
(2011) 08 CAL CK 0044
In the Calcutta High Court
Case No : A.S.T. No. 117 of 2011

Soumik Dandapath

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 25-08-2011

Acts Referred:

Citation : (2012) 1 CHN 60

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

Bench : Division Bench

Advocate : Ekramul Bari, Syed M. Ali and K.M. Hossain, for the Appellant; Debangsu Basak, Driraj Trivedi for the respondent Nos. 1, 2 and 3, Kamalesh Bhattacharya, Id. Addl.Gvt.Pleader and Moupiya De Basu for the respondent Nos. 4 and 5, for the Respondent

Final Decision : Allowed

Judgement

Amit Talukdar, J.—Father of the Appellant was a Headmaster in a primary school under the Chairman of the District Primary School Council, Paschim Mcdinlpur, hereinafter referred to is "the Chairman", He passed away on 14.11.2005. Thereafter the Appellant made a prayer for compassionate appointment to sustain his family on 04.09.2006 before the Chairman-Proposal for the same was forward by the Chairman on 05.04.2007. It was ultimately regretted by the Director of School Education (D.S.E. for short) on 24.08.2010 which was communicated by the Chairman to the Appellant, inter alia, containing the ground that in view of the D.S.E.'s Memo No. 549-Sc/P dated 27.7.2010 the appellant cannot be treated as "financially distressed in terms of Memo No. 331-SE(Pry) dated 26.6.2009".The persuaded the appellant to prefer a writ application, W.P. No. 24607 (W) of 2010. Hon"ble Single Judge, after considering the submissions made at the Bar and taking into account the said communication was of the prima facie opinion - "no reason has been cited as to why the deceased teacher" family (read the appellant) cannot be treated as financially distressed. The language of the communication appears to be quite cryptic and

terse." His Lordship, on such premises disposed of the writ application by directing the D.S.E. to consider the matter afresh supported by cogent reasons after considering the relevant Rules governing Appointment on Compassionate Ground.

2. Against the same this Appeal has been filed. Shri Ban for the Appellant-has at the outset submitted that against an absolutely identical order, passed in the case of Shri Satyagopal Mishra, reported in 2011(2) WBLR (CAL.)757 a Division Bench of this court disposed of the appeal by way of directing compassionate appointment in favour of the appellant. Shri Bari has submitted that the said decision of Shri Satyagopal Mishra (supra) was tested by the State of West Bengal before the Hon''ble Supreme Court. According to Shri Bari the Special Leave to Appeal was refused by Their Lordships of the Supreme Court. As such, according to Shri Bari, keeping in view the above aspect of the matter this Appeal is required to be dealt in similar situation on the ground of parity.

3. We have looked into the Division Bench decision in Shri Satyagopal Mishra (supra) alongside the order under Appeal in the instant case vis-a-vis the same in Shri Satyagopal Mishra (supra). Shri Bari is quite right that it is an absolutely identical nature of order and if we may hasten to say so are carbon copy of each other. Commonly we treat such matters as analogous and dispose it of by a common judgment governing the fate of the others. In ordinary fact situation we would have been required to simply match the line of the Division Bench decision in Shri Satyagopal Mishra (supra). More so, where the Hon''ble Supreme Court has refused the grant of Special Leave.

4. But there is a rider and for a moment we have to pause before proceeding of the basis of the submission of Shri Bari.

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5. Learned Senior Government Advocate who appears with Shri Dhiraj Trivedi for the State of West Bengal has raised two-fold points for consideration. These are:

dismissal of an SLP cannot have a binding effect on the High Court and the decision in Shri Satyagopal Mishra's case (supra) did not consider the three decisions-

1. Punjab National Bank and Others Vs. Ashwini Kumar Taneja,
2. State Bank of India and Another Vs. Somvir Singh,
3. State Bank of India and Others Vs. Jaspal Kaur,

of the Supreme Court which were on the point of compassionate; appointment. As such the said decision in Shri Satyagopal Mishra's case is per inquirium in nature and not binding on us.

6. At the outset we completely abide by the first submission of the learned Senior Government Advocate. This position is quite well-settled. Dismissal of a

SLP cannot be of any finality. For profitable discussion-we would quote the order of the Supreme Court--

"We are not inclined to interfere with the impugned judgment and order passed. The SLP is dismissed accordingly. However, the question of law could be raised in an appropriate case."

7. It is now quite trite position that simply Leave, having been refused by the Hon"ble Apex Court the Judgment under Appeal does not reach its finality. This question is no longer res integra. In view of the decision of the Supreme Court in State of Manipur Vs. Thingujam Brojen Meetei, , followed by the later decision in Union of India (UOI) and Another Vs. Manik Lal Banerjee, Very recently the Supreme Court in Gangadhara Palo Vs. The Revenue Divisional Officer and Another, , taking into consideration its earlier decision had held that even a review would be maintainable against the order of High Court in respect of which Special Leave to Appeal was dismissed without any reasoned order.

8. As such, we can not have any qualms with this part of submission of the learned Senior Government Advocate.

9. Simply on the basis of the dismissal of Special Leave against the Division Bench decision in Shri Satyagopal"s case (supra) it does not attain its finality.

10. This would bring us to the next, phase of his submission in the light of the decisions of the Supreme Court in Punjab National Bank & Ors. (supra); State Bank of India & Anr. (supra) and State Bank of India & Ors. (supra).

11. Learned Senior Government Advocate with Shri Trivedi has submitted that in view of the three decisions in Punjab National Bank & Ors. (supra); State Bank of India & Anr. (supra) and State Bank of India & Ors. (supra) the judgment of Shri Satyagopal Mishra (supra) is rendered per incuriam. The learned Senior Government Advocate has referred to the decisions in-

A. Sunita Devi Vs. State of Bihar and Another,

B. State of Rajasthan and Others Vs. Jagdish Narain Chaturvedi,

C. State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, .

to establish his point as to what constitute a per incuriam decision not having any binding effect and is not covered by the rule of stare decisis. In this aspect also there cannot be any dispute, in this regard as have been sought to be canvassed by the learned Senior Government Advocate.

12. We would now look into the entire conspectus of the matter in the light of the submission of Shri Bari and the objection raised by the learned Senior Government Advocate. Before that we have to refer to the submission of the learned Counsel for the Chairman, District Primary School Council, Paschim Medinipur.

13. Learned Additional Government Pleader with Ms. M. De Basu for the

Chairman has submitted that in fact the Council has no role to play in view of the provisions of the recruitment rules. According to the learned Additional Government Pleader they are simply bound by the directions of the D.S.E.

14. After we have heard the submissions made at the Bari and considered the issue in question we would deal with the same in seriatim. As we have found the first, part of submission of the learned Senior Advocate with regard to the dismissal of the SLP not having any binding effect on the decision under Appeal of the High Court we feel we need not enter into any other discussion in the light of the decisions of the Supreme Court which we have seen in *Union of India vs. Maniklal Banerjee* (supra), *State of Manipur* (supra) and the latest, decision of the Supreme Court in *Gangadhar Palo* (supra). This is in fact well settled question by now.

15. What is of concern is as to whether the principle of stare decisis, would apply in the present case or we would be governed by the question of per incuriam as suggested by the learned Senior Government Advocate on the strength of *Sumitra Devi* (supra); *State of Rajasthan vs. Jagdish Narain Chaturvedi* (supra) and *State of U. P. & Anr. vs. Synthetics and Chemicals Ltd. & Anr.* (supra) as the decisions of the Supreme Court in *Punjab National Bank & Ors.* (supra); *State Bank of India & Anr.* (supra) and *State Bank of India & Ors.* (supra) were not considered.

16. We are of the opinion that in a given situation, as a Bench of coordinate jurisdiction, we are normally bound by our previous Division Bench. This is the rule of precedent and we cannot depart from the view adopted by the previous Division Bench of co-equal strength, as it would be against judicial discipline. Of course, the principle of sub silentio and per incuriam which have been incorporated in our jurisprudence since time immemorial from the various English decisions is an exception to the above principle. Learned Senior Government Advocate is quite right on the strength of the decisions in *Punjab National Bank & Ors.* (supra); *State Bank of India & Anr.* (supra) and *State Bank of India & Ors.* (supra) that once it is found the judgment, which is cited as a precedent, falls short of some requisite materials which has been left out, obviously, is guided by the principle of per incuriam and it will have no binding effect leave alone its persuasive value in a successive Bench.

17. In such perused the Order under appeal as also the decisions in *Punjab National Bank & Ors.* (supra); *State Bank of India & Anr.* (supra) and *State Bank of India & Ors.* (supra). We are dealing with a case of compassionate appointment where the State Government has set out some statutory regulation (read Rule 14) whereas the decisions in *Punjab National Bank & Ors.* (supra), *State Bank of India & Anr.* (supra) and *State Bank of India & Ors.* (supra) relate to some Schemes formulated in various banks where the question of computation of the Family Pension is to be taken into account before assessing the need for compassionate appointment. We are of the humble view that the said decisions of *Punjab National Bank & Ors.* (supra); *State Bank of India & Anr.*

(supra) and State Bank of India & Ors, (supra) dealing with various Schemes of the different banks which were appellants before the Supreme Court and whereas in the present case the issue relates to interpretation of Rule 14 of a particular statute are quite distinguishable and cannot be of any assistance to the learned Senior Government Advocate for the point he intends to drive home.

18. Once we have understood the same at once, we feel that it cannot be termed that the order passed in Shri Satyagopal Mishra's case (supra) falls foul, of the doctrine of per incuriam as the decisions cited by learned Senior Government Advocate in Punjab National Bank & Ors. (supra); State Bank of India & Anr. (supra) and State Bank of India & Ors. (supra) not having been considered, may have render the decision otherwise. This is not the case here. The said decisions of Punjab National Bank & Ors. (supra); State Bank of India & Anr. (supra) and State Bank of India & Ors. (supra) placed by the learned Senior Government Advocate are not only quite distinguishable but are on a different footing and cannot be said to have full scale application in the facts and circumstances of the present case.

19. Once we have covered a portion of the submission of the learned Senior Government Advocate in the above aspect of the matter, this would now, bring us to the other part :of his submission inter alia, to a Notification issued by the State Government on the strength of a Single Bench Judgment in W.P. No.2375 (W) of 2004 (Mir Md. Shamim vs. State of West Bengal) which, according to the learned Senior Government Advocate, has paved the way for amendment of Rule 14(A) and clarification of the word "extreme economic hardship" in Rule 14(1)(A). According to the learned Senior Government Advocate, who was of the view that unless the "extreme economic hardship" as clarified in the, sub-section of amendment of Rule 14 is fulfilled, no compassionate appointment can be granted. For this purpose he had placed before us the amendment of the rule.

20. In this sphere also, we are afraid, we cannot abide ourselves with the conclusion sought to be reached by him on the strength of the amendments".

21. As rightly pointed out by Shri Bari that the Notifications are at a later date, when the prayer for compassionate appointment was made. We find the family cannot be treated as financially distressed in terms of Memo No. 331-S.E./Pry dated 26.6.2009 can be acceptable. At the very outset we have found that the appellant lost his father way back on 14.11.2005. His prayer was processed by the Chairman on 04.09.2006 which is very anterior to the Notification which came into effect in 2008 and 2009. These amendments, as rightly pointed out by Shri Bari, has been done to this will come into effect, immediately". As such it cannot have any retrospective effect.

22. Clearly the Notification, relied upon by the learned Senior Government Advocate, cannot be given any effect on a date when particular accrued right of the appellant has arisen and that too when it would appear to his prejudice. Reference made by Shri Bari to the decisions of our Court in Parthasarathi Sarkar

vs. State of West Bengal & Ors., in W.P. 19745(W) of 2010 as also the Division Bench decision in State of West Bengal vs. Bina Debnath & Ors., 2009 (2) CLJ (CAL) 512 and also the Supreme Court in State Bank of India and Others Vs. Jaspal Kaur, are quite appropriate.

23. In other words when a cause of action falls for consideration and the same is in the process of being dealt with as subsequent amendment in the Rules, that too which makes the position stringent for the present, seeking, such remedy, cannot be given a retrospective effect. More so, when the notification has been shown to this will come into effect immediately. Accordingly, the argument of the learned Additional Government Pleader does not have any strength in this regard.

24. From a wholesome appreciation of the entire matter we are of the considered view that the question of financial hardship, which has been sought to be later amended by Rules 14 and 14(a), has not been properly assessed by the D.S.E. simply on the basis of his whims and caprice a decision has been taken relying on a Circular, It will have no effect as it cannot govern the question which did not fall for consideration at the relevant time when the Circular, was in effect. As we have found the question of financial hardship has not been quantified and more over the process was made for Compassionate Appointment way back on 4th September, 2006 but the D.S.E. for reasons best known to him could find time only in 27th July, 2010 to come to a decision that family is not under financial hardship.

25. Keeping in mind the submission of the learned Additional Government Pleader for the Chairman that he has no role to play in the process as he is bound by the direction of the D.S.E. we have to under stand the same in the light of the point taken by Shri Bari on the anvil of the objection of the learned Senior Government Advocate. In their interpretation of Rule 14 it would necessary to discuss this issue in some detail, Shri Bari has submitted that in Rule 14 it is simply " the approval of the Director....." whereas it is the formation of opinion of the Council that matters. In other words Shri Bari has sought to impress us on the strength of the same that after preliminary opinion is formed, with regard to the necessitation of a compassionate appointment, by the Council, the proposal is forwarded before, the D.S.E. for approval, Shri Bari argued on the line of power of approval of the Director being limited to simply endorsing the proposal of the Council, who had forwarded the same. Whereas learned Senior Government Advocate was of the view that when the statute contains the phrase "approval of the Director "..... " he cannot act as a mere Post Office but it requires application of his mind and the same cannot be done mechanically simply on the basis of a proposal being forwarded by the Council.

26. We have read Rule 14 in order to better appreciate the contentions of Shri Bari and the learned Senior Government Advocate in this regard. A plain reading of the said Rule shows that for compassionate consideration "the Council may appoint primary teachers with the approval of the Director on compassionate ground in the following cases [(a) and (b)] where, in the opinion of the Council,

the cases deserves compassionate consideration". The very basis of Rule 14 suggests, as rightly pointed out by Shri Bari, the preliminary formation of opinion as regards the competency of the claim. Thereafter upon the same being forwarded Director is necessary to give approval. Now there is a big rider in the sentence which reads "with the approval of the Director....." in Rule 14. We fully appreciate the concern of the learned Senior Government Advocate that neither the D.S.E. can be a simple endorsing authority on the proposal of the Council nor it will affix its mere seal of approval, but obviously, has to apply its mind for the entire issue.

27. This would bring us to a very important question which has formed the very basis of the present Appeal. It is the Memo No-3065/ES dated 24.8.2010 by the respondent No.4 (the Chairman, Paschim" Medinipur District Primary School Council) communicating to the appellant "that proposal for appointment cannot be approved as the family cannot "be treated as financially distressed in terms of Memo No. 331-SE/Pry dated 26.6.2009. The said communication was a fall of the D.S.E. Memo No.549/Sc/P dated 27.7.2010. This Memo by the respondent No.4 communicating the decision of the respondent No.2 (D.S.E.) has widespread ramification for this Appeal as well as in similar nature of such matters which frequently crop up for decision before the Court. At the cost of repetition if we again revert to Rule 14 we cannot give a narrow meaning to the words "approval of the Director....." as emphasized by the learned Senior Government Advocate to show that he has a master role to play. In the instant case even if we, for a moment, abide by the views of the learned Senior Government Advocate, we clearly come to the conclusion, that the Memoriated 24.8.2010 issued by the Respondent No.4 in terms of the Memo of Respondent No.2 which we have quoted hereinabove it would at once be seen that it is an oblique exercise of power in the first place, as i neither contains any reason nor any cogent ground which has been deprecated by His Lordship of the Hon"ble Trial Court as already we have found that the Memo No.331 - I SE/Pry dated 26.6.2009 has no application since the entire issue has fructified much long before the amendment in Rule 14, which necessitated the issuance of such Memo. Once the Chairman (Respondent No.4) has formed an opinion, thereafter the question of compassionate appointment is thrown before the D.S.E. (Respondent No.2) for his approval. Obviously, it entails exercise of discretion, which has not being done at all and thus makes the issue very much vulnerable. To make it more precise we hold that the interpretation of Rule 14 comes to the position that the Council, as a sponsoring authority, has a larger role to play in considering the criteria for compassionate consideration. The Director is to merely look into the same by way of crosscheck but never as a super body of appeal.

28. After noting the objection of learned Senior Government Advocate and the learned Additional Government Pleader for the Chairman, as we have found that the decisions in Punjab National Bank & Ors. (supra); State Bank of India & Anr. (supra) and State Bank of India & Ors. (supra) are quite distinguishable. The

decision in Shri Satyagopal Mishra's Case (supra) operates as a binding precedent upon us in a coequal jurisdiction. More particularly/we are of the view that at the behest of the State Shri Satyagopal Mishra's case was tested before the Supreme Court. The effect of the said decision was not interfered with by the Hon"ble Supreme Court. Neither we are sitting in Review or in appeal over the decision of the preceding Division Bench and as we have found the Orders under appeal in Shri Satyagopal Mishra's (supra) case as also in this case are, if we may say, carbon copy of each other and not only identical but absolutely selfsame in nature being analogous, are required to be disposed of accordingly. We are also buttressed with the decision of the Supreme Court in State Bank of India & Ors. vs. Akeel Ahmed Khan, as referred to by Shri Bari, reported in 2005(11) SCC 508. The process being pan passu with each other it would difficult to distinguish Shri Satyagopal Mishra's case (supra) separately. More over we have understood that following dismissal of the SLP in Shri Satyagopal mishra's (supra) case the D.S.E. has passed necessary directions for compliance of the order.

29. As such, appeal stands allowed and the connected application is disposed of and we would direct the Proposal sent by the Chairman before the D.S.E. be approved within three weeks from the date of communication of this Order.

30. No order as to costs.

31. Urgent xerox certified copy of this Order, if applied for, be given to the parties.

32. This order would also cover the fate of Aparajita Sharangi vs. State of West Bengal & Ors., In A.S.T. No. 118 of 2011 with A.S.T.A. No. 96 of 2011 (Stay) being absolutely analogous in nature.

P.K. Dey, J.

I agree.