
(1995) 02 CAL CK 0028
In the Calcutta High Court
Case No : C.O. No. 17878 (W) of 1993

Tarun Chakraborty

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 16-02-1995

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 16, 162

Citation : (1995) 2 CALLT 309 : (1995) 1 ILR (Cal) 362

Hon'ble Judges : Satya Brata Sinha, J

Bench : Single Bench

Advocate : P. Bajpayee, for the Appellant; Tarun Roy, for the Respondent

Final Decision : Allowed

Judgement

Satya Brata Sinha, J.—In this writ application the petitioner has, inter alia, prayed for issuance of a writ of mandamus directing the respondents to give employment to him on compassionate ground.

2. The fact of the matter shortly stated is as follows :-

The petitioner's father who was an employee of the respondent Board died on 11.3.1992.

It is admitted that there existed a policy decision adopted by the said respondent that in case of death in harness, a dependent of the deceased employee would be provided with a job. However the Respondent-Board issued a circular letter dated 30.4.92 whereby and whereunder a scheme has been introduced for grant of one time financial benefit to the claimant in lieu of employment. The said scheme has been given retrospective effect and retroactive operation with effect from 1.4.1990.

3. The only question which, therefore, arises for consideration in the instant application is as to whether the said scheme can be given retrospective effect.

4. Mr. Bajpayee, the learned Counsel appearing on behalf of the petitioner has

relied upon an unreported decision of a division bench decision of this Court in Pradyut Kumar Chakraborty v. State of West Bengal in FMAT No. 2654 of 1994 disposed of on 28.9.1994 and submitted on the basis thereof that the said scheme of the Board dated 30.4.92 has no application to the facts and circumstances of the case.

5. Mr. Tarun Roy, the learned Counsel appearing on behalf of the Respondent, however, submitted that keeping in view of the fact that the petitioner applied for the said job on 28.12.1992, the said scheme having already come into force shall be applicable in the instant case.

6. Reliance in this connection has been placed on Smt. Sushma Gosain and Others Vs. Union of India (UOI) and Others, ; Life Insurance Corporation of India Vs. Mrs. Asha Ramachandra Ambekar and another, ; Union of India and others Vs. Tejram Parashramji Bombhate and others, ; Asif Hameed and others Vs. State of Jammu and Kashmir and Others, and State of Tamil Nadu and Others Vs. St. Joseph Teachers Training Institute and Another, .

7. There cannot be any doubt whatsoever that an executive instruction unless issued for the benefit of the employees cannot be given retrospective effect and retroactive operation.

8. In Pradyut Kumar Chakraborty's case (supra) the division bench of which I was a member held :

"By reason of the impugned order date 20th January, 1994, the Secretary, Board of Revenue rejected the prayer of the petitioner on the ground that the State of West Bengal has issued a memorandum bearing No. 200(60)/EMP/2E-31/93 dated 3.8.93. The contention of the learned Counsel for the appellant is that the said letter should not have been given retrospective effect. The contention of the learned Counsel appears to be correct. Keeping in view the fact that the father of the petitioner was permitted to retire with effect from 16th February, 1990, in terms of Annexure "E" aforementioned, which was relevant for the purpose of consideration, was the Rules and the circular letter issued by the State at the relevant time. It is now well known that an executive direction cannot be given retrospective effect. Only a Rule framed under the Proviso to Article 309 of the Constitution of India can be given retrospective effect."

9. In Smt. Sushma Gosain and Others Vs. Union of India (UOI) and Others, , Apex Court held :-

"She had then a right to have her case considered for appointment on compassionate ground under the aforesaid Government Memorandum. In 1983, she passed the trade test and the interview conducted by the DGBR."

10. In Smt. Phoolwati Vs. Union of India and Others, the Supreme Court following its earlier decision in Sushma Gosain's case directed Union of India to provide employment to the second son of the appellant.

11. In Asif Hameed and others Vs. State of Jammu and Kashmir and Others, the Apex Court observed :-

"When the Constitution gives power to the executive Government to lay down policy and procedure for admission to medical colleges in the State then the High Court has no authority to divest the executive of that power. The State Government in its executive power, in the absence of any law on the subject, is the competent authority to prescribe method and procedure for admission to the medical colleges by executive instructions."

12. In Union of India and others Vs. Tejram Parashramji Bombhate and others, , the Supreme Court observed :-

"It is a policy matter involving financial burden. No court or the tribunal could compel the government to change its policy involving expenditure. The tribunal, therefore, could not have issued the directions as it did to compel the Central Government to assess the needs of the school and create the necessary posts without support of law."

13. In State of Tamil Nadu and Others Vs. St. Joseph Teachers Training Institute and Another, it was held that the court cannot grant relief to a party in humanitarian grounds contrary to law.

14. In Life Insurance Corporation of India Vs. Mrs. Asha Ramachandra Ambekar and another, , the law has been laid down in the following terms :-

"Thus apart from the directions as to appointment on compassionate grounds being against statutory provisions, such direction does not take note of this fact. Whatever it may be, the Court should not have directed the appointment on compassionate grounds. The jurisdiction under mandamus cannot be exercised in that fashion."

15. There cannot be any doubt that but for the Scheme/Policy decision of the Respondent-Board, the petitioner would not have any legal right for appointment on compassionate ground.

16. The State frames such schemes keeping in view the immediate need that a family in distress requires owing to death of the bread earner. Such a scheme being benevolent in nature must be given its full effect.

17. A dependant of the employee who died in harness derives a legal right to be employed pursuant to such a scheme. It has to be borne in mind that such scheme is not ultra vires Articles 14 and 16 of the Constitution of India. Thus, a right accrued to the petitioner to obtain an employment under the Respondent-Board on the death of his father. However such application has to be filed within a reasonable time.

18. The State also exercised its executive power under Articles 162 of the Constitution of India in relation to such matters which are covered by the legislative fields, that is, the Lists 2 and 3 of the 7th Schedule of the

Constitution. Such an executive instruction issued under Article 162 of the Constitution of India ; which either takes away the right of a citizen or which does not confer any benefit upon its employees cannot be given retrospective effect or retroactive operation. The Respondent-Board is also a State within the meaning of Article 12 of the Constitution of India. It, apart from its power under the provisions of the Electricity (Supply) Act, 1948, has the requisite jurisdiction to issue executive instructions. Such executive instructions, however, are not statutory in nature, a fortiori what cannot be done by the State in exercise of its jurisdiction under Article 162 of the Constitution of India, cannot also be done by the respondent Board in exercise of its inherent jurisdiction to issue the guidelines or executive directions. In *Accountant General and Another Vs. S. Doraiswamy and Others*, the law has been laid down in the following terms :-

"The next question is whether clause (5) of Article 148 permits the enactment of rules having retrospective operation. It is settled law that unless a statute conferring the power to make rules provides for the making of rules with retrospective operation, the rules made pursuant to that power can have prospective operation only. An exception, however, is the proviso to Article 309. In *B.S. Vadera Vs. Union of India (UOI) and Others*, this Court held that the rules framed under the proviso to Article 309 of the Constitution could have retrospective operation. The conclusion followed from the circumstances that the power conferred under the proviso to Article 309 was intended to fill a hiatus, that is to say, until Parliament or a State Legislature enacted a law on the subject matter of Article 309. The rules framed under the proviso to Article 309 were transient in character and were to do duty only until legislation was enacted. As interim substitutes for such legislation it was clearly intended that the rules should have, the same range of operation as an Act of Parliament or of the State Legislature. The intent was reinforced by the declaration in the proviso to Article 309 that "any rules so made shall have effect subject to the provisions of any such Act". Those features are absent in clause (5) of Article 148. There is nothing in the language of that clause to indicate that the rules framed therein were intended to serve until Parliamentary legislation was enacted. All that the clause says is that the rules framed would be subject to the provisions of the Constitution and of any law made by Parliament. We are satisfied that clause (5) of Article 148 confers power on the President to frame rules operating prospectively only. Clearly then, the rules of 1974, cannot have retrospective operation, and therefore, sub-rule (2) of Rule 1, which declares that they will be deemed to have come into force on 27th July, 1956, must be held ultra vires".

19. In *Ex-Major N.C. Singhal Vs. Director General Armed Forces Medical Services, New Delhi and Another*, it has been stated :

"The appellant submitted that his conditions of service were governed by the Army Instruction No. I/S of 1954 and according to para 13 thereof, the whole of his previous full pay commissioned service must count for pay, and that Army Instruction No. 176 which came into force with retrospective effect from October

26, 1962, in the case of A.M.C. Reserve Officers called to colour service during emergency in the matter of "ante-date", for promotion. T.A., leave and pay, cannot affect his conditions of service which were governed in this behalf by para 13 of Army Instruction No. I/S of 1954.

We think that the appellant's conditions of service were governed by para 13 of Army Instruction No. I/S of 1954 and his previous full pay commissioned service should be taken in the matter of "ante-date" for the purpose of his pay. The condition of service in this regard was not liable to be altered or modified to the prejudice of the appellant by a subsequent administrative "(Army) instruction which was given retrospective effect from 26th October, 1962."

20. A similar view has been taken by the Supreme Court in a decision reported in Commissioner of Income Tax, U.P.-II, Lucknow Vs. Bazpur Co-operative Sugar Factory Ltd., Bazpur, Distt. Nainital, Moreover, by reason of the resolution dated 13.3.92, as contained in Annexure "A" to the affidavit-in-opposition, the scheme for granting employment on compassionate ground has been altered only because difficulties are sometimes felt to provide employment owing to non-availability of suitable vacancy. The respondent Board has not altogether done away with the scheme. The contention of the learned Counsel for the respondents could have some substance if the scheme for grant of appointment on compassionate ground have been done away with. Such being not the position here, the submission of the learned Counsel cannot be accepted.

21. A citizen of India only derives a legal right under a statute, but also derives right in the event of any benevolent scheme is framed or a policy decision is issued. Any deviation or departure from the policy decision on the part of the State also attracts the wrath of Article 14 of the Constitution of India. (See State of Mysore and Another Vs. H. Srinivasmurthy, .

22. Had the petitioner applied for appointment on compassionate ground prior to 30th April, 1992, his application would have been considered on the basis of the scheme as then existing. Only because the petitioner filed the application after the new scheme came into force, his right under the old scheme, in my opinion, cannot be taken away. For the reasons aforementioned, this application is allowed. The respondents are hereby directed to consider the petitioner's application for appointment on compassionate ground in terms of the scheme as was in existence prior to the scheme dated 30.4.1992, as contained in Annexure "A" to the affidavit in opposition at an early date, and preferably within a period of 2 months from the date of communication of this order. However, in the facts and circumstances of this case, there will be no order as to costs.