

(2007) 03 CAL CK 0071
In the Calcutta High Court
Case No : F.M.A. No. 1786 of 2003

The Secretary, West Bengal Regional School Service
Commission (Southern Region)

APPELLANT

Vs

Debapriya Bose and Others

RESPONDENT

Date of Decision : 26-03-2007

Acts Referred:

Constitution of India, 1950 — Article 14
West Bengal School Service Commission Act, 1997 — Section 17(1), 17(2), 8
West Bengal School Service Commission Rules, 1997 — Rule 7(1)

Citation : (2007) 2 CALLT 548

Hon'ble Judges : Tapas Kumar Giri, J;Pratap Kumar Ray, J

Bench : Division Bench

Advocate : Tanim Sengupta and Tapabrata Chakraborty, for the Appellant; B.B. Sarkar and Iti Dutta, for the Respondent

Final Decision : Dismissed

Judgement

Pratap Kumar Ray, J.—Heard the learned advocates appearing for the parties.

2. Challenging the Judgment and order dated 23rd June, 2003 passed by Bhaskar Bhattacharya, J. in W.P. No. 4738 (W) of 2003 this appeal has been preferred. By the said Judgment under appeal the learned Trial Judge allowed the writ application by quashing and setting aside the impugned order in the writ application namely, the decision of the Regional School Service Commission recalling the recommendation of the name of the writ petitioner as earlier issued for her appointment in the concerned school, a secondary school which is controlled and guided by the Rules of Management of Recognised Non-Government Institutions (Aided and Unaided) Rules, 1969 (hereinafter referred to for brevity as the Management Rules, 1969) and the decision of the Managing Committee cancelling the appointment of the writ petitioner in the school in question in view of recalling of the recommendation by the School Service Commission. The School Service Commission recalled the recommendation by its

decision dated 23rd December, 2002 on the ground that at the time of registration of the name under died-in-harness category the writ petitioner was a married daughter of the deceased staff and as such, in terms of G.O. No. 457-Edn.(P) dated Calcutta, the 12th October, 1987 was not entitled to be appointed from died-in-harness category whereby the term "ward" has been defined as a son/a dependent daughter. It is the case of the Service Commission that as the writ petitioner was married so she was not at all remained as dependent of the deceased staff who died-in-harness that is her mother and accordingly recommendation was recalled.

3. The writ application was moved assailing the order recalling recommendation and the order canceling the appointment both.

4. The learned Trial Judge relying upon the Judgment passed by Girish Chandra Gupta, J. in another writ application being the case Smt. Usha Singh v. State of West Bengal and Ors. reported in 2003 (1) CLJ 407 whereby it was held that the circular letter of providing job under compassionate ground as applicable to the appointment in primary schools cannot debar the appointment of a married daughter under died-in-harness category on the logic that the marriage of a woman cannot be the subject matter of any statutory embargo in availing any job. The School Service Commission has preferred this appeal against the said Judgment. The parties argued at length on different angles about power and jurisdiction of the School Service Commission to recall the recommendation and the right of a married daughter to apply for a job under died-in-harness category due to the death of the mother, deceased employee. Some factual matters are required to be dealt with to adjudicate this appeal, which read such.

5. The mother of the writ petitioner/respondent while working in the post of Assistant Teacher of a secondary school (Government Aided) breathed last on 25th July, 2001 leaving beside the spouse husband and the writ petitioner daughter, who was unmarried at that time. The writ petitioner on 8th September, 2001 filed an application praying registration of her name in the live register maintained and kept by the District Inspector of Schools concerned for such candidates who were entitled to be registered under died-in-harness category for compassionate appointment without following Recruitment Rules. On 10th September, 2001, the Chairman of the concerned Municipality wherein the petitioner was residing at the material time issued a certificate certifying the dependency of the writ petitioner upon the deceased mother and the financial hardship as was being suffered due to death of the bread earner of the family. On 30th September, 2001 the writ petitioner got married. On 10th October, 2001 the District Inspector of Schools concerned issued a letter asking the writ petitioner to appear for verification of the certificate namely, dependency certificate for the purpose of registering her name. Admittedly, the writ petitioner did not disclose change of her marital status during pendency of the adjudication of the application and she relied upon the certificate of the Chairman of the concerned Municipality to satisfy her dependency upon the deceased staff which

was issued admittedly at the pre-marriage stage of the writ petitioner. The District Inspector of Schools concerned on the basis of that certificate on holding the writ petitioner an unmarried dependent of the deceased teacher registered the name of the writ petitioner in the live register under died-in-harness category candidate. The name of the writ petitioner was thereafter referred to by the District Inspector of Schools concerned to the Regional School Service Commission on 29th April, 2002. The Regional School Service Commission asked the writ petitioner to appear before them and the writ petitioner appeared on 24th May, 2002 along with relevant documents of academic qualification including the certificate issued by the Chairman of the concerned Municipality, a certificate which was admittedly a certificate of the dependency prior to the marriage of the writ petitioner. The School Service Commission on considering the merit recommended the name of the writ petitioner for her appointment as Assistant Teacher in the concerned school on 14th November, 2002 and the petitioner joined in the school on 22nd November, 2002. After joining in the post when the writ petitioner wanted to change and/or modify her surname in view of the marriage, the matter was ultimately enquired by the respective authorities and the School Service Commission had withdrawn the recommendation on 13th December, 2002 on the ground that at the time of recommendation and also during the registration she was a married daughter of the deceased staff and as such was not entitled to be recommended for a job under died-in-harness category. As a consequence of withdrawal of recommendation, naturally the Managing Committee cancelled the appointment.

6. On the factual matrix of the case it is the submission of the learned advocate for the appellant that the impugned order of the School Service Commission recalling recommendation was within the jurisdiction of the School Service Commission as the writ petitioner exercised fraud by not disclosing her change of status due to marriage which automatically changed dependency factor upon the deceased staff, It is submitted by the learned advocate for the appellant that though the impugned order has not properly couched with the language save and except a reference that the writ petitioner got married but actual cause for recalling the recommendation was losing of the dependency status of the writ petitioner due to the marriage on 30th September, 2001 and accordingly ineligibility of the writ petitioner to register her name under died-in-harness category on 10th October, 2001. The learned advocate for the appellant very frankly submitted before us that in any circumstances there should not be any gender discrimination and also in any circumstances there should not be any discrimination in between a son and a daughter on the basis of a marital status. It has been further submitted that in the instant case as the writ petitioner had lost her dependency upon the deceased staff as was prevalent during the life-time of the deceased due to the marriage of the writ petitioner and her living in the husband's family which is quite natural in view of the prevalent social system, the writ petitioner became ineligible even to register her name under died-in-harness category. It has been further submitted that, had there been

disclosure of factum of marriage of the writ petitioner when she appeared for consideration of her case before the District Inspector of Schools concerned for the purpose of registration of her name in the register, surely the District Inspector of Schools concerned would not have registered her name on the basis of the certificate of dependency as was issued at the pre-marriage stage of the writ petitioner. It has been further urged that accordingly under such state of affairs surely her name would not have been referred to by the District Inspector of Schools concerned to the School Service Commission for consideration of her candidature on merit for the purpose of recommendation to a post of Assistant Teacher under died-in-harness category. The learned advocate for the respondent vehemently has opposed the contention as has been raised by the appellant. It is the submission of the learned advocate for the respondent that the dependency for the purpose of consideration of appointment under died-in-harness category should be considered on the date of cause of action that is on the date of death of the Assistant Teacher and not on the issue of subsequent event of marriage. The learned Advocate for the respondent, however, has not denied the factum of marriage of the writ petitioner prior to registration of her name under died-in-harness category and also has not disputed the fact that after marriage the writ petitioner is living with her husband. The learned Advocate for the respondent further has not denied that the dependency factor of the writ petitioner due to marriage was shifted to the shoulder of the husband as per prevalent social norms.

7. Having regard to the factual matrix of the case and the Judgment under appeal, we have to analyse the relevant statutory provision to identify the main issue. The appointment for the post of Assistant Teacher of a Government aided school which is controlled by the Management Rules of 1969 as referred to wherein the writ petitioner was appointed is controlled and guided by the School Service Commission Act and the procedure for appointment by the Rule as framed by such School Service Commission under the Act. The relevant Recruitment Rules framed being empowered under the School Service Commission Act, 1997 stipulates the condition that as soon as the vacancy declaration is made by the concerned Regional School Service Commission the eligible candidates should file applications and after admission test and interview the final panel is prepared by the School Service Commission. From this panel the name is recommended on seniority basis of the merit list to the respective vacancies of the concerned school. That procedure for recruitment issue under School Service Commission Act is known as procedure for selection of a person for appointment to the post of teacher of a school recognised by the West Bengal Board of Secondary Education or the West Bengal Board of Madrasah Education or the West Bengal Council of Higher Secondary Education or the West Bengal Board of Madrasah Education as the case may be (hereinafter referred to for brevity as Recruitment Rules). This recruitment procedure was published in the Calcutta Gazette and in terms of its notification dated 8th January, 1998 this procedure was framed being empowered u/s 8 read with Sub-section (1) and in

particular Clause (8) of Sub-section (2) of Section 17 of the West Bengal School Service Commission Act, 1997 and Sub-rule 1 of Rule 7 of West Bengal School Service Commission Rules, 1997. Under the said recruitment procedure the inviting of the names, selection of the candidates and thereby recommendations, all have been prescribed. One only exception made to by-pass such procedural steps is the appointment of candidates from death-in-harness category. Clause (6) of the said procedure provides a scope of such appointment of candidates under death-in-harness category by providing an exception clause that they need not to contest along with other general candidates in terms of the vacancy notification. The Clause (6) of the said procedure reads such:

6. In the case of appointment on compassionate ground from death-in-harness category, each District Inspector of Schools (Secondary Education) shall maintain a Roster of such candidates as per prevalent procedure and forward the names to the respective Regional Service Commission from time to time. The Regional School Service Commission shall prepare panels subject wise and category-wise from amongst those candidates in order of merit on the basis of academic qualifications. The Regional School Service Commission shall forward the name of a suitable candidate from death-in-harness category to the concerned school with intimation to the concerned candidate and the District Inspector of Schools (Secondary Education). The school shall then issue order of appointment to the candidate within one month from the date of receipt of the commission's letter forwarding the name.

8. On a bare reading of the said provision it appears that for appointment of the candidate under death-in-harness category it requires a processing under three different phases namely:

1. Identification of economic stringency due to the death of the concerned employee, of the dependents on the basis of the certificate as to be issued by the competent authorities, by the District Inspector Schools concerned and thereby forwarding the name by the said officer to the School Service Commission.

2. The identification of the suitability of the candidate from such death-in-harness category candidates as to be referred to by the District Inspector of Schools concerned on considering the respective merits of the candidate on the basis of academic qualification by the Regional School Service Commission and empanelment of the candidates on the basis of merit.

3. Recommendation from such panel by the School Service Commission of a candidate from the list to a school where the vacancy exists and appointment by the school on such recommendation, which thereafter requires a post appointment approval by the District Inspector of Schools concerned.

9. So far as the identification of a candidate at the first phase for placement of a candidate under death-in-harness category in terms of the said Clause (6) of the procedure it provides that a roster should be maintained by the District Inspector of Schools concerned following the prevalent procedure. The prevalent procedure

was prescribed by the recruitment direction issued by the Director of Schools Education, West Bengal under Memo No. 2066- G.A. dated 27th October, 1995 whereby and whereunder Clause 2(a),(b) and (c) are different procedural steps which should be followed by the District Inspector of Schools concerned to register the name of a candidate under death-in-harness category. The relevant provision of Clause 2(a),(b) and (c) from the said procedure reads such:

2. (a) Each District inspector of Schools (SE) shall maintain a roster wherein the names of the wards of the teachers or non-teaching staff who died-in-harness leaving the family in extreme financial hardship and in need of immediate financial assistance, shall be entered after verification of all relevant records.

(b) The certificate from the concerned Sabhapati, Panchayat Samity in respect of the deceased teachers or non-teaching staff who had been residing in the rural areas, from the Chairman of the Municipality or concerned Councillor of Corporation as the case may be for the staff who had been residing in Urban areas and from Chairman of the Notified Area Authority for those who had been residing in that area, to the effect that the family of the deceased staff is in extreme financial hardship and is in need of immediate financial assistance, will be necessary for consideration of appointment in death-in-harness category.

(c) The term "ward" shall mean (1) the unemployed widow/a dependent unemployed son/a dependent unemployed and unmarried daughter and dependent unemployed husband in case of a female teacher and in that order. No choice of the family will be entertained to change the order. In exceptional cases, the order may be changed with the prior permission of the Director of School Education. Only one member of deceased family shall be eligible for appointment subject to the fulfillment of other conditions.

10. Prior to the said procedural steps as framed in the recruitment direction of Director of School Education, West Bengal there was another notification prescribing the procedure as has been relied upon by the School Service Commission to recall the recommendation namely, the Memo No. 457-Edn. (P) dated Calcutta 12th October, 1987 issued by the Deputy Secretary to the Government of West Bengal as addressed to the Director of School Education, West Bengal (Primary Unit) on issue of appointment of wards of teachers and non-teaching employees of recognised Non-Government Primary/Junior High/Secondary/Higher Secondary School etc. on compassionate ground. The relevant provision of such notification namely Clauses 5 and 6 read such:

5. The term "Ward" shall mean a son/a dependent daughter/the widow/the husband of the deceased teacher or of the deceased non-teaching employee. The ward shall apply for appointment on compassionate ground to the authority concerned immediately after the death of the teacher or of the non-teaching employee concerned.

6. The appointing authority after satisfying itself that the ward fulfil all the prescribed conditions and also that the family is in distress and in immediate

need of assistance may issue necessary appointment orders only with the prior approval of the Director of School Education, West Bengal.

11. Hence, it appears that under Clause (6) of the procedure for recruitment issued by the Regional School Service Commission save and except an indication that following the prevalent procedure the District Inspector of Schools concerned should maintain a roster of the candidates by registering their names under death-in-harness category, no prevalent procedure has been indicated. It appears that there are two procedures one of the year 1987 and another was of the year 1995. In view of the procedure as set up in the Memo dated 27th October, 1995 same will be the guiding principle of the instant case. Under the said memo the District Inspector of Schools concerned on the basis of the certificate issued by the Chairman of the Municipality considered the name of the writ petitioner as eligible candidate for her registration under death-in-harness category. The factum of marriage of the writ petitioner on the date of registration was not disclosed by the writ petitioner and as such there was no enquiry made as to whether the writ petitioner was still a dependent to satisfy the appointment on compassionate ground. The School Service Commission under Clause (6) referred to considered the candidature of the writ petitioner on merit and referred her name for appointment. On a bare analysis of Clause (6) of the procedure issued by the School Service Commission it appears that the School Service Commission never was vested with any power and jurisdiction to identify the legality and validity of registration of the names of the candidates under death-in-harness category. The action of the School Service Commission starts as soon as the name is referred to by the District Inspector of Schools concerned from such death-in-harness category. Hence, we are of the view that the School Service Commission only got a limited right to adjudicate the respective merits of the candidates on the basis of academic qualification only and statute did not vest the Regional School Service Commission with any power beyond the statutory power vested under the law namely, the consideration of suitability of the candidates in respect of the merit is concerned.

12. In the instant case, no case has been made out by the Regional School Commission that the petitioner exercised fraud so far as the production of the certificate of academic qualifications and it is also not the case of the School Service Commission that the petitioner on merit was not successful. The learned advocate for the appellant, however, has submitted before us a Judgment of the Apex Court passed in the case Khargram Panchayat Samiti and Another Vs. State of West Bengal and Others, to submit that the School Service Commission got an ancillary and incidental power to recall the recommendation by identifying the condition of ineligibility at the initial stage of registration of the name under death-in-harness category. There is no doubt in the legal proposition that when a body is vested with the power of doing something, there is an inherent incidental power to recall the same and/or to take further steps on the matter which are incidental or consequential action. But in the instant case on a bare reading of the said statutory provision Clause (6) of the Recruitment Procedure issued by

the School Service Commission, it appears that the Regional School Service Commissions only was vested with the power to consider the merit of the respective candidates for their empanelment and thereby to recommend the names from the panel. Under the statute as already discussed, the Regional School Service Commission was not given any power or authority to identify the eligibility of a candidate for his/her registration under death-in-harness category and such power is vested with the District Inspector of Schools concerned. The Regional School Service Commission only got a limited power to judge the merit of the candidates on the basis of the academic qualification. The decisive factor of identifying merit of a candidate on the basis of the factual domain thereof namely, academic qualification since has been vested upon the School Service Commission, as a consequential and incidental power, the School Service Commission got the right to identify whether the academic qualification as was submitted as a qualification of the candidate was a genuine qualification or not and in the event of any fraud on that angle and/or fraud on material existence of academic qualification surely the School Service Commission has the incidental or consequential power to recall the recommendation under such situation. But the School Service Commission cannot probe into the jurisdictional factor and the relevant factual matrix which became the decisive factor to identify the eligibility of a candidate for registration under death-in-harness category as the same was vested to the District Inspector of Schools concerned. If we consider that it was ancillary power vested upon the School Service Commission, then naturally situation will arise by which the School Service Commission will sit as an appellate authority over the decision of the District Inspector of Schools concerned which statute never had intended. Furthermore, we are not unmindful of the settled legal position that the statutory body may act in terms of the statutes. Furthermore, it is a settled legal position that a statutory body under the law is entitled to perform only on those acts as are prescribed under a statute whereas an individual can do whatever he likes save and except as are not prohibited by law. The statutory body is bound to perform those actions as are stipulated under a statute. Reliance may be placed to the Judgment passed in the cases *Moniruddin Bepari v. The Chairman, Municipal Commission, Dacca* reported in 40 CWN 17 and *Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others*, .

13. It appears that the Regional School Service Commission recalled the recommendation on the ground that due to marriage the writ petitioner became ineligible for such recommendation. The eligibility of registration of a name under death-in-harness category was considered and decided by the District Inspector of Schools concerned and that authority is the only authority who can by identifying any defect in the registration of the name of a candidate under the said category. The Regional School Service Commission at best could have referred the matter when a dispute cropped up to the District Inspector of Schools concerned for his decision in the matter to identify the eligibility factor of registration of the name of a candidate under died-in-harness category. But

without doing such, the said authority took the power in their own hands and acted beyond their power. Hence, the action itself is a nullity being without jurisdiction. Hence, the action of the Regional School Service Commission which was impugned in the writ application was not legally sustainable and as a consequence thereof the action of the school authority also was not sustainable and accordingly both are stand quashed by different reasonings and findings given by the learned Trial Judge.

14. However, we make it clear that consideration of the dependency factor whether at all was existing due to the marriage of the writ petitioner has not been decided by us in any way and the matter is kept open for decision by the appropriate authority, if the authority so desires. It is further mentioned by us that since the appointment under compassionate ground under died-in-harness category is per se violative of Article 14 of the Constitution of India but the Court of Law is considering such appointment as valid despite breach of Article 14 because of the reason that the statute has prescribed certain norms to identify it by the legislative wisdom though there is no doubt that on challenge of such legislative wisdom the Court in the appropriate cases very well adjudicate the matter to test the vires of the same on the principle of infringement of the basic structure of the Constitution namely, equality clause under Article 14 of Constitution of India.

15. Having regard to such state of affairs, we are of the view that the condition stipulated for appointment under died-in-harness category must be satisfied in the true sense and not in the technical manner and as such, we are keeping the point open for adjudication and the appropriate authorities are at liberty to take appropriate steps as to be considered by them right and proper.

The appeal stands dismissed with the aforesaid findings and observations. The Judgment under appeal stand confirmed save and except modification of reasoning as observed.

Let xerox certified copy of this order, if applied for, be given to the learned advocates appearing for the parties expeditiously.

Tapas Kumar Giri, J.

16. I agree.