

(2015) 07 CAL CK 0047
In the Calcutta High Court

Case No : Writ Petition No. 18521(W) of 2014 and C.A.N. No. 9005 of 2014

Howrah District Primary School Council and Others	APPELLANT
Vs	
The State of West Bengal and Others	RESPONDENT

Date of Decision : 17-07-2015

Acts Referred:

Citation : (2015) 07 CAL CK 0047

Hon'ble Judges : Debangsu Basak, J

Bench : Single Bench

Advocate : Subir Sanyal, for the Appellant; Sunil Kumar Chakraborty, Advocates for the Respondent

Judgement

Debangsu Basak, J—The Howrah District Primary School Council and its Chairman has filed the present writ petition challenging a Memo dated March 20, 2014 issued by the Commissioner of School Education, West Bengal. By the impugned Memo, the Council has been requested to take necessary steps to issue appointment letter in favour of the respondent No. 4 if he confirms to and satisfy all statutory conditions for appointment as an Assistant Teacher in primary school on compassionate ground under the died-in-harness category.

2. It is contended on behalf of the writ petitioners that, the Commissioner has acted beyond the law laid down by the Hon'ble Supreme Court in the judgment and order dated April 4, 2008 rendered in Special Leave Petition (Civil) No. 1626 of 2005 (Bipad Taran Ray v. State of West Bengal & Ors). It is submitted that the respondent No. 4 does not fulfil the criteria laid down by the Hon'ble Supreme Court in Bipad Taran Ray (Supra) and, therefore, the decision rendered by the Commissioner is bad in law. It is also contended that the Commissioner had relied upon a Special Bench decision dated September 25, 2012 rendered in C.O. No. 2257(W) of 1994 (Himadri Sekhar Biswas v. Director of School Education and Ors.). The Special Bench decision is not good law in view of Bipad Taran Ray (Supra). In any event the direction of the Special Bench contained in Himadri Sekhar Biswas (supra) is not applicable to the facts of the present case. An

applicant for compassionate appointment made after the 1991 Rules cannot avail of the ratio of Himadri Sekhar Biswas (*supra*). In the present case the father of the respondent No. 4 had died on July 1, 1993 Rule 35 of the 1991 Rules had come into effect from November 22, 1991. Therefore, Himadri Sekhar Biswas (*supra*) is not applicable to the respondent No. 4.

3. The respondent No. 4 is represented. It is contended on behalf of the respondent No. 4 that, the present writ petition is not maintainable. The writ petitioners being lower in hierarchy than the Commissioner of School Education are not in a position to challenge an order issued by the Commissioner of School Education. It is contended that the writ petitioners had moved this Hon'ble Court by way of a writ petition being W.P. No. 9139(W) of 1997. Such writ petition was disposed of by a judgment and order dated June 12, 1997. The appeal preferred by the State of West Bengal against the judgment and order dated June 12, 1997 was dismissed. The father of the writ petitioner had exercised his option in 1990 and, therefore, the new Rule 35 coming into effect from November 22, 1991 would have no effect on the right of the respondent No. 4 to obtain appointment on compassionate ground in the died-in-harness category.

4. I have heard the rival contentions of the parties and the materials made available on record.

5. I am not in a position to accept the contention that the present writ petition at behest of the writ petitioners is not maintainable as the writ petitioners being lower in hierarchy than that of the Commissioner are not entitled to maintain a writ petition challenging an action of the Commissioner. The writ petitioner No. 1 is a statutory authority. It has a right to approach a Court when, in its opinion, its rights have been violated or infringed upon. It is another aspect that the contentions of the writ petitioner No. 1 canvassed in such proceedings may not be accepted. The same, however, does not denude the writ petitioners of the right to approach a Court to ventilate their grievance. The present writ petition is maintainable at behest of the writ petitioners.

6. The father of the respondent No. 4 was an Assistant Teacher in a primary school. He had attained the age of 60 in 1992. The policy prevalent at that time allowed a primary teacher an option to either opt for the revised scale of pay and retire at the age of 60 or continue to the age of 65 in service without financial benefit by reason of such extended service. The father of the respondent No. 4 had opted to continue in service till the age of 65 without the benefit of revised scale by claiming any financial benefit by reason of extended service. The father of the respondent No. 4 had died within the extended period of service. The respondent No. 4 had applied for appointment on compassionate ground in respect of an employee who had died-in-harness. The application for compassionate appointment of the respondent No. 4 not being considered, he had moved a writ petition complaining of inaction. Such writ petition was disposed of by directing the Director of School (Primary) to consider the case of the respondent No. 4 and to dispose of the same. By an Order dated September

11, 1996 the Director of School Education had rejected the claim of the respondent No. 4. This decision of the Director of School Education was assailed by the respondent No. 4 in W.P. No. 9139(W) of 1997. The Second writ petition of the respondent No. 4 was allowed by setting aside the order of rejection dated September 11, 1996. It was held that in view of the fact that the service of the father of the respondent No. 4 was duly extended till the age of 65, the prescribed age of superannuation as far as the father of the respondent No. 4 was concerned must read as 65. The matter was remanded to the Director of School Education (Primary) to re-determine the issue in light of the observations contained in the judgment and order dated June 12, 1997.

7. The Chairman being the writ petitioner No. 2 herein was a party respondent in W.P. No. 9139(W) of 1997. The State authorities had preferred an appeal. Such appeal was dismissed. The writ petitioners did not prefer any appeal from the judgment and order dated June 12, 1997 passed in W.P. No. 9139(W) of 1997.

8. It has been contended on behalf of the writ petitioners that as they were not parties in W.P. No. 9139(W) of 1997 therefore, the judgment dated June 12, 1997 and the judgment and order passed in the appeal therefrom are not binding upon the writ petitioners herein. It has also been contended on behalf of the writ petitioners that, the respondent No. 4 has not established whether the writ petitioners were served with notice of W.P. No. 9139(W) of 1997 and the orders passed therein.

9. I am afraid, I am not in a position to accept the contentions on behalf of the writ petitioners.

10. The certified copy of the judgment and order dated June 12, 1997 has been placed before me. It appears from such certified copy that the writ petitioner No. 2 was a party respondent in W.P. No. 9139(W) of 1997.

11. The judgment and order dated June 12, 1997 and the order passed in appeal therefrom were known to the writ petitioners for a considerable period of time, assuming that the writ petitioners were not served with W.P. No. 9139(W) of 1997 and the judgment and order dated June 12, 1997. In spite of such knowledge, the writ petitioners did not take any steps to have the judgment and order dated June 12, 1997 passed in W.P. No. 9139(W) of 1997 set aside. The writ petitioner No. 1 was represented by the writ petitioner No. 2 in W.P. No. 9139(W) of 1997. The fact that only the writ petitioner No. 2 was made a party in W.P. No. 9139(W) of 1997 does not permit the writ petitioner No. 1 to contend that the writ petitioner No. 1 is not bound by the order passed therein. The writ petitioner No. 2 herein is the Chairman of the writ petitioner No. 1. Any action of the Chairman of the writ petitioner No. 1, so far as a third party is concerned, is binding on the writ petitioner No. 1 on the basis of ostensible authority of the writ petitioner No. 2 to act and bind the writ petitioner No. 1 by his actions. It is for the writ petitioners to establish that the writ petitioner No. 2 was not authorized to represent the writ petitioner No. 1 in W.P. No. 9139(W) of 1997 or

that the writ petitioner No. 2 did not bring to the notice of the writ petitioner No. 1 the pendency of W.P. No. 9139(W) of 1997. Such an argument is not available in the facts of the case, as both the writ petitioners are well aware of the judgment and order dated June 12, 1997 passed in W.P. No. 9139(W) of 1997 and in spite thereof has not taken any steps with regard thereto. The parties in the present writ petition are bound by the judgment and order dated June 12, 1997 passed in W.P. No. 9139(W) of 1997.

12. Since the parties in the present writ petition are bound by the judgment and order dated June 12, 1997, the law pronounced on the subject by the Special Bench and the Supreme Court thereafter will not alter the rights of the parties in W.P. No. 9139(W) of 1997. The Commissioner of School Education has proceeded on the basis of the judgment and order dated June 12, 1997 in passing his impugned order. The impugned order, therefore, cannot be assailed on the ground that the same is contrary to the law pronounced by the Supreme Court subsequently. In the facts of this case I am not called upon to decide the issue as to whether or not Himadri Sekhar Biswas (supra) is not good law in view of Bipad Taran Ray (Supra).

13. The Commissioner in the impugned Memo has found that Rule 4A and Rule 14 framed under the 1991 Rules allows a ward of a deceased teacher who was in extended period of service and had died during the period of extension was entitled to be considered for compassionate appointment. The Commissioner in the impugned order draws substance of such a view from Himadri Sekhar Biswas (supra) also.

14. The Commissioner was directed to consider the matter in terms of the judgment and order dated June 12, 1997. The judgment and order dated June 12, 1997 has held as follows:--

"In view of the fact that the petitioner's father's services had been duly extended till the age of 65, the prescribed age of superannuation as far as he was concerned must be read as 65. Although this has not been expressly made clear in the circular, it must be read into the circular having regard to the controlling phrase "the prescribed age of superannuation" and considering the object of the rule. The object of the rule is to provide for the family of a deceased employee whose source of income may have been suddenly stopped by reason of the death of the wage earner during his service. The phrase used is "died in harness". These are cases where a person dies while in service. Therefore, the only question which is germane is whether the employee who died did so while he was in service....

In my view and for the reasons stated above, the impugned order must be set aside. The matter is remanded back to the Director of School Education (Primary), being the respondent No. 2 to re-determine the issue in the light of the observations contained in this judgment together with a copy of the writ application upon him. The petitioner or his authorised representative will be

given an opportunity of being heard before any decision is taken and the decision shall be communicated to the petitioner within a week from the date of taking any decision."

15. In this case, the father of the writ petitioner had died before attaining the age of 65 years and while in service. The Commissioner has returned a finding that the father of the writ petitioner was in fourth extension period of service and had died on May 22, 1994 at the age of 64 years 3 months and 24 days. He has also relied upon the certificate of the Sabhadipati, Khanakul- II, Panchayat Samity that the annual income of the family does not exceed Rs. 24,000/- and that the family consisted of seven members. In such circumstances, the direction issued by the Commissioner, School Education, West Bengal to the Chairperson of the District Primary School Council to take necessary steps to issue appointment letters in favour of the writ petitioner if he conforms to and satisfy all statutory conditions for appointment as an assistant teacher in primary school on compassionate ground under died-in-harness category cannot be faulted.

16. Even if the ratio laid down in Himadri Sekhar Biswas (supra) as followed by the Commissioner is discounted, then also the order impugned passed by the Commissioner cannot be faulted as the Commissioner has followed the directions contained in the judgment and order dated June 12, 1997 which are binding upon the parties.

17. In such circumstances, I do not find any merit in the present writ petition. W.P. No. 18521(W) of 2014 is dismissed. Interim Order dated July 1, 2014 passed herein stands vacated. No order as to costs. The writ petitioners are directed to act in terms of the Memo dated March 20, 2014 issued by the Commissioner of School Education, West Bengal impugned herein within a period of four weeks from the date of communication of this order on them.

C.A.N. No. 9005 of 2014:--

18. The application is for vacating the interim order dated July 1, 2014. In view of the vacating of the interim Order dated July 1, 2014 no further order need be passed in C.A.N. No. 9005 of 2014. The same is disposed of without any order as to costs.

19. Urgent photostat certified copy of this judgment, if applied for, be given to the parties on priority basis.