(2012) 09 CAL CK 0005

Calcutta High Court

Case No: Writ Petition 4364 (W) of 2011

Piali Saha	APPELLANT
Vs	
State of West Bengal	RESPONDENT

Date of Decision: Sept. 25, 2012

Acts Referred:

- Constitution of India, 1950 - Article 14, 16
- Limitation Act, 1963 - Section 6, 6(1)

Citation: (2013) 1 CHN 18 : (2013) 138 FLR 542 : (2013) LabIC 2647 : (2013) 2 LLN 348

Hon'ble Judges: Shukla Kabir (Sinha), J; Kalyan Jyoti Sengupta, J; Joymalya Bagchi, J

Bench: Full Bench

Advocate: Saktipada Jana, Subhrangshu Panda and Pranab Chatterjee, for the Appellant; Subir Sanyal and Sumita Sen for Primary School Council, for the Respondent

Judgement

Kalyan Jyoti Sengupta, J.

The learned Single Judge by an order dated 12th May, 2011 while dealing with the above mentioned writ petition has been pleased to express His Lordship''s difference of opinion on the applicability of Rule 14 of the West Bengal Primary Teachers'' Recruitment Rules, 2001 in case of appointment on compassionate ground from the views taken by the another learned Single Judge in another case namely, W.P. No. 5236 (W) of 2009, Arpita Sen vs. The State of West Bengal & Ors. In the last mentioned writ petition learned Single Judge by judgment and order dated 23rd March, 2011 has been pleased to interpret the said Rule liberally following a Division Bench judgment of this Court in case of the Chairman, District Primary School Council vs. Sri Prithwish Samanta & Ors. reported in (2011) 1 WBLR 664. The learned Single Judge in the first mentioned writ petition has expressed inability to follow the aforesaid Division Bench judgment as His Lordship has been pleased to observe that earlier Division Bench judgment on that point was not considered in the first mentioned Division Bench judgment. Hence His Lordship has been pleased to place the matter before the Hon''ble Chief Justice for constituting a Larger Bench

to decide following questions:

(i) Whether an applicant seeking appointment on compassionate ground under the death-in-harness category who was a minor at the time of death of the concerned teacher or was a minor at the time of making an application within the statutory time framed of 2 years has any legal right to be considered for such appointment as a minor and

(ii) Whether on attaining majority a subsequent application can be deemed to be held as a continuing process notwithstanding the fact that such application was made after the statutory period of 2 years?

The Hon''ble Chief Justice on receipt of the aforesaid judgment of learned Single Judge has been pleased to pass an administrative order constituting a Larger Bench comprising of the Hon''ble Justice Bhaskar Bhattacharya (as His Lordship then was), Hon''ble Justice Aniruddha Bose and Hon''ble Justice Dr. S. Chakrabarti. Thereafter the Bench was later reconstituted by order dated 31st January, 2012 comprising Hon''ble Judges of the present Bench.

2. Thus this Bench has been called upon to answer the two points on interpretation of the above Rules. We have heard the learned counsel for the writ petitioner and the learned counsel for the Primary School Council concerned.

3. Mr. Saktipada Jana, learned counsel appearing for the writ petitioner explaining fact in the writ petition made submission with reference to the Rule 14 of the West Bengal Primary School Teachers Recruitment Rules, 2001. According to him the time frame in the said Rule for making application is not mandatory.

4. His submission is that in case of minor ward the period of two years should be relaxed it ought to be applied from the date the minor attains majority. The directory character of the Rule would be clear from the word ''may'' as mentioned in the said Rule. He while relying on the said Division Bench judgment mentioned by the learned Single Judge in Arpita Sen''s case, in Sri Prithwish Samanta''s case contends that the said Rule has been given purposive interpretation. If it is understood as mandatory character purpose of the Rule becomes frustrated in a given case like present one, where no member of the family is competent otherwise to get employment within two years from the date of death of employee teacher concerned. In that situation no appointment could be given and the object of the rule is to save the family of the deceased teacher who was only bread earner of the family would be defeated. He has sought support in this connection, of the judgment of the Supreme Court reported in (2006) 9 SCC 195 Syed Khadim Hussian vs. State of Bihar & Ors.

5. Mr. Subir Sanyal, learned counsel for the respondent on the other hand contends that aforesaid provision of the Rule has been made for special purpose and it is an exception to the ordinary recruitment rules. The whole purpose is to save the family

of the deceased teacher who was only bread earner from penury which had befallen owing to sudden death of the deceased teacher.

6. He contends that the Division Bench in case of Sri Prithwish Samanta, [(2011) 1 WBLR 664] has overlooked the earlier judgment of the Division Bench reported in case of Sajal Kumar Mondal vs. State of West Bengal & Ors. reported in 1999 Lab IC 3405 by which the similar Rule which was prevailing at that point of time was interpreted to be otherwise. Therefore, this Bench should lay down the law while interpreting the same. According to him, the language in present Rule 14 is mandatory in character unless the condition mentioned therein are satisfied no right of appointment can be asserted as a matter of course. The Court cannot supply the language of the statute while interpreting the same. He contends with reference to Supreme Court judgment reported in Jawahar Lal Sazawal and Others Vs. State of Jammu and Kashmir and Others, that the decision rendered by Court without following its earlier decision which remained unchallenged is liable to be quashed on the ground of judicial indiscipline for not following binding precedent.

7. Mr. Sanyal, learned counsel while referring to a Supreme Court decision in case of Commissioner of Public Instructions and Others Vs. K.R. Vishwanath, contends that almost identical recruitment rules on compassionate ground was held by the Supreme Court to be a mandatory in nature and it is imperative to fulfil the conditions.

8. After hearing the learned counsels for the parties and reading the decisions cited at Bar we need to interpret while giving answer to the aforesaid points whether the Rule 14 is a mandatory character or not or for that matter whether Court resorting to purposive interpretation, can supply any language what has not been done by the legislature.

Therefore, we need to set out the Rule 14 of the aforesaid Rule:

R. 14. Appointment on compassionate ground. - The Council may appoint primary teachers, with the approval of the Director of School Education, West Bengal or his authorized officer, on compassionate ground in the following cases where, in the opinion of the Council, the cases deserve compassionate consideration:-

(1) when a teacher dies in harness before the date of his superannuation i.e. at the age of 60 years, leaving a family which, in the opinion of the Council, is in extreme financial hardship that is it fails to provide two square meals and other essentials to the surviving members of the deceased teacher''s family, the following members of the deceased teacher''s family, viz, the

(a) widow wife, or

(b) widower, or

(c) son, or

(d) unmarried daughter, or

(e) divorce dependent daughter- divorced before the date of death of the teacher, possessing required educational qualifications as laid down in clause (a) and (c) of sub-rule (1) of rule 6 and unemployed, and not below 18 years from the date of such death, a prayer in wiring to the Council for appointment as primary teacher on compassionate ground, provided that only one member of a deceased primary teacher''s family may be appointed on compassionate ground.

(2) when a primary teacher applies for being declared permanently incapacitated on medical ground, to the council for appearing before the Medical Board set up according to the procedure laid down in the Government Board, before attaining 58 years of age and discontinues to attend the school for such incapacitation, he may be allowed by the Council to retire on and from the date of submission of such application, provided that the Council is satisfied with such incapacitation and other conditions through Enquiry Committee, and provided further that, after receiving the report from the Council, the Medical Board set-up for this purpose declares him permanently incapacitated to continue in further service for a reasonable time and if his family is in extreme financial hardship after such retirement, the

(a) wife, or

(b) husband, or

(c) son, or

(d) unmarried daughter, or

(e) the divorce dependent daughter - divorced at least one year before submission of application for declaration of permanent incapacitation, of the incapacitated prematurely retired primary teacher, possessing requisite qualifications as laid down in clause (a) and (c) of sub-rule (1) of rule 6 and unemployed, and not below 18 years of age and not above 45 years of age and found eligible to teach may be appointed as primary teacher on compassionate ground on submission of prayer in writing within three months from the date of issue of certificate by the competent Medical Board. Only one member of the family of the declared permanently capacitated teacher may be appointed.

Government orders issued from time to time for appointment on compassionate ground shall also duly be considered in making such appointment. But if the Medical Board does not declare the teacher to be permanently incapacitated to continue in further service the Council will allow him to rejoin duty provided he does not attain superannuation. In such a case the period of absence will be regularized as per existing leave rules.

9. On plain reading of the said rule it appears to us that the legislature has used the word ''may''. This word ''may'' according to us is undoubtedly discretion of the

council for its application, and on conditions being fulfilled as mentioned therein. Conditions which are summarized, in case of death-in-harness are as follows:-

(i) The deceased teacher must have died before date of his superannuation at the age of his 60 years,

(ii) He must have a family at the time of his death and is in extreme financial hardship so much so that it fails to provide two square meals and other essentials to the surviving members of the deceased teacher''s family,

(iii) The members of the family consist of as mentioned therein

(iv) The eligible members seeking employment from that ground, they must possess required educational qualifications as laid down in clauses (a) and (c) of sub-rule (1) of Rule 6 and unemployed, and must not below 18 years and not above 45 years of age and found eligible to teach,

(v) The prayer must be made for consideration for appointment within two years from the date of such death.

10. Therefore the aforesaid language of the rule is very clear as correctly contended by Mr. Sanyal, to provide for an exception to the ordinary recruitment rules as it has created classified candidates from other candidates. Apparently such a rule is an affront to Articles 14 and 16 of the Constitution of India but such a classification is discernable for valid reasons. The reasons therefor are mentioned in the said Rules. The purpose of the appointment on death-in-harness is not to provide an employment anyone and every one at any time. Its object is to save the member of the family of the deceased teacher from the acute financial hardship which had befallen because of death and particularly when there is no other means to survive but for such employment. This exceptional provision cannot be said to be a matter of right. Therefore interpretation given by the learned Single Judge while relying on the earlier Division Bench judgment in case of Sri Prithwish Samanta and Ors. which in its turn has affirmed the learned Single Judge''s decision extending the period of two years on any ground is not the correct interpretation of purpose of the said Rule. It seems to us that learned Single Judge in case of Arpita Sen''s case and the Division Bench while affirming the learned Single Judge''s decision in case of Sri Prithwish Samanta''s case have been swayed by emotional argument that object is to provide with employment. According to us if any particular member can survive for a longer time without employment and could wait on any circumstances we think that family does not deserve any employment on compassionate ground. We find support of the Supreme Court pronouncement for above conclusion. In case of Commissioner of Public Instructions and Others Vs. K.R. Vishwanath, in paragraph 10 Apex Court observed while noting the decision of the same Court in case of Sushma Gosain vs. Union of India that the purpose of providing appointment on the compassionate ground is to mitigate the hardship due to death of the bread-earner in the family. Such appointments should, therefore, be provided immediately to

redeem the family in distress. The fact that the ward was a minor at the time of death of his father is no ground, unless the scheme itself envisages specifically otherwise, to state that as and when such minor becomes a major he can be appointed without any time consciousness or limit. The views of the same Court in earlier judgments in case of Smt. Phoolwati Vs. Union of India and Others, Union of India (UOI) and Others Vs. Bhagwan Singh, have also been noted and accepted in this judgment.

11. In this judgment the Supreme Court has also accepted and followed the ratio decided in case of Director of Education (Secondary) and Another Vs. Pushpendra Kumar and Others, and reiterated the legal principle which is as follows:

.....that in the matter of compassionate appointment there cannot be insistence for a particular post. Out of purely humanitarian consideration and having regard to the fact that unless some source of livelihood is provided the family would not be able to make both ends meet, provisions are made for giving appointment to one of the dependants of the deceased who may be eligible for appointment. Care has, however, to be taken that provision for ground of compassionate employment which is in the nature of an exception to the general provisions does not unduly interfere with the right of those other persons who are eligible for appointment to seek appointment against the post which would have been available...

12. In the last sentence of paragraph 10 the Supreme Court has said that as it is in the nature of exception to the general provisions it cannot substitute the provision to which it is an exception and thereby nullify the main provision by taking away completely the right conferred by the main provision.

13. We have seen the earlier Division Bench judgment in case of Sajal Kumar Mondal. It appears that the Division Bench has merely observed that in view of the rule the petitioner has no legal right. But Their Lordships have no occasion to decide this legal issue as argument in this regard was not advanced whether the aforesaid time limit is a mandatory character or not. In Prithwish Samanta & Ors. the Court has not really decided anything independently rather Their Lordships had accepted basically what the learned Single Judge has done. It was opined by the Division Bench that delay in making application can be condoned by virtue of the concept of continuous wrong. The learned Single Judge in case of Sri Prithwish Samanta & Ors. while construing the said Rule 14 has been pleased to hold that the period of two years for making application is extendable applying the provision of section 6(1) of the Limitation Act.

14. We are of the view such an interpretation given by the learned Single Judge and accepted by the Division Bench in case of Sri Prithwish Samanta and Ors. is wholly unacceptable under the scheme of the Constitution. Section 6(1) of the Limitation Act is applied for taking action before judicial fora for asserting a right which has accrued already, not for acquiring or creating right which is nonexistent. Provision

of section 6 of Limitation Act is essentially designed to provide a safeguard measure against legal disability in bringing legal action to assert right before judicial fora. We set out section 6(1) of Limitation Act 1963:

Section 6(1) Where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the prescribed period is to be reckoned, a minor or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time specified therefor in the third column of the Schedule.

15. We could not find legal support to condone delay aiming to extend the time on the concept of continuous wrong. We failed to comprehend how the department could commit any wrong let alone continuous wrong. When the rule creating some substantive right does not envisage any power to condone delay how Court can do it. Again we add concept of continuous wrong giving rise continuous cause of action applies in judicial proceeding for assessing existing right either codified or common law against wrongdoer, not for creating substantive right now non-existent.

16. If the period which has not been contemplated in the Rule intending to create a right cannot be extended by the Court. In other words when the legislature has fixed a time limit in relation to substantive law the Court cannot taking the task of legislature extends time limit, simply it amount to amendment of Rule. The Court cannot have any amending power of the legislation. Under those circumstances as Supreme Court has been pleased to observe in the case quoted above the aforesaid rule is a mandatory in character, we answer the aforesaid questions in the manner as follows:

The time fixed in the said Rule is a rigid, subsequent application after attaining majority is not a lawful application and the same cannot be said to be a continuing process. Now we send down the writ petition for assigning finally taking note of our decision.

Shukla Kabir (Sinha), J.

I agree.

Joymalya Bagchi, J.

I agree.