

(2013) 05 CAL CK 0056
In the Calcutta High Court
Case No : M.A.T. No. 1036 of 2011

State of West Bengal and Others

APPELLANT

Vs

Purnam Pradhan

RESPONDENT

Date of Decision : 02-05-2013

Acts Referred:

Citation : (2013) LabIC 4016 : (2013) 4 WBLR 939

Hon'ble Judges : Arun Mishra, C.J.;Joymalya Bagchi, J

Bench : Division Bench

Advocate : Ushanath Banerjee, Md. Galib and Ms. Koyeli Bhattacharyya, for the Appellant;Milan Chandra Bhattacharjee, Ms. Sulagna Bhattacharjee, Ms. Daisy Basu and Srinjoy Ghosh, for the Respondent

Final Decision : Allowed

Judgement

Arun Mishra, C.J.—The intra-Court appeal has been preferred by the State of West Bengal & others calling in question the order dated 15.6.2011 passed by the single Bench in W.P. No. 19968(W) of 2006 (Shri Purnam Pradhan v. The State of West Bengal & Ors.) by which the writ petitioner's prayer for compassionate appointment has been allowed and compassionate appointment has been ordered to be made by the respondent No. 1 in favour of the petitioner for the post of "Clerk". The facts in short are that the mother of the petitioner was in the employment of Jasteghori Saranan Trilochan Balika Vidyalaya, Purba Medinipur. She was appointed on 15.05.1987. However, she died on 14.10.1995. The petitioner's mother was allegedly murdered by her husband, Dilip Prodhan, who was taken into custody and had been convicted for commission of offence u/s 302, I.P.C. The petitioner was approximately 8 years at that time. He applied for compassionate appointment after attaining majority after ten years in the year 2005. The prayer had been rejected while memo dated 30.06.2006 passed by the District Inspector of Schools (SE) on the ground that compassionate appointment could not have been offered in terms of the policy which provided for appointment. The application for appointment on compassionate ground can

be entertained if filed only within two years. The aforesaid memo was questioned. The single Bench has observed that since the petitioner was minor at the time when his mother was murdered in the year 1995, thus the provision of filing the application within the period of two years for the purpose of seeking compassionate appointment as provided in the Memo dated 2.1.1995 is not applicable considering the facts and circumstances of the case that rider has been held not to be applicable. Compassionate appointment has been directed as such, intra Court appeal has been preferred.

2. Shri Ushanath Banerjee, learned Senior Counsel appearing on behalf of the appellant along with Md. Ghalib, has submitted that the Court has travelled beyond the policy. It was not open to direct compassionate appointment beyond policy by issuing direction to offer appointment on compassionate ground. The power of judicial review has been exceeded by the single Bench. He has further submitted that after 10 years there is no rhyme or reason and ground for compassionate appointment as the very purpose of compassionate appointment is to provide immediate succor of the family in distress of the employee who died in harness. None of the factors was available for offering the compassionate appointment and as such, the impugned decision of the single Bench is to be quashed.

3. Shri Milon Bhattacharya, learned Senior Counsel appearing with Ms. Daisy Basu, on behalf of the respondent, has made endeavour to sustain the order by referring to the various facts and circumstances of the instant case. It was submitted that the provisions contained in the Memo dated 2.1.1995 for filing application within a period of two years is applicable in the case of member of teaching staff who died in harness. The same period of limitation cannot be said to be applicable towards non-teaching staff. Since the petitioner was minor in the instant case, he could not have applied at the relevant point of time and rightly when he attained the age of majority, he filed the application which ought to have been allowed. The single Bench is right in directing compassionate appointment and no case for interference is made out.

4. After hearing the learned counsel appearing on behalf of the parties at length, we are of the considered opinion that the compassionate appointment is clearly governed by the policy. The compassionate appointment is an exception to general rule of appointment from the open market by competition, compassionate appointment cannot be claimed as a matter of right and dehors of policy. The very objective of providing compassionate appointment is to provide immediate succor to the family in distress to take care of severe financial crisis which might arise in case of an employee died in harness. It is also settled proposition of law that the compassionate appointment cannot be offered after a reasonable time. It is also settled by various decisions that compassionate appointment should not be offered after lapse of reasonable period, to say, five years.

5. The Hon''ble Supreme Court in State Bank of India and Another Vs. Raj Kumar,

has laid down that claim for compassionate appointment is traceable only to specific scheme framed by the employer for such employment and there is no right whatsoever outside such a scheme. It has also been observed once a scheme is abolished no right can be claimed even with respect to pending application under the scheme, which has been abolished, unless saved. The dependents of the employee who died in harness do not have any special claim or right to employment is traceable only to specific scheme framed by the employer for such employment and there is no right whatsoever outside such a scheme. It has also been observed once a scheme is abolished no right can be claimed even with respect to pending application under the scheme, which has been abolished, unless saved. The dependents of the employee who died in harness do not have any special claim or right to employment, except by way of concession that may be extended by the employer under the rules or by a separate scheme to enable the family of the deceased to get over the sudden financial crisis. The Apex Court in the case of *State Bank of India v. Rajkumar* (supra) has laid down thus:

8. It is now well settled that appointment on compassionate ground is not a source on recruitment. On the other hand it is an exception to the general rule that recruitment to public services should be on the basis of merit, by an open invitation providing equal opportunity to all eligible persons who participate in the selection process. The dependents of employees, who die in harness, do not have any special claim or right to employment, except by way of concession that may be extended by the employer under the rules or by a separate scheme, to enable the family of the deceased to get over the sudden financial crisis. The claim for compassionate appointment is therefore traceable only to the scheme framed by the employer for such employment and there is no right whatsoever outside such scheme. An appointment under the scheme can be made only with the scheme is in force and not after it is abolished/withdrawn. It follows therefore that when a scheme is abolished any pending application seeking appointment under the scheme will also cease to exist, unless saved. The mere fact that an application was made when the scheme was in force, will not by itself create a right in favour of the applicant.

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11. Normal schemes contemplate compassionate appointment on an application by a dependent family member, subject to the applicant fulfilling the prescribed eligibility recruitments, and subject to availability of a vacancy for making the appointment. Under many schemes the applicant has only a right to be considered for appointment against a specified quota, even if he fulfils all the eligibility criteria; and the selection is made of the most deserving among the several competing applicants, to the limited quota of posts available. In all these schemes there is a need to verify the eligibility and antecedents of the applicant for the financial capacity of the family. There is also a need for the applicant to wait in a queue for a comparative need of a large number of applicants so as to

fill in a limited number of earmarked vacancies.

12. Obviously, therefore, there can be no immediate or automatic appointment merely on an application. Several circumstances having a bearing on eligibility, and financial condition, upto the date of consideration may have taken into account. As none of the applicants under the scheme have a vested right, that is in force when the application is actually considered and not the scheme that was in force earlier when the application was made, will be applicable.

6. The Apex Court has laid down in the case of State of Chhatisgarh and Others Vs. Dhirjo Kumar Sengar, that appointment on compassionate ground are exception to the general rule that is provided only in terms of the scheme. The Apex Court has laid down thus:

13. The Government of Madhya Pradesh had adopted a scheme for appointment on compassionate ground which was circulated to all concerned in terms of a Letter dated 10.06.1994, stating:

If any Government servant dies in harness then either his widow or his legal children (which includes the stepson/daughter also) would be made available service. Service would not be made available to any other member or relative.

The nephew of the deceased employee, therefore, was ineligible for grant of such appointment. The appointment, however, was offered to the respondent without taking into consideration that he had not been able to establish his relationship with the deceased or that he was in fact totally dependent on him.

7. Similarly, in the State of Haryana and Another Vs. Ankur Gupta, it has been held that the Court cannot rewrite such policy. The Single Bench proceeded in the matter on sympathetic consideration but sympathetic consideration can be adopted only within the realm of policy but not outside it.

8. It has also been laid down by the Hon"ble Apex Court in the case of Shreejith L. Vs. Deputy Director (Education) Kerala and Others,) in which question was considered of a person who attained majority subsequently. The Apex Court has decided that filing of application for appointment on compassionate ground within the period stipulated is necessary where no vacancy is available. The Apex Court has laid down thus:

14. There is considerable merit in the contention urged by Mr. Rajan. It is not in dispute that Respondent No. 1 had attained majority on the 8th of May, 1995 whereas the application for compassionate appointment was made on 10th September, 2007. This application was, on the face of it, beyond the period stipulated in the scheme for making such a claim. The High Court appears to have confused an application required to be filed within the period stipulated for the purpose with the availability of a vacancy against which such an application could be considered by the Manager. These were two distinctly different matters. What was important was the making of an application for appointment on compassionate basis within the period stipulated for the purpose. Whether or not

a vacancy is available had nothing to do with the making of the application itself. An application could and indeed ought to have been made by respondent No. 1 within the time stipulated, regardless whether there was a vacancy already available or likely to become available in the near or distant future. Respondent No. 1 having failed to do that, could not claim a compassionate appointment especially when there was nothing on record to suggest that the family was in penury notwithstanding the lapse of a considerable period since the demise of the bread-winner; during which period respondent No. 1 had got married and settled down in life and supports a family. The High Court was in that view clearly in error in issuing a mandamus to the Manager to appoint the respondent on compassionate basis which order calls for interference and is hereby reversed.

9. In the case of Local Administration Department and Another Vs. M. Selvanayagam @ Kumaravelu, it has been held that when a minor has applied after seven years and six months of his father's death, appointment cannot be said to be subverted the basic object and purpose. The Apex Court has laid down thus:

9. In this case the respondent was only 11 years old at the time of the death of his father. The first application for his appointment was made on July 2, 1993, even while he was a minor. Another application was made on his behalf on attaining majority after 7 years and six months of his father's death. In such a case, the appointment cannot be said to sub-serve the basic object and purpose of the scheme. It would rather appear that on attaining majority he staked his claim on the basis that his father was an employee of the Municipality and he had died while in service. In the facts of the case, the municipal authorities were clearly right in holding that with whatever difficulty, the family of Meenakshisundaram had been able to tide over the first impact of his death. That being the position, the case of the respondent did not come under the scheme of compassionate appointments.

10. In Union of India (UOI) and Another Vs. B. Kishore,), it has been held that when a person waiting in the list of candidates for appointment under the scheme of compassionate appointments and was already beyond the age of superannuation, there was no question of offering compassionate appointment to him.

11. In Sudhir Kumar Consul Vs. Allahabad Bank, , the case has to be considered within the realm of the regulation for appointment and not beyond it.

12. Reliance has also been placed in Smt. Mumtaz Yunus Mulani Vs. State of Maharashtra and Others, in which husband of the appellant was died in 1996 and she made an application for compassionate appointment but in 1997 another person was appointed in that vacancy. No other post was available to accommodate the appellant. Twelve years have passed since the death of appellant's husband and in the meantime her children had grown up and family pension was received. High Court has refused to grant relief to the appellant. The

Apex Court upheld the decision of the High Court.

13. It is submitted by Shri Bhattacharyya, learned counsel appearing on behalf of the respondent No. 1 that the period of two years as specified in the Memorandum dated 02.01.1995 is applicable only with respect to teacher. We are unable to accept the aforesaid submission. As a matter of fact, the aforesaid Memorandum dated 02.01.1995 was issued in continuation of G.O. No. 457-Edn. (P) dated 12.10.1987. If we consider the aforesaid Government Order dated 12.10.1987 it is apparent that wards of non-teaching employees are also brought under the single umbrella under which wards of teachers were provided appointment on compassionate ground. Thus, when both the Government Orders are considered together, it is apparent that when the wards of non-teaching staff have been brought under the same umbrella, the rider of filing the application within two years from the date of death of the concerned teacher cannot be ignored and overlooked otherwise also there is no provision in the policy so as to offer compassionate appointment to the wards of non-teaching staff who are waiting for attaining majority for compassionate appointment. In absence of any such provision, it is not for the Court to rewrite the policy.

14. Reliance has been placed upon by the learned counsel for the respondent No. 1 on a decision of Hon"ble Supreme Court in Syed Khadim Hussain v. State of Bihar & Ors., reported in (2006) 9 SCC 195 in which Peon died in harness in 1991 leaving behind widow and five minor children, widow applied for compassionate appointment within time in 1993 which was not in prescribed format. Appellant son then applied for compassionate appointment in 1995 but his application was rejected in 2001 on the ground that he at the time of filing the application was aged around 13 years. In the facts and circumstances of the case rejection of application was held to be justified, as at the time of rejection, appellant had attained above 18 years of age. Authorities, therefore, must consider his application and give him appropriate appointment within three months. The facts are distinguishable in the instant case as the application had been filed after ten years when there is a rider of compassionate appointment in filing of application within two years from the date employee died in harness, no such application in the instant case was filed for seeking compassionate appointment within the prescribed period. Thus, the decision is not attracted in the facts of the instant case.

15. Reliance has also been placed on a decision of Hon"ble Supreme Court in Mukesh Kumar Vs. Union of India (UOI) and Others,) in which prayer for compassionate appointment was rejected on the ground that the family was not in indigent condition and no indication was available how the departmental authorities arrived at this conclusion. The facts of the case are totally different and as such no support can be derived by respondent No. 1 from the aforesaid decision.

16. Learned senior counsel appearing on behalf of the respondent No. 1 has also relied on a Division Bench decision in Tapan Kumar Barman Vs. State of West

Bengal and Others, , the question came up for consideration for compassionate appointment, in the facts and circumstances of this case direction was issued to provide the compassionate appointment. Question did not arise for consideration of the compassionate appointment as it was applied after lapse of a reasonable time.

17. Decision of a Division Bench in Gopal Mondal Vs. State of West Bengal and Others,) has also been relied upon in which the case of the appointment was processed when the applicant attained the age of majority. It was held by this Court, in the facts and circumstances of this case, since he was minor at the time of death of his father, the compassionate appointment could not have been declined only on that ground. The order was set aside and application was directed to be decided. In the instant case, the case was not under consideration at the time of attaining majority, as such, the aforesaid case was not attracted.

18. Reliance has also been placed on The Chairman, District Primary School Council v. Sri Prithwish Samanta & Ors., reported in (2011) 1 WBLR (Cal) 664, the facts indicate that at the time of death of employee the applicant was 15 years 7 months and 6 days. After two years of the death of his father, as soon as he attained the age of 17 and ? years, he made a prayer for compassionate appointment. In the aforesaid factual matrix the application was filed within two years, this Court has issued the appropriate direction. In the instant case the application has been filed after ten years, as such, the decision is totally distinguishable on facts.

19. Reliance has also been placed on Md. Mansur Ali Vs. State of West Bengal, 743, in which the compassionate appointment was turned down by the authority on that ground that the total monthly family income exceeded the initial gross pay of employee. It was held that rejection of prayer on the aforesaid ground was not appropriate. The ratio of the decision is totally different and is not applicable in the instant case.

20. In the facts and circumstances of the case, we find that the decision rendered by the single Bench cannot be allowed to be sustained and is set aside. The appeal is accordingly, allowed.

21. The parties to bear the costs. Urgent xerox certified copy of this order be supplied to the applicants.