

(2011) 01 CAL CK 0007
In the Calcutta High Court

Case No : C.A.N. No. 4177 of 2010 in F.M.A. No. 827 of 2010

Md. Mansur Ali

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 25-01-2011

Acts Referred:

Constitution of India, 1950 — Article 21

Citation : (2011) 2 CHN 743

Hon'ble Judges : Prabhat Kumar Dey, J; Amit Talukdar, J

Bench : Division Bench

Advocate : Ekramul Bari and Shamim-ul-Bari, for the Appellant; Subal Moitra and Gopa Roy, for the Respondent

Final Decision : Allowed

Judgement

Amit Talukdar, J.—His health was giving away and he felt that he did not have much time ahead, as a consequence thereof, he could not put in his best in imparting of lessons to his wards in the school where he has been serving since 1973 as an Assistant Teacher.

2. This saw the Appellant No. 1 petitioning Respondent No. 4 on 14.09.2003 to allow him to recuse himself from the teaching assignment and place the Appellant No. 2, his elder son in his place (Page 33 of the Stay Petition).

3. Acting on the basis of the same, the authority concerned directed him to appear before a Medical Board of the North Bengal Medical College. A Medical Board consisting of the Professor & Head of the Department of Medicine, Professor & Head of the Department of Physical Medicine & Rehabilitation, Professor & Head of the Department of Ophthalmology of the North Bengal Medical College under the Chairman of Zonal Medical College returned the finding on behalf of the Board on 15.12.2003 recommending that the Appellant had become "completely and permanently incapacitated for further service of any kind in consequence of Diabetic Nephropathy "and other ailments (Page 36 of the

Stay Petition.)

4. Accepting the finding returned by the said Medical Board, the Respondent No. 4 (Chairman of the District Primary School Council), on 27.01.2004 allowed him to call it a day (Page 35 of the Stay Petition).

5. Financial stringency and inability to make both ends meet for a family consisting of several members, Appellant No. 1 wrote to the Respondent No. 4 in March 2005 for absorption of the Appellant No. 2 (his elder son) in the post of a Primary School Teacher.

6. Nothing fructified except a terse scorn from Respondent No. 2 (Director of School Education) on 07.08.2009 (Page 44 of the Stay Petition) which transpired as follows:

...his proposal for apptt. of Sri Mijanur Rahaman, son of Md. Mansur Ali has not been approved as per existing G.O., since the total monthly family income has exceeded the initial gross pay of Gr. D employee of the Council. So the family may not be treated as financially distressed.

7. Unable to contain themselves with their plight and not being in a position to face such turn down by Respondent No. 2, they approached the Writ Court.

8. Fortune also did not smile this time; since the Hon"ble Single Judge, who considered the Memo dated 07.08.2009 of Respondent No. 2(as discussed in Page 44 of the Stay Petition), dismissed the writ application primarily on two fold score;

a) ...Since financial distress has not been established and;;

b) the second Petitioner has been survived for more than five years since the date the first Petitioner was declared incapacitated, this is sufficient to prove that the Petitioners have been able to tide over the financial crisis that had befallen them.

9. In the backdrop of the aforesaid profile of the family which, has been graft through the various annexure and the order under appeal, we would be now required to assess the impact of the submission made at the Bar.

10. Shri Ekramul Bari appearing with Shri Shamim-ul-Bari submitted that " the actual financial condition of the family was not correctly considered at any stage.

11. Shri Bari was of the view that the certificate issued by the Panchayat and the fact that the Appellants would make out a prima facie case for consideration of the plight of the family, was sufficient for the purpose of harnessing Appellant No. 2 in the place of his superannuated father.

12. According to Shri Bari, reference was made by Respondent No. 2 in the concerned G.O., which came into effect in 2008. Whereas Shri Bari submitted that the Appellant No. 1 was found to be medically unfit by the Board constituted by the Professors and Heads of the various departments of the North Bengal

Medical College way back on 15.12.2003. In such reckoning, Shri Bari stressed that the finding returned by the Respondent No. 2 was not maintainable and the conclusion of the learned Single Judge with regard to the capacity of the family, was also not correctly assessed.

13. As a part of his submission Shri Bari referred to the decisions of this Court in 1) Rupali Chowdhury v. State of West Bengal and Ors. 2000 LAB IC 3794, 2) Tapan Kumar Barman v. State of West Bengal and Ors. reported in 2009 (1) CHN 24 and 3) Nazrul Islam and Anr. v. State of West Bengal and Ors. 2009 (1) CHN 339.

Per Contra:

14. Shri Subal Moitra for the Respondent did not see eye to eye with Shri Bari. Shri Moitra submitted that once the Respondent No. 2 had come to a particular conclusion on the basis of his subjective satisfaction and in exercise of its power of judicial review Hon''ble Single Judge had accepted it-now it is not open for Shri Bari to challenge the same in appeal in the absence of any patent illegality.

15. Shri Moitra further submitted that it could not be established that the family was in distress and simply superannuation on the health ground cannot give any edge to the Appellant No. 2 to gain compassionate appointment which is after all, de horse the recruitment rules.

16. Refuting the favour of Shri Bari's appeal, Shri Moitra relied on the decisions of Supreme Court in State Bank of India and Another Vs. Somvir Singh, General Manager (D&PB) and General Manager (D and PB) and Others Vs. Kunti Tiwary and Another, and Umesh Kumar Nagpal Vs. State of Haryana and Others, .

17. Shri Moitra wind up his submission and prayed for dismissal of appeal.

18. Once we have gained control over the situation after having traversed through the materials and the tenor of the judgment & order under appeal, keeping in view the submissions advanced, both by Shri Bari and Shri Moitra, we will proceed ahead so as to see as to whether this appeal can subsist.

19. It is now well-settled through catena of decisions that unless an order under appeal is wholly wrong, it should not be ordinarily interfered with.

20. Against such an order, which is the product of exercise of the power of judicial review by the Hon''ble Single Judge in this Mandamus appeal-our scope would be very circumspective and even narrower.

21. of course, we enjoy the amplified power of judicial review in a Mandamus appeal. But how far and to what extent the same can be exercised?

22. In our basic opinion it is absolutely restrictive. It is not simply at the drop of a hat that a person rushes to the fore of the Court of Mandamus appeal and is welcome. But there are cases where interference is necessitated for the sake of just justice. It is one such case where we would interfere-although we cannot say

the Order under appeal is bad or wrong in any manner, on the contrary, we find it is what it was required to. It is now what is required of us, is required to be done so that it would be just desert for those distraught Appellants, who have pursued relief for all these years with No. success.

23. To make it short and sweet, we find there is substance in the submission of Shri Bari that the G.O. relied upon by the Respondent No. 2 cannot have any application in the factual matrix of the present case. We have read the Rules.

24. We find that the same relates to January 28th, 2008 (Section 14 of the West Bengal Primary School Teachers Recruitment Rules, 2001). But the exercise began way back in the autumn of 2003(14.09.2003) and practically concluded in the literal December term of not only the said Order but also the career of the Appellant No. 1 (15.12.2010) and necessary recommendations and steps were processed soon thereafter and much before 2005.

25. As such, we accept this part of contention of Shri Bari.

26. That apart, even if we for a while decide to situate this part of the submission of Shri Bari in the backburner with regard to the application of the particular G.O., which haunted the mind of Respondent No. 2 we are of the opinion that the conclusion of Respondent No. 2, which, very much imbibed the Ronnie Single Judge, also cannot be full proof.

27. For the simple reason what is the basis of such conclusion of Respondent No. 2? There is No. application of mind in that regard nor is there any tangible reason in support of such conclusion. Before a Court of Law, such finding is mere child of conjectures and surmises.

28. This is one aspect of the matter.

29. On the flip side of the same we find the shadow of hardship and paucity has loomed large over its family, which saw its breadwinner being displaced.

30. From formalism, law has now undergone a sift to the value laden approach to law." ...it is No. more the black letter in the law which guides the interpretation but the goal, which is imbibed by the particular body of law which may be termed as a rationality of law. When such a lane is available why should we tread the path of a value neutral avenue [See: State of U.P. and Others Vs. Jeet S. Bisht and Another,

31. Simply being alive for a number of years since the date of incapacitation-cannot be "sufficient to prove that the Petitioners have been able to tide over the financial crisis that had befallen them" as have been held by His Lordship.

32. True, they have lived to crawl up in the Forecourts of appeal but is this all ? Is it life as defined under Article 21 or simply animal existence ? These are cardinal principles which should be kept in mind.

33. The Division Bench decision of this Court referred to by Shri Bari in Rupali

Chowdhury v. State of West Bengal and Ors. (supra), Tapan Kumar Barman v. State of West Bengal and Ors. (supra) and Nazrul Islam and Anr. v. State of West Bengal and Ors. (supra) are quite axiomatic in its application in the present situation whilst those relied upon by Shri Moitra are quite distinguishable.

34. Shri Moitra's reference to the decision of Supreme Court in State Bank of India and Anr. v. Somvir Singh (supra) is required to be understood in the backdrop of the defining situation leading to penury and/or poverty of the Appellants following the incapacitation of the breadwinner. There are ample proof of how the family has merely eked out a living for all these period.

35. Decisions referred to by Shri Moitra in General Manager (D & PB) and Ors. v. Kunti Tiwari and Anr. (supra) and Umesh Kumar Nagpal v. State of Haryana and Ors. (supra) also cannot retrieve him from the situation that has fallen before us for consideration.

36. From the materials that we have perceived and conversely, the vague assumption of Respondent No. 2 that the family had a level of income-it is quite apparent that extreme hardship and acute penury formed the spectre of the jinxed life of the family post incapacitation of its breadwinner.

37. Delay-no, on the contrary, the Appellants have pursued a continuing cause of action since 2003 to secure justice which eluded them like a teasing mirage.

38. It would not only be just and appropriate that we ring down the curtains on the misery of this family by way of setting aside the finding rendered by the Respondent No. 2 (page 44 of the Stay Petition) and also the finding arrived at by the learned Single Judge in W.P. No. 18104(W) of 2009 on 18.11.2009 and direct the Respondent No. 4 to process the case of the Appellants within four weeks from the date of communication of this order.

39. Appeal allowed.

40. There will be no order as to costs.

Prabhat Kr. Dey, J.

41. I agree.