

(2012) 02 CAL CK 0009
In the Calcutta High Court
Case No : Writ Petition No. 21848 of 2011
In Re: Kalyan Majumdar

Date of Decision : 27-02-2012

Acts Referred:

West Bengal Primary Education Act, 1973 — Section 106, 60

Citation : (2012) 3 CHN 449

Hon'ble Judges : Indira Banerjee, J

Bench : Single Bench

Advocate : Ekramul Bari, S.M. Ali and Tanuja Basak, for the Appellant; Swapan Kumar Majumder for the Respondent Nos. 4 and 5, for the Respondent

Judgement

Indira Banerjee, J.—In this writ application the petitioner has, inter alia, challenged an order being Memo No. IC-289L (Pry)/2009 dated Kolkata, 14th November, 2011 passed by the Director of School Education pursuant to an order dated 5th April, 2011 passed by His Lordship the Hon"ble Justice Harish Tandon in W.P. 12915 (W) of 2009 rejecting the proposal for compassionate appointment of the petitioner. The petitioner is the son of late Arati Mazumdar, who died-in-harness, as an Assistant Teacher of Joykrishnapur Junior Basic School, Chakdaha in Nadia District. According to the petitioner, Arati Majumdar died-in-harness leaving behind her husband, her two sons and a married daughter.

2. There is no whisper in the write petition of the economic condition of the married daughter. It is not the case of the petitioner that she is also dependent on the family of the deceased for her necessities. It may reasonably be presumed that the married daughter is dependent on her husband and not on her parental home for her necessities.

3. The petitioner submits that the petitioner applied for compassionate appointment on 6th January, 2007 i.e., about five months after the death of his mother. The application was, however, kept pending.

4. By a Memo dated 7th November, 2008 the Chairman of the Nadia District Primary School Council called upon the petitioner to submit documents, which

were submitted under cover of a letter dated 8th December, 2008.

5. By a Memo No. 1302 dated 23rd June, 2009 the Chairman of the Nadia District Primary School Council informed the petitioner that the proposal for appointment of the petitioner as primary teacher in the died in-harness category had been rejected by an order of the Director of School Education. Reference was made to Memo No. 762-SE/P dated 15th June, 2009 of the Director of School Education.

6. Challenging the aforesaid communication, the petitioner filed a writ petition being W. P. No. 12915 (W) of 2009 in this Court. The said writ petition was disposed of by the order dated 5th April, 2011 of His Lordship the Hon'ble Justice Harish Tandon referred to hereinabove. His Lordship observed, and rightly, that it was a principle of law that every order passed by an administrative or quasi-judicial body must disclose reasons.

7. The denial of compassionate appointment as per rules certainly had adverse civil consequences so far as the applicant was concerned and reasons were absolutely necessary. His Lordship set aside the impugned Memo No. 1302 dated 23rd June, 2009 as also the Memo No. 762-SC/P-7P-13P-2006 (Pt-II) dated 15.6.2009 and directed the respondent no. 2, being the Director of School Education, West Bengal, to consider the application of the petitioner afresh, in accordance with law, within the time stipulated in the said order after giving the petitioner an opportunity of hearing.

8. Pursuant to the aforesaid order dated 5th April, 2011 the petitioner, as also the concerned District Primary School Council, was given a heading. The representative of Nadia District Primary School Council had submitted that the petitioner's representation has been forwarded to the Director of School Education, West Bengal, for instructions. The Director of School Education rejected the prayer on the ground that the family income was more than the starting salary of a Group "D" employee. At the material a newly recruited Group "D" employee used to get Basic Pay of 2600/- Dearness Allowance of Rs. 1650 at 64% of Basic Pay and House Rent Allowance of Rs. 390/- at H.R.A. 15% of Basic Pay and Medical Allowance of Rs. 100/-, the total Income being Rs. 47401/-.

9. The petitioner's father earned pension of Rs. 3439/- and family pension of Rs. 1845/- as husband of the deceased teacher. His total income was Rs. 5284/-.

10. The Director of School Education, West Bengal, passed a reasoned order rejecting the case of the petitioner, observing that compassionate appointment in favour of a ward of a deceased primary school teacher, was governed by Rule 14 of the West Bengal Primary School Teachers Recruitment Rules, 2001, framed in exercise of the power conferred by sub-section (1) of clause (k) of sub-section (2) of section 106, read with section clause (k) of sub-section (1) of section 60 of the West Bengal Primary Education Act, 1973.

11. The said Rule 14 was amended by notification No. 85-SE (Pry) dated 15th

February, 2008. At the material time when the petitioner's mother died and the petitioner applied for compassionate appointment, Rule 14 provided that if a teacher died-in-harness before the date of his superannuation i.e. the age of 60 years leaving a family, which was in the opinion of the Council in such extreme financial hardship, that it failed to provide two square meals and other essentials to the surviving members of the deceased teacher's family, one member of the family i.e. the spouse, son or daughter could, within two years from the date of death, make an application to the Council for appointment as primary teacher, provided such member of the family was above 18 years of age but within 45 years of age and otherwise eligible to teach.

12. By a notification dated 15th February, 2008 an explanation was inserted explaining that the expression "financial hardship", in relation to the family of a deceased teacher, consisting of upto five members, would mean income less than the gross salary of Group "D" staff of the Council at the material point of time.

13. However, if the family of the deceased teacher exceeded five members, its income would have to be computed by adding further amount equivalent to 20% of the gross income of a Group "D" employee for each member exceeding five and the amount so arrived would be taken into consideration for the purpose of compassionate appointment.

The Director of School Education, West Bengal, held that-

At the material point of time, gross monthly salary of a newly appointed Group "D" staff was Rs. 4740/-. Considering the proposal of compassionate appointment of the petitioner, it was found that the income of the concerned family was higher than the monthly income of a newly appointed Group "D" staff. Therefore, in terms of the provisions of the amended Rules, the family was not considered to be in financially distress. The proposal thus could not be approved. Hence the Nadia District Primary School Council was informed accordingly by this Directorate vide memo no. 762-SC/P dated 15.6.2009.

It is submitted that in terms of the amended Rule 14 of the West Bengal Primary Teachers Recruitment Rules, 2001, one of the important conditions for getting appointment on compassionate ground when a school teacher dies in harness before the date of his superannuation, leaving a family, which in the opinion of the Council, is in extreme financial hardship that it fails to provide two square meals and other essentials to the surviving members of the deceased teacher's family. The Government by its statutory Rule precisely described the expression "financial hardship". It was no more left to the individual interpretation of any officer. Financial hardship must be computed as explained in the rules. As the proposal had not been submitted strictly examining the requirements of the rules, this Directorate was unable to accede to the said proposal and accordingly the same was rejected.

The matter is disposed of.

14. There can be no doubt, as argued by Mr. Majumdar the learned appearing on behalf of the concerned District Primary School Council, that compassionate appointment can only be given in accordance with Rules. Any Rules framed are binding. Rules are either valid or liable to be struck down as ultra vires or unconstitutional. It is not for the Court to modify the Rules. This Court, therefore, did not deem it necessary to refer to the judgments relied upon in this regard. It is accepted that compassionate appointment can only be given in accordance with Rules.

15. So far as the amendments are concerned, the amendments have been made pursuant to observations made by this Bench in earlier proceedings. This Court was of the view that determination of financial hardship could not depend on the whims and fancies of the authorities, which could be variable. This Court was also of the view that determination of financial hardship should not be variable. It would be grossly unjust if in one case an income of Rs. 2,000/- for four members of a family were to be considered as financial hardship but in another case not considered as financial hardship. No fault can be found with the Rules as amended in 2008, whereby a specific standard has been set for determination of financial hardship. The question is whether the Rules, as amended, applied to the case of the petitioner who had apply for compassionate appointment in the year 2007 long before Rule 14 had been amended.

16. It is true that by the amendment of the rule an explanation has been added. It may have been possible for the respondents to argue that the explanation is to be deemed to have been in existence from the very inception had not the notifications specifically provided that the amendment would come into force with immediate effect. Accordingly, different Single Benches and Division Benches of this Court have held that the amendments are prospective with effect from the date of notification. Reference may, in this context, be made to the judgment of His Lordship the Hon'ble Justice Biswanath Somadder dated 4th July, 2011 in W. P. 19745 (W) of 2010 referring to a judgment rendered by this Bench dated 8th January, 2010 in W. P. 15346 (W) of 2009. His Lordship held that the explanation was prospective.

17. Mr. Bari, the learned advocate appearing for the petitioner, submits that there was no appeal from the said order dated 4th July, 2011 of Somadder J. The Order has been complied with. The earlier decision of the Court in W.P. No. 15346 (W) of 2009 where this Court specifically held that the Rules were prospective was not appealed against. In any case, the order was not interfered with in appeal.

18. The issue of whether the notification amending rules would be prospective has been settled by a Division Bench by its judgment in Soumik Dandapath Vs. State of West Bengal, where the Division Bench held that the amended rules would have no effect where an application for compassionate appointment was already pending.

19. Mr. Bari, the learned advocate appearing on behalf of the petitioner, submitted that the Chairman of the concerned Primary School Council had recommended the case of the petitioner. The Director of School Education had rejected the proposal. Significantly in Soumik Dandapath (*supra*) relied upon by Mr. Bari the Division Bench also held that the Director of School Education could not act as a super body of appeal over the decision of the Chairman of the concerned Primary School Council.

20. The amendments being prospective, it would not be open to the Director of School Education to reject the proposal for compassionate appointment of the petitioner by relying on the amendment. As per rule 14, as quoted in the impugned Order itself, compassionate appointment may be given when a teacher dies-in-harness before the date of his superannuation, i.e. the age of 60 years, leaving a family which is in the opinion of the Council in such extreme financial hardship that it fails to provide two square meals and other essentials to the surviving members of the deceased teacher's family.

21. The opinion of the family being in extreme financial hardship would necessarily have to be formed by the Council, taking into account all relevant factors-and-in this case the Council has forwarded the case of the petitioner to the Director of School Education after calling for requisite documents from the petitioner. It was not open to the Director of School Education to sit in appeal over the decision of the Chairman of the concerned District Primary School Council and that too by reliance upon Rules which had not taken effect at the material time when the petitioner applied for compassionate appointment.

22. Mr. Majumdar, learned Counsel appearing on the behalf of the respondents nos. 4 and 5, cited the judgment of the Supreme Court in *Dadu Dayalu Mahasabha, Jaipur (Trust) Vs. Mahant Ram Niwas and Another*, . The Supreme Court held that the judgment of a Court, it is trite, should not be interpreted as a statute. The meaning of the words used in a judgment must be found out in the backdrop of the facts of each case. The observation made by a superior Court is not binding. What would be binding is the ratio of the decision.

23. There can be no dispute with the albresald propulsion. However, in the case of Soumik Dandapath (*supra*), the Division Bench had not merely made an observation. The Division Bench set aside the decision of the Director of School Education, which was in issue before the Division Bench, and directed that the proposal sent by the Chairman before the Director of School Education be approved within the time stipulated in the judgment and order of the Division Bench.

24. The Supreme Court has time and again held that compassionate appointment is meant to tide over the crisis caused by the sudden death of the breadwinner. Accordingly, the application for compassionate appointment has to be made within reasonable time.

25. In the instant case, the Rules provide that the application for compassionate

appointment is to be made within two years. Rules do not prescribe the time limit within which the application for compassionate appointment is to be disposed of. It is also well accepted practice that once an application for compassionate appointment is allowed, the applicant for compassionate appointment is only empanelled and is provided with appointment as and when there are vacancies in the reserved category of "died-in-harness" candidates. This Court cannot but take judicial notice of the fact that an application for compassionate appointment made within two years is often considered after three/ four years and even five years after which the applicant is kept empanelled and provided with appointment as and when a vacancy arises.

26. In Jagdish Prasad Vs. State of Bihar and Another, , the application for compassionate appointment had been made 13(thirteen) years after the death of the concerned employee. The judgment rendered in the particular facts can have no application in the instant case.

27. In Mandvi Co-op. Bank Ltd. Vs. Nimesh B. Thakore, the Supreme Court held that in the field of statutory law the judge must be obedient to the will of Parliament as expressed in its enactments. In this field Parliament makes and unmakes the law. The judge's duty is to interpret and to apply the law not to change it to meet the judge's idea of what justice requires. Interpretation implies in the interpreter a power of choice where differing constructions are possible. But if only one construction is possible, the judge has no option but to decide as per the provision. If the result is patently unjust, the Judge makes an observation inviting parliament to reconsider its provision. He must not deny the statute. There can be no dispute with the proposition of law laid down in Duport Steels Limited vs. Sirs. 8 (1980)1 All ER 529, 534, which was approved by the Supreme Court in Mandvi Co-operative Bank Ltd. (supra).

28. In State of Punjab and Others Vs. Bhajan Kaur and Others, the Supreme Court held that statute is presumed to be prospective unless held to be retrospective, either expressly or by necessary implication. A substantive law is presumed to be prospective. Where a right is created by an enactment, in absence of a clear provision in the statute, it is not to be applied retrospectively.

29. There can be no dispute with the proposition laid down in the judgment but it is not understood how the judgment is of assistance to the respondents.

30. The impugned decision cannot be sustained and the same is set aside and quashed in view of the finding of the Division Bench in Soumik Dandapath (supra) that the Director of School Education cannot sit in appeal over the decision of the Council, which is binding on this Single Bench.

31. No useful purpose would be served by remitting back the matter to the Director of School Education for consideration. If the Council has initially recommended the case of the petitioner for compassionate appointment on the basis of the unamended Rules, compassionate appointment shall have to be approved. The Director of School Education shall approve the proposal for

compassionate appointment within two months from the date of communication of this order.

32. This writ petition is, thus, disposed of. Urgent certified Photostat copy of this order, if applied for, be supplied to the parties, upon compliance of all usual formalities.