

(2007) 06 KL CK 0075

In the High Court Of Kerala

Case No : O.P. No. 18342 of 2001 and W.P. (C) No. 32375 of 2005

Rajesh, R.

APPELLANT

Vs

Secretary to Government and Others

RESPONDENT

Date of Decision : 14-06-2007

Acts Referred:

Constitution of India, 1950 — Article 21, 226, 32
Kerala Education Act, 1958 — Section 7(2)
Kerala Education Rules, 1959 — Rule 1, 3(1), 51B, 7, 7(1)
Protection of Human Rights Act, 1993 — Section 2
Revenue Recovery Act, 1890 — Section 8

Citation : (2007) 06 KL CK 0075

Hon'ble Judges : Thottathil B. Radhakrishnan, J

Bench : Single Bench

Advocate : M.V. Mathew, for the Appellant; Asha P. Kuriakose, P.N. Mohanan, Unni, K.K. and Smitha Sukumaran, Govt. Pleader, for the Respondent

Judgement

Thottathil B. Radhakrishnan, J.—The issue of law that arises for decision in these writ petitions is as to whether a dependent of a non-teaching employee governed by Chapter XXIV B of the Kerala Education Rules, 1959, hereinafter referred to as "KER", for short, is entitled to employment on compassionate grounds on demise, in harness of that employee.

The facts:

2. Sri A. Ramakrishnan, entered service as a part-time menial in the K.V. Sanskrit Higher Secondary School, Muthukulam on 8-6-1966. He died on 4-3-1995 in harness. His son, Sri Rajesh, the Petitioner in O.P. No. 18342 of 2001, born on 20-5-1982, was not a major at that time. On attaining majority, he promptly applied for appointment on compassionate grounds. The District Educational Officer, hereinafter referred to as the "DEO", for short, rejected it on the ground that the dependents of part-time menials are not entitled to compassionate employment in terms of the Government Orders. Sri Rajesh moved this Court for a direction to the Government to consider his petition,

which was then pending. By the decision contained in the letter dated 9-1-2001, the Government took the view that he is entitled to appointment on compassionate grounds. By letter dated 3-5-2001, the Government rejected again the Manager's request to revise the decision and directed to appoint Sri Rajesh, as a Lower Division Clerk. However, the Manager did not appoint Sri Rajesh. He, therefore, filed O.P. No. 18342 of 2001 on 20-6-2001 seeking a direction to the Manager to comply with the orders of the Government. Service of notice in that writ petition, going by the endorsements, appear to have been completed, in so far as the second Respondent Manager is concerned, in 2001 itself.

3. Without obeying the directions of the Government and during the pendency of O.P. No. 18342 of 2001, of which he had notice, the Manager appointed one Sri Sreekumar, the sixth Respondent in W.P. (C) No. 32375 of 2005, as a full-time menial from 10-1-2005 and moved the statutory authorities for approval of that appointment. The DEO rejected the approval on the ground that Sri Rajesh was yet to be appointed. The Deputy Director affirmed that decision on 4-5-2005.

4. Thereafter, on 14-1-2005, the Deputy Director invoked Rule 7(1) of Chapter III of KER and proceeded against the Manager to take action on account of mismanagement and disobedience of departmental instructions and denial of appointment, in spite of the specific directions by the Government.

5. Faced with that situation, W.P.(C) No. 32375 of 2005 was filed by the Manager on 18-11-2005, that is, more than four and a half years after the direction of the Government to appoint Sri Rajesh and four years of the uncontested pendency of O.P. No. 18342 of 2001 before this Court. In that writ petition, the Manager challenges the Government directive and the consequential decisions, including the action notified against him under Rule 7(1) of Chapter III, KER. He also seeks a declaration that Chapter XXIV B, KER does not contain any provision enabling the issuance of the direction to appoint Sri Rajesh.

Arguments:

6. The learned Counsel for Sri Rajesh argued that the decision of the Government commanding the Manager to appoint Sri Rajesh on compassionate grounds became final on 3-5-2001, the finality of which was not challenged by the Manager at any point of time until the institution of W.P.(C) No. 32375 of 2005 on 18-11-2005 and that therefore, the Manager may not be permitted to agitate that issue. It is further pointed out that Chapter XXIV B does not contain any provision, which disentitles the dependent of a non-teaching staff dying in harness from being appointed in terms of Rule 9A of Chapter XXIV A.

7. Learned Counsel for the Manager argued that Chapter XXIV A and Chapter XXIV B of KER, having regard to the relevant legal history, have to be treated as distinct sets of Rules and there is no provision in Chapter XXIV B, which provides for compassionate appointment similar to Rule 9A in Chapter XXIV A. It is also argued that late Ramakrishnan having appointed only on 8-6-1966, Chapter

XXIV B alone would apply since Rule 1(ii) in that Chapter provides that the Rules in that Chapter shall apply to non-teaching staff of aided schools, appointed after 1-10-1964.

Consideration by Court:

8. First, I shall deal with the issue of law raised.

9. Admittedly, late Ramakrishnan entered service on 8-6-1966. Therefore, Chapter XXIV B of KER applied to him. That Chapter does not contain any specific rule similar to that of Rule 9A in Chapter XXIV A, which obliges the Manager to give employment to a dependent of a non-teaching employee of an aided school, dying in harness.

10. Assuming that Chapter XXIV A and Chapter XXIV B are two water-tight compartments and Rule 9A in Chapter XXIV A does not apply to non-teaching staff to whom the provisions in Chapter XXIV B applies, it has to be considered whether a dependent of a non-teaching employee to whom the provisions in Chapter XXIV B applied, has the benefit of any enabling provision in the KER for on compassionate grounds.

11. Rule 7 in Chapter XXIV B is relevant in the context. It reads as follows:

7. The rules regarding appointment, probation (increment) (transfer from one educational agency to another educational, agency or transfer under the same educational agency) (discipline, maintenance of service records confirmation, promotion, seniority and maintenance of seniority list) contained in Chapter XIV(A) and the Conduct Rules in Chapter XIV(C) applicable to teachers of aided school shall mutatis mutandis apply to the non-teaching staff in aided schools.

(emphasis supplied)

12 . A plain reading of the aforesaid Rule will show that the Rules in Chapter XIV A regarding the appointment shall mutatis mutandis apply to the non- teaching staff in aided schools.

13. Rule 51B of Chapter XIV Areads as follows:

51B. The Manager shall give employment to a dependent of an aided school teacher dying in harness. Government orders relating to employment assistance to the dependents of Government servants dying in harness shall mutatis mutandis, apply in the matter of such appointments.

14. The aforequoted Rules which enjoins that the Manager shall give employment to a dependent of an aided school teacher dying in harness and the further direction therein that the Government Orders relating to employment assistance to the dependents of the Government servant's dying in harness shall mutatis mutandis apply in the matter of such appointments would clearly show that it, namely, Rule 51B of Chapter XIV A, is a rule regarding appointment. Therefore, it is a Rule that gets incorporated into Chapter XXIV B, by virtue of Rule 7 of that

Chapter. Rule 51B of Chapter XIV A is a Rule providing for, compassionate appointment. Hence, notwithstanding the absence of any specific provision in Chapter XXIV B, similar to Rule 9A of Chapter XXIV A, the Rule regarding appointment contained in Rule 51B of Chapter XIV A, KER will apply to non-teaching staff governed by Chapter XXIV B and therefore any claim by the dependent, for appointment, on account of the death in harness of any member of the non-teaching staff, is governed by that Rule.

15. Even if two views are possible in the above matter, the provisions for compassionate appointment are intended to prevent vagrancy and destitution and that concept is referable to the philosophy of socialism, one of the pivotal pillars of the Constitution of India. It geiminates out of Article 21, in the sense that the intention is to provide immediate succour to the bereaved, unfortunate needy. This is the manner in which the content of the concept of compassionate appointment has to be understood. Therefore, a beneficial construction of the relevant rules is called for.

16. Falling back to KER, it can be easily noticed that Rule 51B in Chapter XIV A provides for compassionate appointment to the dependents of the teaching staff. Rule 9A in Chapter XXIV A provides the necessary aid for the non- teaching staff governed by Chapter XXIV A. The teaching staffbeing given the benefit of such a provision and the non-teaching staff governed by Chapter XXIV A being given such a provision, what, if any, would be the intelligible differentia on the basis of which those who fall under Chapter XXIV B could be classified and segregated for refusing the benefit of a rule in the nature ofRule 51B of Chapter XIVA or Rule 9 A in Chapter XXIV A? Any such isolation of those to whom the Rules and Chapter XXIV B applies, thereby depriving them of the entitlement to compassionate appointment, when such benefit is being extended to those who fall under Chapter XIV A and Chapter XXIV A, would result in hostile discrimination and hence would be plainly unconstitutional and therefore void and inoperative. The conclusion is a pointer in support of the approach to be adopted by the Court in constituting the Rules in question, to arrive at the conclusion that the provisions relatable to compassionate appointment would apply to those governed by the provisions of Chapter XXIV B and their dependents.

17. Now, independent of the findings rendered above, it needs to be considered whether the provisions in Chapter XXIV B always work in isolation or whether the provisions in Chapter XXIV A would also apply to those who fall under Chapter XXIV B. While Rule 1 of Chapter XXIV B specifically makes that Chapter applicable to all non-teaching staff in aided schools appointed on or after 1-10-1964 and to those non-teaching staff in the service as on 1-10-1964, on the basis of option, and excludes the applicability of those Rules to those who superannuated on or before 1-10-1964, there is no provision in Chapter XXIV A confining its applicability to any particular class of non-teaching staff. This is because, a legal history would show, what now stands as Chapter XXIV A, were the only set of Rules originally available and the provisions brought in as Chapter

XXIV B were based on the need, with the passage of time. Therefore, to ensure that there is an harmonious construction and application of the entire Rules, it has to be taken that while the provisions in Chapter XXIV B would apply to those falling under Rule 1 thereof to the extent provisions are specifically made in that Chapter, the provisions in Chapter XXIV A would also apply to them, except to the extent of any Rule in Chapter XIV B being as repugnant to the provisions in Chapter XXIV A. There is nothing in Chapter XXIV B, which expressly or even tacitly excludes the making available of succour by compassionate appointment to the dependents of non-teaching staff, dying in harness. The manner in which Rule 1 of Chapter XXIV B is framed would show that it was not a matter in the contemplation of the rule making authority that the non-teaching staff appointed on or after 1-10-1964 would be disentitled of a provision for compassionate appointment to their dependents. This presumption looms large because the framers of statutory rules are to be presumed to have acted in teans of the equality doctrine, embodied in Part EI of the Constitution. Therefore, the provision in Rule 9A of Chapter XXIV A also could be applied since that Rule is not inconsistent with any of the provision in Chapter XXIV B.

18. For the foregoing reasons, it is held that the dependents of non-teaching staff to whom the provisions of Chapter XXIV B of the KER apply, are entitled to the benefit of compassionate appointment and the Manager shall give employment to a dependent of the non-teaching staff of an aided school dying in harness, without reference to the question whether the deceased employee had entered office on or before 1-10-1964.

19. Having held so, it has to be considered as to how the reliefs in these writ petitions have to be moulded.

20. As already noticed, the Manager stood directed by the Government on 9-1-2001 and later on 3-5-2001 to appoint Sri Rajesh. The beneficiary of that order moved this Court in 2001 itself, complaining about the Manager's refusal to appoint in spite of the Government's directive. The decision of the Government directing the Manager to appoint Sri Rajesh is challenged by the Manager in the writ petition filed on 18-11-2005, that too only because, he faces proceedings under Rule 7(1) of Chapter III KER.

21. As per Section 7(2) of the Kerala Education Act, 1958, hereinafter referred to as the "Act", for short, the Manager shall be responsible for the conduct of the school in accordance with the provisions of the Act and the KER. In terms of Rule 3(1) of Chapter III KER, the Manager is responsible to the Department for the management of the institution. Failure on the part of the Manager to obey the instructions issued by the Department may result in withdrawal of aid, grant, recognition etc. in terms of Rule 7(2) in Chapter ID. Section 8 provides for recovery of amounts due from the Manager by the provisions of the Revenue Recovery Act. Rule 7(1) in Chapter III of KER provides for declaring the Manager unfit to hold such office after following the procedure prescribed therein. Such a notice has been issued to the Manager. If monetary loss is caused to teachers by

denial of appointment for statutory claims and on account of denial of due promotions, the Manager can be proceeded for recovery in terms of Sub-rule 4 of Rule 7 of Chapter III. The aforesaid provisions will show that the Manager is duly bound to give effect to the orders of superior statutory authorities, including the Government and failure, in appropriate cases, may visit the Manager with consequences, including recovery.

22. All the aforementioned provisions are relevant in the context of this case because the dependent of a non-teaching staff, a part-time menial, who died-in-harness on 4-3-1995 and the application for appointment was promptly made by Sri Rajesh, the dependent, on his attaining majority and the Government in 2001 had directed his appointment. Though the Manager would now contend that the direction was to appoint Sri Rajesh as a Lower Division Clerk, there is no shred of materials to show that after the Government dismissed the revision of the Manager on 3-5-2001, there was any action on the part of the Manager to challenge that decision of the Government. Even if only a vacancy of permanent menial had occurred after the aforesaid decision of the Government in favour of Sri Rajesh, it is not open to the Manager to contend that Sri Rajesh was not appointed because there was no vacancy of LDC, but only of a menial. The required and desired obedience in the hierarchy, commands that if the Manager had any doubt as to the directions of the Government and therefore needed any clarification, the Government ought to have moved in that regard. On record, it is admitted that the vacancy of permanent menial occurred by the end of September, 1999. On that admitted situation, the Manager ought to have promptly appointed Sri Rajesh following the clear direction of the Government on 3-5-2001. By not doing so, Sri Rajesh has been deprived of his legitimate entitlement to employment at least from June, 2001. The context of employment relatable to compassionate appointment on account of dying-in-harness is a situation immediately referable to Article 21 of the Constitution and therefore, the failure of the Manager to appoint Sri Rajesh resulted in deprivation of his right to livelihood and life. On a fair estimate and application of the relevant pay scale, Sri Rajesh would have drawn nothing less than Rs. 6,000 per month as a permanent menial, at least from June, 2001. If that were so, by this time, he has been deprived of an amount of Rs. 4,38,000 as prevented emoluments, leave alone the mental agony that he has undergone by this process. I find no reason to refrain from making an order for costs quantified on principles akin to compensation, in favour of Sri Rajesh, on the facts and in the circumstances of the case. Giving an allowance that Sri Rajesh had not worked, though such situation was the making of the Manager alone, I deem it appropriate to grant Sri Rajesh an order for costs and compensation, against the Manager, fixed at Rs. 2,00,000.

23. Now, the question that arises for decision is as to whether, Sri Rajesh, the Petitioner in O.P. 18342 of 2001, not having specifically sought any relief by way of compensation, is to be awarded compensation in these proceedings. Still further, can the Manager be directed to pay compensation, in a writ proceedings?

24. I have already held above that the failure of the Manager to provide compassionate appointment for Sri Rajesh is a situation immediately resulting in the infraction of Article 21 of the Constitution.

25. Appointment on compassionate grounds is given only for meeting the immediate hardship, which is faced by the family by reason of the death of the breadwinner. When an appointment is made on compassionate grounds, the idea is to provide immediate succour. What is taken into consideration to make such appointments is the fact of the death of the employee, while in service, leaving his family without any means of livelihood. In such a case, the object is to enable the family to get over sudden financial crisis. Thus the provision for compassionate appointment is intended to be applied for the most deserving, for immediate succour, thereby meaning that the said provision is essentially built on the recognition of the right to livelihood as an insegregable component of the right to life enshrined in Article 21 of the Constitution.

26. In *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, " it was held that it would be sheer pedantry to exclude the right to livelihood from the content of the right to livelihood and therefore any person, who is deprived of his right to livelihood, except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21, though the State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. Though, in the context of failure to provide timely emergency medical treatment, in *Paschim Banga Khet Mazdoor Samity and others Vs. State of West Bengal* and another, the Apex Court, referring to the earlier decisions in *Rudul Sah Vs. State of Bihar* and Another, ", *Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa* and others, , *Consumer Education and Research center and others Vs. Union of India* and others, held that in respect of deprivation of constitutional rights guaranteed under Part III of the Constitution, the position is well-settled that adequate compensation can be awarded by the court for such violation by way of redress in proceedings under Articles 32 and 226 of the Constitution.

27. In *Ruddal Sah's* case (supra), it was held that the constitutional courts can pass orders for payment of money, if such an order is in the nature of compensation consequent upon the deprivation of a fundamental right and the right to compensation is palliative for the unlawful acts of instrumentality. It is necessary to educate ourselves into accepting that, respect for the right of individuals is the true bastion of democracy.

28. It is apposite in the context to quote the following *Nilabati Behara's* case (supra)

32. The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much as protector and guarantor of the indefeasible rights of the citizens. The courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the

people and expected to respond to their aspirations.

33. The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by this Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting "compensation" in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making "monetary amends" under the public law for the wrong done due to breach of public duty of not protecting the fundamental rights of the citizen. The compensation is in the nature of "exemplary damages" awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/ and prosecute the offender under the penal law.

34. This Court and the High Courts, being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings....

29. The principles noticed above is not confined to cases of custodial death as in the case of Nilabati Behara's case (supra) or failure to provide emergency medical treatment PBK Mazdoor Samity's case (supra). It necessarily applies to all cases of clear violation of the right to life guaranteed by Article 21 of the Constitution, which also is part of human rights as defined in Section 2(d) of the Protection of Human Rights Act, 1993.

30. In terms of the statutory Rules in KER, the Manager was obliged to appoint Sri Rajesh. Such action was not taken in spite of the Government directive. Thereby Sri Rajesh was deprived of timely compassionate appointment and kept away from his right to livelihood, at least from June, 2001, until now. There is thus inexcusable and glaring infringement of his fundamental right to life

guaranteed by Article 21, which deprivation can, at this distance of time, be alleviated only by payment of compensation.

31. The Manager of an aided school functions under the Kerala Education Act and the Rules. His obligation to make appointment on compassionate grounds is a statutory duty. Such duty cast on the Manager by Legislation, either primary or subordinate, is one that gives a statutory right to a dependent of an employee, who dies-in-harness. It is the dictate of the law of the land. Such right of the dependent is referable to the fundamental right to life, under Article 21 of the Constitution. Therefore, the deprivation of the fundamental right to life of such a person, Sri Rajesh in the instant case, is by the Manager on account of his failure to discharge his statutory duty under the relevant Rule, which is intended to provide succour, referable to Article 21. Hence, the Manager is liable to pay compensation.

32. In Nilabati Behara's case (supra) the Apex Court termed the following as a warning by Lord Denning in his Hamlyn Lecture in 1949 under the title "Freedom under the Law":

No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do; and will not do things that they ought not to do. But if and when wrongs are thereby suffered by any of us what is the remedy? Our procedure for securing our personal freedom is efficient, our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up to date machinery, by declarations, injunctions and actions for negligence...This is not the task for Parliament the courts must do this. Of all the great tasks that lie ahead this is the greatest. Properly exercised the new powers of the executive lead to the welfare State; but abused they lead to a totalitarian State. None such must ever be allowed in this country.

33. The concept of compensation, as a remedy, has found recognition to answer situations of violations of fundamental rights. As already noticed, it is the constitutional obligation of the courts to ensure protection against violation of fundamental right and if unfortunately, violation happens, restitutionary jurisdiction of the courts would extend to provide compensation, when such compensation is required in the situation, to do complete justice between the parties. That need not depend on any particular relief in that regard, being specifically sought for in a writ petition, more so, when the person before the court, in this case Sri Rajesh, had been running from pillar to post for a compassionate appointment on the ground of dying in harness of his father, who had been only a menial in an school. The reach of the remedies and the delivery of reliefs in a demonstrated case of gross violation of fundamental rights, particularly the right to life guaranteed by Article 21 are not to be held

dependent on the asking of the victim. Such reliefs spring from the guarantees in Part III of the Constitution. The right of access to judicial redressal is the part of the guaranteed fundamental rights. The entitlement to such reliefs is not to be confined to only those who are aware of their rights and seek to enforce them, seeking specified relief by way of compensation.

34. Hence, the Manager is liable to satisfy the order of compensation being passed hereunder.

In the result,

(1) W.P.(C) No. 32375 of 2005 filed by the Manager is dismissed.

(2) O.P. No. 18342 of 2001 is allowed directing that the Petitioner shall be appointed forthwith, by the Manager, as a full time menial in the K.V. Sanskrit Higher Secondary School, Muthukulam.

(3) The Petitioner in O.P. No. 18342 of 2001, Sri Rajesh will be entitled to an amount of Rs.2,00,000 as costs and compensation. This amount shall be chargeable on the assets of the Manager and recoverable by Sri Rajesh from the Manager.