

(2011) 11 CAL CK 0079
In the Calcutta High Court
Case No : W.P No. 19276 (W) of 2009

Sailendra Nath Das and Another

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 24-11-2011

Acts Referred:

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

Citation : (2011) 11 CAL CK 0079

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : Ekramul Bari and Ms. Tanuja Basak Ali, for the Appellant; P.S. Deb Barman, for the Respondent

Judgement

Harish Tandon, J.—The petitioner has assailed the decision of the Director of the School Education, West Bengal, Vide Memo No. 1105 (7) dated 03.09.2009 whereby and whereunder an application for appointment on compassionate ground was rejected on the ground of delay as well as on the basis of the subsequent government order.

2. In spite of the direction dated 24.03.2011, no affidavit in opposition is filed by the respondents. However, the learned Advocate appearing for the council proceeded to argue the matter at length.

3. The case adumbrated in the writ petition is that the petitioner No. 1 was appointed as a Primary Teacher and was working in Sujapur Kumodini Primary School, District-Malda under the respondent No. 4, Malda District Primary School Council. The petitioner No. 1 applied for his premature retirement on the ground of medical incapacitation. The said application was submitted by the petitioner No. 1 in prescribed proforma before attaining the age of 58 years.

4. The concerned authority did not take any step on the said application which constrained the petitioner No. 1 to file a writ petition being W.P No. 10131 (w) of 1999 praying for an order directing the appropriate authority to constitute the

medical board for medical examination of the petitioner No. 1 for the purpose of premature retirement on permanent disablement. The said writ application was disposed of on 29.07.1999 with a direction upon the Chairman, District Primary School Council to forward the application of the petitioner No. 1 to the Chief Medical Officer of Health, Malda for constituting the medical board for the purpose of finding out whether the petitioner No. 1 is medically incapacitated to render his services.

5. Subsequently, the Medical Board found the petitioner No. 1 permanent disabled to continue in service and declared him unfit since 14.08.1999. By memo No. 1058/1 dated 12.06.2003 issued by the Chairman, Malda District Primary School Council to the Sub Inspector of Schools, Kalichak North Circle Malda, the said authority intimated that the petitioner No. 1 has been declared medically unfit on and from 14.08.1999 and asked for the submission of the proposal for appointment of award for further action. Pursuant thereto another application is taken out by the petitioners seeking for the appointment on compassionate ground.

6. The Director of the School Education, West Bengal by impugned decision refused to grant approval as the ward has applied for appointment on compassionate ground after 2/3 years from the date of disablement of the teachers.

7. Mr. Ekramul Bari, learned Advocate appearing for the petitioner submits that the concerned authority should not have rejected the said application on the ground of delay as the applications submitted by the petitioner No. 1 in prescribed proforma contends the prayer for appointment of the petitioner No. 2 on compassionate ground. He further submits that the authorities have applied the existing government order for rejecting the application of the petitioners which is not permissible. In support of such submissions he placed reliance upon a division bench judgment of this court in case of Chand Mohammad and Another Vs. State of West Bengal and Others,

8. Mr. Partha Sarathi Deb Barman, the learned Advocate appearing for the Malda District Primary School submits that the concerned authority has applied the government order prevalent at the time of consideration of an application which postulates that the said application must be taken out within 2 years. He further submits that the authorities cannot proceed in contravention to the statutory provisions and have rightly rejected the said application.

9. Heard the respective submissions it is undisputed that an application for premature retirement on the ground of permanent disablement was filed in prescribed proforma by the petitioner No. 1 before attaining the age of 58 years. Since the authorities showed reluctance in taking steps on the said application the petitioner No. 1 moved before this court in writ jurisdiction and this court disposed of the writ petition on 29 July, 2009 recording the agony of the petitioner who was about to reach the age of 58 years and the said order reads

thus:-

In the instant writ application the petitioner who is an Assistant teacher in a Primary School in the District of Malda within the jurisdiction of the Malda District Primary Scholl Council has prayed for issue of a writ in the nature of Mandamus, inter alia, directing the respondents to get the petitioner examined by a duly constituted Medical Board for the purpose of declaring permanently incapacitated.

It is claimed by the petitioner that he has become permanently disabled and incapacitated for continuing his service as a teacher in the School. Accordingly he applied before the respondents in a prescribed form for being declared as disabled and incapacitated from rendering service. Normally the date of superannuation of the petitioner is 30.03.2001. it is the case of the petitioner that because of his prolong illness he is unable to continue his service any further and therefore, is liable to be so declared as incapacitated and disabled.

It is the grievance of the petitioner that although such application was made and an enquiry Committee was constituted by Chairman, Adhoc Committee, District Primary Council for consideration of the genuineness on his ground, has submitted a report in his favour, till date no Medical Board has been constituted for which the petitioner is suffering prejudice. The anxiety of the petitioner for an expeditious decision of the Apex-Medical Board an appropriate authority is for obvious reasons, if the petitioner is found to be disabled and incapacitated then obvious consequences would be that he will be retired from service permanently and will be entitled to all terminal benefits.

That apart under Rule 14 (B) of the Recruitment and Leave Rules of the Primary teachers provides that when a primary teacher is declared permanently incapacitated by the competent medical board set up according to the procedure laid down in the Government order and he has been allowed to retire at least two years before he attains the age of superannuation and his family is in extreme economic hardship after such retirement the unemployed wife, or the unemployed son or the unemployed unmarried daughter of the incapacitated and permanently retired primary teacher possessing the required qualification may be appointed on compassionate ground.

In fact it appears that the petitioner in the aforesaid application made in the prescribed form has also indicated the name of his son whose employment has been asked for, if he is declared incapacitated. Consideration for such compassionate appointment can be made only if a teacher is declared incapacitated or disabled at least two years before he attains the age of superannuation. In such view of the matter it cannot be said that the anxiety of the petitioner to obtain expeditious decision in the matter is unjustified.

The learned Advocate appearing for the petitioner prays before this court for similar order as passed by G.R. Bhattacharya J, and M.H.S. Ansari, J in a writ application of similar nature, by issuing appropriate direction for consideration of the matter expeditiously.

After hearing the learned Advocate appearing for the parties and considering the writ application, I am of the view that similar nature of case has been made out in the instant writ petition. Under such circumstances, I am of the view, that in view of the order which I propose to pass no useful purpose would be served by giving directions for affidavit.

If the application of the writ petitioner has already been considered by the three-men enquiry committee ascertaining the genuineness of the case of the petitioner and recommendation has been made in his favour, the same shall be submitted forthwith to the Chairman Primary Council, Malda and if such report testifies the genuineness of the case of the petitioner the Chairman of the Primary Council shall forward the same to the Chief Medical Officer of Health, Malda forthwith who shall take all appropriated steps for examination of the petitioner by a duly constituted Medical Board for the purpose of finding out whether the petitioner is to be declared permanently disabled and incapacitated, positively within six weeks from the receipt of the said report from the chairman of the Primary Council. The said report of the said Medical Board shall be forwarded to the Chairman, District Primary Council immediately after the decision is taken by such Medical Board and the Chairman, Primary Council, Malda, in the event such Medical Board declared the petitioner permanently incapacitated or disabled he shall send such report along with the application of the petitioner to the Director of School Education, West Bengal for passing appropriate order in accordance with law.

It is made clear that the Council shall forward such report to the Medical Board along with the application of the petitioner to the director of School Education positively within six weeks from the receipt of such report and the Director of School Education shall take final decision in accordance with law positively within eight weeks from receipt of such report an application of the petitioner through the Primary Council.

It is also made clear that since in the instant case the petitioner is to reach his normally the age of superannuation namely 58 years by 30th September, 1999. The constitution of the Medical Board for examination of the petitioner and the decision of the Medical Board on examination of the petitioner must be made by 28th September 1999.

The time limit so fixed for every stage is peremptory and mandatory.

The writ application is thus disposed of. There will be no order as to costs.

Since no affidavit has been made to the instant writ application the allegations made in the writ petition shall not be deemed to have been admitted.

10. From the tenet of the order, there is no hesitation that the petitioner was conscious of the statutory provisions which contemplates that the declaration regarding permanent incapacitation should be made before attaining the age of 58 years.

11. Pursuant to the said order, the Medical Board constituted by the Chief Medical Officer of Health, Malda declared the petitioner No. 1 permanent disabled to continue in service with effect from 14.08.1999 whereas the petitioner was about to attain the age of 58 years by 30th September, 1999.

12. On a bare look to an application submitted by the petitioner No. 1 in prescribed proforma one could find from Clause 11 that the petitioner No. 1 prayed for the appointment of the petitioner No. 2 on compassionate ground. Thus it cannot be said that the prayer for appointment of the petitioner No. 2 was made belatedly. Even otherwise the Chairman, Malda District Primary School Council by memo dated 12th June, 2003 invited the proposal in prescribed proforma for appointment of the petitioner No. 2 in prescribed form. Further application was filed by the petitioners on 14.07.2003 reiterating the prayer for compassionate appointment as was made in a first application dated 16.04.1999.

13. Therefore, the order impugned in this writ petition is not sustainable.

14. The other point which has been taken by the authority that the existing government order creates an embargo in approving for appointment on compassionate ground is also not tenable. Admittedly, the application in prescribed form was filed by the petitioner No. 1 on 16.04.1999 when the rules regulating the recruitment and live of the teacher in primary school in West Bengal which was framed in exercise of the power conferred by section 106 and section 60 of the West Bengal Primary School Education Act, 1973 and was duly notified with a government order No. 768-Edn (P) dated 22 November, 1991, was in vogue. The said application should be considered in the light of the rule prevalent at the time of making the same and the amendment rules should not be applied unless the same is expressly made to operate retrospectively. Furthermore by an executive order the statutory rules cannot be amended and those orders which are contrary to the statutory rules cannot be said to be legal.

15. Thus the order impugned is unsustainable and is hereby quashed and set aside.

16. The respondent No. 2 is directed to reconsider the said application on merit and shall pass a reasoned order within 8 weeks from the date of the communication of this order. Entire exercise should be made by the said authority strictly in accordance with the rules prevalent at the time of making an application by the petitioner No. 1 on 16.04.1999.

17. The writ petition is thus disposed of.

18. There shall have no order as to costs.

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