
With
CAN 3 of 2022**

(Via Video Conference)

**Nirmal Kanti Joddar
Vs.
State of West Bengal & Ors.**

Mr. Sridhar Chandra Bagari.

...for the Appellant.

Mr. Bhaskar Prasad Vaisya,
Mr. Suman Dey.

...for the State.

Ms. Koyeli Bhattacharya.

....for the Respondent No.4.

Mr. Ekramul Bari

....for the Respondent No.6.

The school authorities are taking shelter more on the guidelines than the substantive statutory rules governing the field. The West Bengal School Service Commission (General Transfer, Transfer on special grounds and relocation) Rules, 2015 was framed in exercise of the power conferred under Section 17 read with Sub Section (1) and Sub-Section (II) of Section 10B of the West Bengal School Service Commission Act, 1997 superseding the West Bengal School Service Commission (General Transfer) Rules, 2013. It is no longer res integra that the moment the statutory rule is pitted against the guidelines issued by the authority, the Rules shall prevail and the guidelines, to the extent of repugnancy and/or inconsistency shall not have any

effect. In other words, the provision contained in the statutory rules are required to be adhered by all authorities coming within the purview thereof and no departure can be made unless the Rule or the Act under which such rule has been framed confers a right or the power. Un-amended Rule 4 of the aforesaid Rules, 2015 imbibe the incidences of transfer pertaining to a teaching and non-teaching staff of a school which runs thus;

4. General Transfer on Special ground – (1) An incumbent belonging to the following categories may apply for transfer on any of the special grounds, namely:-

- a) Any teacher or non-teaching staff or his/her son/daughter or spouse suffering from malignant diseases, heart diseases, renal failure, thalassemia, replacement of organ, serious gynaecological disorder or physically disablement of 40% or more or to assist in proper treatment of self or his/her son/daughter or spouse;
- b) Any women teacher or non-teaching staff whose husband died prematurely or divorced or is a victim of crime;
- c) Teachers or non-teaching staff serving in Aided/Sponsored schools where the serving places of the spouses are away beyond 50 KMs.

- (2) In respect of special ground mentioned in clause (a) of sub-rule (1) the State Government may cause medical enquiry for satisfaction on urgency of transfer of a teacher.
- (3) In respect of special ground Victim of crime mentioned in clause (b) of sub-rule (1), the application may be considered, where FIR has been lodged and case has been instituted.
- (4) In respect of special ground mentioned in clause (c) of sub-rule (1), 10% of the applications on this special grounds shall be considered by the West Bengal School Service Commission for recommendation in a year on receiving applications after publication of notice of General Transfer and Only one member of the spouse may apply for general transfer under this special ground and priority shall be given to the senior most applicant serving maximum period in the present place of posting at a maximum distance to the proposed place of posting in comparison to others.

Unamended Rule 5 relates to eligibility for general transfer of a teacher or a non-teaching staff from one school to another in the same category of posts and the subject provided the contingencies mentioned therein are strictly fulfilled. Since one of

the sub-rule is a centre of consideration in the instant appeal, it would be apposite and profitable to quote the unamended Rule 5 of the said Rules as under;

5. Eligibility for General Transfer – (1) Any Teacher or non-teaching staff qualified as per provision of rule 3 of this Rules may be eligible for transfer to a post of Teacher or non-teaching staff of another school of same category of post and for a Teacher of same subject under same category of reservation (Honours/Post Graduate or Pass) and Post, as the case may be.

- (2) An incumbent opting for General Transfer shall be transferred to the same category of schools having Bengali or English or Hindi or Nepali or Oriya or Santhali or Telegu or Urdu, as the medium of instruction, as the case may be.
- (3) A male incumbent shall not be eligible for General Transfer in a female vacancy and a female incumbent can prefer male/Co-ed/female vacancy.
- (4) No incumbent shall be eligible to apply for a General Transfer who is left with less than two years of service from the date of his/her retirement on superannuation.
- (5) The General Transfer shall be allowed to an incumbent, against whom no Judicial or Disciplinary proceeding is pending or contemplated and, who is not under suspension.
- (6) The school authority of a particular school shall not forward applications received from more than 10% (rounded up to next higher digit) of total number of teachers of that school. Priority shall be given first to the teachers senior in age.

It would be pertinent to record that the said Rules of 2015 was subsequently amended by a notification dated September 8, 2021 but the Rule 5 remained unchanged except to the extent that the period provided in sub-rule 4 of two years is reduced to one year. Sub Rule 6 is a focal point and prima facie appears to us at the initial hearing to have been completely departed and/or not adhered to by the school authority who in fact have usurped the power of the Central Commission/Regional Commission envisaged under Rule 6 thereof.

We will deal with the effect of sub-rule 6 of Rule 5 of the said Rules later but we feel that the unamended and the amended provision is required

to be elucidated first in order to have the clarity in the subject.

The unamended Rule 6 of the said Rules contains an exhaustive provision relating to procedure for submission of the application of the general transfer concerning the teacher, and the mode of awarding the marks on different parameters. Rule 4 and 6 have been completely substituted by the amended notification dated September 8, 2021 which stand as under;

4. Grounds for Transfer. – An incumbent may apply online in the designated portal for transfer on following grounds :

- (a) Any incumbent or his/her son/daughter/spouse suffering from malignant disease/severe heart disease/renal failure/thalassemia, replacement of organ/serious gynaecological disorder causing serious problem in attending the school;
- (b) Physically disablement of 40% or more as certified by competent authority;
- (c) Female incumbent facing serious problem in attending the school due to divorce or death of husband;
- (d) Incumbent of age 57 years and more and willing for home district posting;
- (e) Any other reasons.

6. Procedure for submission and consideration of the application. –
 (1) An incumbent, may apply for transfer on grounds and manner mentioned in rule 4. The respective authorities involve in the process of transfer i.e. School Managing Committee (SMC), District Inspector of Schools of Secondary Education (DI), Central Commission (CSSC), West Bengal Board of Secondary Education (Board) shall consider such transfer application within such time as may be specified by the State Government by guidelines.

(2) Upon submission of application, the authority of SMC shall –

- (a) verify the service records and other details of applicant;
- (b) examine whether departmental/judicial proceeding is pending or being contemplated, or suspension order is issued against applicant or not. In any such affirmative case, the school authority shall not forward the application;
- (c) consider the number(s) of subject teacher(s) and roll strength. If resultant vacancy of school in particular subject become zero, or not commensurate with roll strength, the authority of SMC shall not forward the application;
- (d) consider the total application(s) from school is not more than 10% (ten) of total teachers' strength of school;
- (e) dispensed with the provision of clause (c) and (d) of this sub-rule for applications made on grounds mentioned in rule 4(a)

to (d);

Provided that while considering such applications, if resultant vacancy of school in particular subject become (0) zero, or not commensurate with roll strength, the SMC shall approach the CSSC through DI/S (SE) for filling up the vacancy;

Provided further that the CSSC may take endeavour to fill such resultant vacancy(s) by any incumbent whose application for transfer is fit for the aforesaid resultant vacancy or under provision of the section 10C of the Act with the approval of the State Government;

Provided also that the Commissioner of School Education shall supervise the process and ensure filling up of such vacancies with utmost priority and send progress report fortnightly to the School Education Department.

- (f) cause to examine the applicant by the doctor of the SMC in case of transfer application made on medical grounds mentioned in clause (a) of rule 4 and must indicate the disease of the applicant, which caused serious problem in attending the school;
 - (g) issue "No Objection Certificate" (NOC) in fit cases and shall forward transfer application to District Inspector concerned.
- (3) District Inspector concerned upon receipt of application with the NOC from school, shall;
- (a) verify the service records and other information as furnished by the incumbents;
 - (b) take the views of the Chief Medical Officer of Health (CMOH) on transfer application related to medical grounds as reported by the doctor of the SMC;
 - (c) forward transfer application to Central Commission along with his/her view.
- (4) Central Commission upon receipt of applications for transfer from District Inspector shall consider the same only against the vacancy available at the time of consideration on following basis:-
- (a) It shall populate the reason wise transfer list forwarded by District Inspectors;
 - (b) Vacancy already reported to it for direct recruitment, shall not be filled by transfer;
 - (c) Transfer shall be made in the same category of post, as specified in sub-rule (1), (2), (3) of rule 5;
 - (d) In case of application for transfer in the category of rule 4(a) to (d) by a teacher of a particular subject to a school which is already having sufficient or excess teacher in that subject, Central Commission shall not consider the application for transfer to opted school. In the event when all options exercised are not found suitable, the incumbent may be considered for transfer to a school (having requirement of that subject teacher) nearby to opted school(s).
 - (e) Applications submitted against a single vacancy with more than one reasons, will be considered in order of preference from grounds mentioned in rule 4(a) to (e).
 - (f) In case of applications under rule 4(c) submitted against a single vacancy, divorce/Widow Lady incumbent having child below the age of 10 years (on date of application) shall get preference over applicant having child above 10 years of age.
 - (g) In case of applications under rule 4(d) submitted against a single vacancy, incumbent who submitted application earlier shall get preference.
 - (h) In case of application for transfer in the category of Rule 4(e) by a teacher of a particular subject to a school which is

already having sufficient or excess teacher in that subject, CSSC shall not consider the application for transfer to opted school. In the event when all the options exercised are not found suitable, the transfer application will be rejected by CSSC.

- (i) In other grounds transfer under rule 4(e), if more than one application for a single vacancy is received, consideration shall be made on the basis of marks obtained on points as follows :

Sl. No.	Particular	Marking
1	2	3
1.	Service rendered in present school and post till last date of application	2(two) marks for each completed year till 31-12-2005 not exceeding 20 marks and 1 (one) mark for each completed year after that. For 6 months and above but below 1 year will be awarded by half of the marks allotted for the year.
2.	(i) Female applicant having child below 10 years of age; (ii) Female applicant having child above the age of 10 years (age till last date of application)	5 (five) marks in addition to the marks awarded in serial No.1 3 (three) marks in addition to the marks awarded in serial No.1
3.	Present serving school of applicant is away from the spouse working place	(i) above 50 km upto 100 kms: 1 mark (ii) Above 100 Kms to 200 Km: 2 marks (ii) Above 200kms : 3 marks
4.	Distance from present Posting of applicant	While considering the distance in kilometers from the place of residence and to the place of posting, the address recorded in the Service Book shall be taken into account. For every 50 Kms distance, 1(one) marks shall be awarded. However, total marks will not exceed more than 6(six) marks. Any change in the Service Book in this regard will be required to be supported with any one of the following documents in the name of the applicant or his/her spouse, namely: 1) EPIC (Voter Card) 2) Aadhar Card 3) Passport 4) Landline or postpaid bill of mobile telephone 5) Electricity bill 6) Bank Passbook 7) Driving Licence. Distance calculated by the CSSC will be final and no appeal for fresh

		calculation will be entertained.
N.B. In case of two or more incumbent securing same marks, application submitted earlier shall get priority.		

- (j) After considering the applications so forwarded to the central Commission in the manner provided hereinbefore, it may issue recommendation of transfer to the Board, in fit cases.
- (k) In case of rejection, the Central Commission shall inform reason to incumbent, District Inspector and School Management Committee.

(5)

- (a) The Board being appointing authority, after receipt of such recommendation, issue transfer order mentioning the joining time, with copy to CSSC, DI and SMC (of present and proposed school of posting) and keep the vacancy report updated caused due to transfer.
- (b) After receipt of the transfer order, SMC of releasing school shall take action for release and issue LPC.
- (c) The SMC/HM of joining school, as the case may be, shall join the teacher within the given time.
- (d) After receipt of copy of the transfer order, release order and joining report, concerned DI will take action for updating service record of incumbent.

(7) The Board may, on basis of application or otherwise transfer any female teacher who is of victim of crime with the concurrence of the State Government in the School Education Department. It shall maintain due confidentiality in regard to identity of such victim.”

The unamended Rules 6 postulates that the Central Commission shall publish a list of vacant posts once in a year mentioning the category, subject and the medium of instruction and other particulars in the website of the Central Commission and simultaneously notices were to be issued by the Central Commission and Regional Commission in case of general transfer and/or the general transfer on special ground provided under Rule 4(1)(c). There has been a sea change, one can conceptualize from the amended provision relating to Rule 6 that instead of publication by the Central Commission, online portal have been provided by the authority to an incumbent to apply for

transfer on the ground mentioned in Rule 4. It is further provided that the respective authorities i.e. School Managing Committee, the D. I. of Secondary Education, the Central Commission and the West Bengal Board of Secondary Education shall consider such transfer application within the time as specified by the State Government upon issuance of the guidelines.

The reference to the guidelines can be seen from the said amended Rule 6 but restricted to the guideline within which the application has to be processed and completed in its entirety. Sub Rule (2) of Rule 6 casts an obligation upon the School Managing Committee to verify the service record and other details of the applicant, examine whether any departmental proceeding or judicial proceeding is pending or being completed or the order of suspension is issued as well as the total number of vacancies of a post in a particular category but Clause (d) therein mandates that the said School Managing Committee will consider the applications so uploaded on the website not exceeding 10% of the total teacher of the school.

However, under Clause (e), the School Managing Committee retained the power to relax or dispense with the mandate of 10% of the total teaching strength of the school but only if an application is made under Clause (a) to (d) of Rule 4 of the said Rules.

From the harmonies of the aforesaid amended and unamended rules, it leaves no ambiguity in our mind that the legislatures while incorporating the said rules did not think it fit to

substitute Rule 5 except for a limited purpose i.e. from two years to one year. Sub-Rule 6 of Rule 5 is categorical to the extent that the school authority i.e. School Managing Committee shall not forward the application in excess of 10% of the teachers of the said school but the priority shall be given to the teachers who is senior in age. The logical inference one can draw from the aforesaid reference that the School Managing Committee receiving the applications of the teacher of the said school if exceed 10% of the teacher strength, is under no obligation to refer all the applications but must forward the application which strictly comes within the parameter of 10% of the total strength of the teachers that too upon taking into account the seniority in age. It is not imperative that the school authority would forward all the applications in lock stock and barrel in complete departure to sub-rule 6 of Rule 5. Clause (d) of sub-rule (2) of Rule 6 retained the restrictions of 10% of the total strength of the teachers in the said school. However, power to relax is provided on a particular contingency and not be used in a routine manner. The moment the relaxation is restricted to the contingencies evident under Rule 4(a) to 4(d), it automatically denudes the school authority to exercise the power of relaxation beyond the above-mentioned eventualities.

By necessary implication, the power of dispensation or relaxation cannot come beyond the specific purview or the eventuality but must be exercised within the circumference thereof. It further appears that under the amended

provisions, the online portal has been launched but it does not take away the other provisions of the statutory rules requiring the school authority to undertake the exercise contemplated in sub-rule (2) of rule 6 or sub-rule (6) of rule 5 therein.

What can be logically deduced therefrom is that the incumbent may still apply for general transfer through the said portal but the school authorities have to make a verification and issue “No Objection Certificate” before the said application is further processed either by the DI or the Central Commission or the Regional Commission, as the case may be, and the school authority shall not issue the “No Objection Certificate” in violation of sub-rule 6 and rule 5 or Clause (d) of sub-rule (2) of rule 6. Any departure would in effect expand the horizon of the consideration which was never the legislative intent as the application must be within the 10% of the total strength of the teachers in the school and be taken and considered among those incumbents.

In the instant case eight numbers of applications were uploaded on the online portal and the school authority after verifying the marks allotted in terms of the amended rule 6 have forwarded the applications of incumbents who secured higher marks which in our opinion is in complete violation of sub-rule (6) of rule 5 of the aforesaid Rules.

Mr. Bari is very much vocal that the guidelines provides for meritorious application on the basis of seniority. He has further highlighted that in case of any equal marks having obtained by more than one candidate, the

seniority in age shall be the deciding factor. As indicated hereinabove wherein all the marks is a post recommended exercise and the school authority can neither award the marks nor can restrict application for recommendation based upon such marks. The power conferred upon the school authority is to forward the application strictly in terms of sub rule 6 of rule 5 and thereafter the awarding of marks is within the domain of the authority having entrusted to consider the merits of the said application amongst the aforesaid candidates. The school authorities have put the cart before the horse and in fact have expanded the horizon of the consideration overlooking the specific eligibility criteria. According to the appellant, he is senior in age to the other candidates and the school authority can only recommend two applications as the total strength of the teaching staff is 16 and, therefore, the teacher who is younger in age has been recommended by the school authority which is in clear violation of the statutory provisions. Even a Single Bench proceeded on the basis of marks disclosed by the school authority without considering the various provisions of the statutory rules and awarded a costs treating the writ petition filed by the appellant to be frivolous.

On the basis of discussion made hereinabove, awarding of the marks is a post recommendation exercise which cannot be a factor to be considered by the school authorities at the time of recommendation or the issuance of the "No Objection Certificate". The school authority is bound to adhere to the provisions

contained in the sub-rule 6 of rule 5 of the said rules and cannot travel beyond it. Since 50% applications have been uploaded on the website and the school authorities have recommended the name based on the marks which in our opinion is contrary to the statutory provisions. The impugned order suffers from serious infirmity or illegality.

The school authority is directed to withdraw the “No Objection Certificate”, if issued to a candidate who is younger in age of the petitioner or do not come within the 10% category and shall issue the “No Objection Certificate” strictly in terms of rule 5 (6) of the said rules within three weeks from date.

The appropriate authority is directed to consider the aforesaid application strictly in terms of rule 6 of the said rules and shall take an appropriate decision within three weeks from the date of communication of this order.

MAT 1032 of 2021 is, thus, disposed of.

In view of the disposal of the main application, all connected applications are also disposed of.

(Harish Tandon, J.)

(Rabindranath Samanta, J.)