

(2019) 03 CAL CK 0081

In the Calcutta High Court

Case No : Wp. State Admin Trib. (WP.ST) 112 Of 2018

Azim Gazi

APPELLANT

Vs

State Of West Bengal & Ors

RESPONDENT

Date of Decision : 15-03-2019

Acts Referred:

West Bengal Regulation Of Recruitment In State Government Establishments And Establishments Of Public Undertakings, Statutory Bodies, Government Companies And Local Authorities Act, 1999 — Section 3
Constitution Of India, 1950 — Article 12, 14, 16, 141, 142

Citation : (2019) 03 CAL CK 0081

Hon'ble Judges : Dipankar Datta, J;Saugata Bhattacharyya, J

Bench : Division Bench

Advocate : Joytosh Majumder, Pinaki Dhole, Avishek Prasad

Final Decision : Dismissed

Judgement

Saugata Bhattacharyya

1. The writ application is presented against the order dated February 9, 2018 passed by the West Bengal Administrative Tribunal (hereinafter the tribunal). In the original application, being O.A. - 906 of 2017, claim of the writ petitioner namely Azim Gazi (hereinafter the petitioner) for appointment on compassionate ground due to death of his father Md. Nuruddin Gazi, on July 4, 2006, while he was working as khalasi in Road and Building Research Institute under Public Works (Roads) Directorate, Government of West Bengal, was made and the same was rejected by the impugned order.

2. It appears from the application made by the petitioner in the prescribed proforma on January 2, 2007, page 135 of the writ petition, that the deceased employee left behind him his widow, namely, Sanehar Bibi, and three sons, namely, Abdul Halim Gazi, Aziz Gazi and Azim Gazi. It also appears from the said application that the elder brothers of the petitioner had crossed the age of 18 years on the date of making such application for compassionate appointment,

whereas age of the petitioner was 17 years 2 months on January 2, 2007. The petitioner and his two other elder brothers on the date of making application on January 2, 2007 had the qualification of Class VIII pass.

3. At the first instance, the application of the petitioner for appointment on compassionate ground was considered by the Joint Secretary, Public Works Department. Vide memo dated February 9, 2015 addressed to the Chief Research Officer & Director, R & BRI, Public Works (Roads) Directorate, the Joint Secretary declined to consider the prayer of the petitioner for appointment on compassionate ground as per existing rules. The petitioner on being aggrieved by the said cryptic order dated February 9, 2015 issued by the Joint Secretary, assailed the same by filing an original application, being O.A-372/15 before the tribunal, and the same was disposed of vide order dated December 16, 2015. The tribunal set aside the impugned order dated February 9, 2015 on the ground that it was a non-speaking one and directed the Joint Secretary to consider the application of the petitioner for compassionate appointment within a specific time by passing a reasoned order after granting opportunity of hearing to the petitioner. Pursuant to the said order of the tribunal dated December 16, 2015 the Joint Secretary to the Government of West Bengal, Public Works Department, passed an order on March 14, 2016 considering the prayer of the petitioner for appointment on compassionate ground. Placing reliance upon the Labour department's order No. 30-Emp dated August 21, 2002, 30-Emp dated April 2, 2008 read with 251-Emp dated December 3, 2013, he rejected the prayer of the petitioner for appointment under died-in-harness category. The concerned authority found the petitioner ineligible to be appointed on compassionate ground since he was found under aged on the death of his father on July 4, 2006. In addition thereto the authority also came to a finding that in spite of two elder brothers of the petitioner being eligible to apply on the date of death of their father, considering their age and academic qualification, they chose not to make any application for compassionate appointment, yet, the petitioner being an under-aged candidate has made the application for compassionate appointment in search of employment.

4. Meanwhile, the petitioner preferred one contempt application being C.C.P No. 51 of 2016 arising out of original application (O.A. 372/2015) alleging violation of the order of the tribunal dated December 16, 2015. In the said contempt proceedings the Joint Secretary, Public Works Department, filed a compliance report relying upon notification No. 97-Emp dated June 6, 2005 thereby refusing to accede to the claim of the petitioner for appointment on compassionate ground. In the said compliance report too, the concerned respondent authority asserted that the petitioner was a minor on the date of death of his father and as per provision contained in clause 2 of notification No. 97-Emp dated June 6, 2005 the petitioner was not found eligible for being appointed on compassionate ground. It was also stated in the said compliance report that compassionate appointment is not a regular method of recruitment of employees and the rules for compassionate appointment are to be strictly adhered to. Moreover, the

application of the petitioner was not found to be complying with the provisions of the relevant rules relating to compassionate appointment.

5. The petitioner preferred second original application (O.A. 906 of 2017) assailing the order dated February 9, 2015 as well as order dated March 14, 2016. While praying for its quashing, consequential relief was prayed so that letter of appointment in favour of the petitioner on compassionate ground is directed to be issued. The tribunal dismissed the original application solely on the ground that there was no immediate financial hardship in the family of the deceased employee requiring compassionate appointment to be offered to one of the dependent family members of the deceased employee upon consideration of the fact that apart from the petitioner, there were two elder sons of the deceased employee who were eligible on the date of death of the deceased employee for being considered for appointment on compassionate ground but the petitioner who was an under aged candidate at the time of death of the employee had made an application for such appointment.

6. During course of hearing the learned advocates representing the parties brought to the notice of the court the notification dated 97-Emp dated Kolkata, the June 6, 2005 issued by the Labour Department, Employment Cell, Government of West Bengal and the relevant part thereof is quoted below :-

"In exercise of the power conferred by clause (c) of section 3 of the West Bengal Regulation of Recruitment in State Government Establishments and Establishments of Public Undertakings, Statutory Bodies, Government Companies and Local Authorities Act, 1999, the Governor has been pleased to lay down the following principles and procedures to be followed in dealing with the issue of appointment on compassionate ground to the dependents of employees who die in harness, or who retire prematurely on being declared permanently incapacitated.

One of the dependants of an employee who dies in harness or who retires prematurely on being declared permanently incapacitated may be offered appointment on compassionate ground subject to the fulfillment of the following conditions:

- i) The employees had died or retired on being permanently incapacitated before completing 20 years of services or before attaining the age of 50 years, whichever is earlier.
- ii) The family of the deceased or the retired employees, as the case may be, is in need of immediate assistance and appointment of dependant of the employees is absolutely essential for survival of the family.

For the purpose of appointment on compassionate ground in terms if this notification, a dependant shall mean spouse, a son or an unmarried daughter who was solely dependant on the earning of the deceased or the retired employee."

Paragraph No. 2 of the said notification contemplates offering appointment on compassionate ground in favour of the dependent of an employee who dies-in-harness or who retires prematurely on being declared permanently incapacitated subject to two conditions - (i) the employee has died or retired on being permanently incapacitated before completing 20 years of services or before attaining the age of 50 years, whichever is earlier and (ii) the family of the deceased or retired employee, as the case may be, is in need of immediate assistance and appointment of dependent of the employee is absolutely essential for survival of the family.

7. In the present case before us, since the petitioner's father died on July 4, 2006, the notification No. 97-Emp dated June 6, 2005 would govern the case of appointment of the petitioner on compassionate ground. It appears from the application of the petitioner in the prescribed proforma made for consideration of his appointment on compassionate ground that the deceased employee Md. Nuruddin Gazi on the date of his death on July 4, 2006 completed service of 25 years 3 months 16 days, thereby rendering the petitioner ineligible for being appointed on compassionate ground.

8. We hasten to add herein that the fact of making application by the petitioner being the youngest of the three sons of the deceased employee at a time when he was under-aged, although the other elder brothers were eligible in terms of their age and educational qualifications, as it appears from the application made by the petitioner in the prescribed proforma for appointment on compassionate ground, goes to show that there was no need of immediate financial assistance as envisaged under paragraph 2 (ii) of the notification No. 97-Emp dated June 6, 2005.

9. Two other notifications, one bearing No. 82-Emp dated Kolkata, June 10, 2009 and other dated March 1, 2016 issued vide memo No. 26-Emp were also brought to our notice by the learned advocates appearing for the parties in order to satisfy the query of the court on applicability of the relevant notification relating to appointment on compassionate ground in consideration of the date of death of the employee. It is well settled that the notification which is prevalent at the time of date of death of the employee will govern the case of appointment on compassionate ground as a result whereof the clarification offered by the concerned Labour Department, Employment Cell, Government of West Bengal in response to the point raised on all pending cases on which no decision had been taken as contained in memorandum dated June 10, 2009, is of no assistance. The other notification dated March 1, 2016 issued vide memo No. 26-Emp whereby the Governor was pleased to bring changes in the existing guidelines to dispose of the cases relating to appointment on compassionate ground, contained revised provision in exceptional cases such as - (i) death during action and (ii) where none in the family is eligible etc. empowering the departments to consider request for compassionate appointment even where the death or retirement on medical grounds of a government servant took place up to 5 years

ago. Such revised provision on death during action or where none in the family is eligible, does not improve the case of the petitioner since there was no unnatural death of the father of the petitioner and the application of the petitioner made in the prescribed proforma shows existence of two eligible elder brothers for being considered for appointment on compassionate ground who did not apply giving rise to an inference that they did not require employment.

10. Recently a coordinate Bench of this Hon'ble Court had considered the question of appointment of two candidates on compassionate ground when at the time of death of the employee the dependent applicants were not of the prescribed age for being appointed, in depth in the writ petition being W.P.S.T. 35 of 2018 (Arindam Choudhury -versus- The State of West Bengal and others) along with W.P.S.T. 38 of 2018 (Anirban Jana - versus- The State of West Bengal and others) and delivered judgement on February 4, 2019. While dealing with both the cases of Arindam Choudhury and Anirban Jana the coordinate Bench separately dealt with the applications made by the dependant family members after the death of the employees who were found to be not within the prescribed age limit as fixed in terms of the relevant notifications. The coordinate Bench placing reliance on the judgements delivered by the Supreme Court in the cases of Umesh Kumar Nagpal v. State of Haryana, reported in (1994) 4 SCC 138, SBI v. JaspalKaur reported in (2007) 9 SCC 571, SBI v. Anju Jain, reported in (2008) 8 SCC 475, V. Siva Murthy v. State of A.P., reported in (2008) 13 SCC 730, SAIL v. Madhusudan Das, reported in (2008) 15 SCC 560, Bhawani Prasad Sonkar v. Union of India, reported in (2011) 4 SCC 209, State of Gujrat v. Arvindkumar T. Tiwari, reported in (2012) 9 SCC 545, Union of India v. Shashank Goswami, reported in (2012) 11 SCC 307, culled out the principles elaborately which are reproduced below -

"a) Public employment in offices or posts under the State or its instrumentalities or any other authority covered by Article 12 of the Constitution must be in accordance with Articles 14 and 16 of the Constitution, meaning thereby that appointment must be preceded by an invitation to the public for offering one's candidature for consideration, providing equal opportunities to each of the applicants to participate in the process and subject to fulfillment of the eligibility criteria, selection on the basis of merit.

a) Appointment based solely on descent is inimical to the Constitutional scheme.

b) Appointment on compassionate ground, which is offered on humanitarian grounds, is an exception to the above rule of equality in the matter of public employment. However, compassionate appointment is not permissible in the absence of any scheme therefor.

c) None can claim compassionate appointment, on the occurrence of death/ medical incapacitation of the concerned employee (the sole bread earner of the family), as if it were a vested right, and any appointment without considering the financial condition of the family of the deceased is legally impermissible.

- d) The whole object of granting compassionate employment by an employer being intended to enable the family members of a deceased/incapacitated employee to tide over the sudden financial crisis, appointments on compassionate ground should only be made in exceptional cases to save the family of the deceased/incapacitated staff from destitution where, but for such appointment, they would not survive.
- e) An application for compassionate appointment has to be made immediately upon death/incapacitation and in any case within a reasonable period thereof or else a presumption could be drawn that the family of the deceased/incapacitated employee is not in immediate need of financial assistance. Such appointment not being a vested right, the right to apply cannot be exercised at any time in future and it cannot be offered whatever the lapse of time and after the crisis is over.
- f) Compassionate appointment can only be made on Group C and Group D posts.
- g) Satisfaction that the family members have been facing financial distress and that an appointment on compassionate ground may assist them to tide over such distress is not enough; a dependent must fulfill the eligibility criteria for appointment.
- h) A decision on an application for compassionate appointment ideally ought to be made within a given time or else the object of such appointment might be frustrated.
- i) The idea of compassionate appointment is not to provide for endless compassion.
- j) The object of compassionate employment is not to give a member of a family of the deceased employee a post much less a post for post held by the deceased.
- k) Compassionate employment cannot be granted after lapse of reasonable period, which must be specified in the scheme.
- l) There cannot be reservation of a vacancy till such time as the applicant becomes a major after a number of years, unless there are some specific provisions.
- m) Compassionate employment being an exception to the general rule, the scheme therefor has to be strictly construed and confined only to the purpose it seeks to achieve.
- n) Compassionate employment is permissible to one of the dependents of the deceased/incapacitated employee.
- o) An appointment on compassionate ground made many years after the death/incapacitation of the employee or without due consideration of the financial resources available to the dependant of the deceased/incapacitated employee would be directly in conflict with Articles 14 and 16 of the Constitution.
- p) Although administrative process might result in delay in disposal of the

pending claims under the scheme either due to non-availability of vacancies or if other eligible candidates are in the queue ahead of the concerned applicant waiting for appointment, for which appointment may not be offered to an applicant immediately upon death/incapacitation, the date of the application for appointment in particular cases might have some bearing on the right claimed having regard to the object of the scheme.

q) Irrespective of the time taken for offering compassionate appointment, rejection of a claim for compassionate appointment on the ground that the family members of the deceased/incapacitated employee are not in financial distress cannot be followed by an application by a different dependent.

r) Having regard to the fixation of minimum and maximum age by an employer answering the definition of State within the meaning of Article 12 of the Constitution for entering service, it is axiomatic that while an over-aged dependent cannot seek appointment, even an under-aged dependent cannot also seek such appointment.

s) It is only in rare cases, if provided by the scheme for compassionate appointment and not otherwise, that a dependent who was minor on the date of death/ incapacitation, can be considered for appointment upon attaining majority.

t) Having regard to the object of compassionate appointment, time frame fixed in the schemes for making an application ought to be considered mandatory unless of course a different intention appears from a reading of the scheme."

11. In the said judgement dated February 4, 2019 the coordinate Bench also taking note of the judgement delivered by the Supreme Court in *Syed Khadim Hossain v. State of Bihar* reported in (2006) 9 SCC 195 as well as the unreported decision of a learned judge of the Madras High Court in W.P. 25784 of 2010 (*J. Jeba Mary v. The Chairman, Tamil Nadu Electricity Board*) made inference that the court in *Syed Khadim Hussain* (supra) moulded the relief claimed in favour of the applicant and, as such, the decision was made on application of Article 142 of the Constitution and is not be considered as a binding precedent within the meaning of Article 141 of the Constitution. While drawing inference the coordinate Bench explained the legal position on the binding effect of decisions rendered under Article 141 vis-à-vis Article 142 by placing reliance upon the decision of the Supreme Court rendered in the case of *State of Punjab v. Rafiq Masih* reported in (2014) 8 SCC 883.

12. We also find the unreported decision of a learned single judge of Madras High Court in *J. Jeba Mary* (supra) is of no assistance in view of the facts of the present case as well as the guidelines/policy for compassionate appointment framed by the concerned respondent authorities.

13 The coordinate Bench in its judgement dated February 4, 2019 delivered in *Arindam Choudhury and Anirban Jana* (supra) in no uncertain terms laid down the law that an applicant for compassionate appointment does not acquire a right

of appointment only upon establishing the distressed condition of the family members of the deceased/incapacitated employee but the applicant for a post must have other necessary qualifications which, inter alia, would include being within the prescribed age for entry in service, possessing minimum educational qualifications and bearing good moral character as well as health. Financial crisis would not automatically guarantee an appointment.

If there is any deficiency, such deficiency can be relaxed by the Government but not by any direction of court and a court by issuing a mandamus cannot direct the Government to act contrary to law.

14. The present case in our hand reveals that the petitioner, Azim Gazi at the time of the date of death of his father was 17 years 2 months old and on application of the law laid down by the coordinate Bench of this Hon'ble Court in the case of Arindam Choudhury and Anirban Jana (supra) is not found to be eligible and entitled to be appointed on compassionate ground in view of his father's death. In the same breath, we are also constrained to hold that in the event of acute financial assistance due to death of petitioner's father one of two elder brothers who appeared to us, on perusal of the application at page 135 of the writ petition, made in the prescribed proforma, could approach the authority concerned for appointment in order to tide over the distressed condition of the family. The fact of not preferring application by the eligible family member of the petitioner's family will take us to a definite conclusion that there was no financial crisis in the family of the petitioner warranting appointment on compassionate ground to tide over the same. Finally, and most importantly, the deceased employee having put in more than 20 years' service, the application for compassionate appointment did not deserve to be looked into in view of the notification dated June 5, 2006.

15. In the above conspectus of facts and the observations, we find no infirmity in the impugned order dated February 9, 2018 passed by the West Bengal Administrative Tribunal and accordingly the writ petition fails and stands dismissed. There shall, however, be no order as to costs.

Photostat certified copy of this judgement and order, if applied for, be furnished expeditiously.