

(2011) 08 CAL CK 0011

Calcutta High Court

Case No: Writ Petition No. 9137 (W) of 2007

Sayera Banu

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: Aug. 18, 2011**Acts Referred:**

- Constitution of India, 1950 - Article 14, 16, 21
- West Bengal Primary Education Act, 1973 - Section 106(1)

Citation: (2012) 3 CHN 636**Hon'ble Judges:** Harish Tondon, J**Bench:** Single Bench

Advocate: Ekramul Bari and Syed Mansur Ali, for the Appellant; Kamalesh Bhattacharya and Anindya Bhattacharya for the Murshidabad Council and Ram Mohan Pal for the State, for the Respondent

Judgement

Harish Tondon, J.

The petitioner has challenged the decision of the District Primary School Council, Murshidabad, vide Memo No. 4422/D/H dated 9th February 2007, whereby and whereunder the application seeking appointment on compassionate ground by the ward of the deceased teacher was rejected. Admittedly, the father of the petitioner was an assistant teacher in a primary school under the District Primary School Council, Murshidabad. He breathed last on 15th February, 1999. The widow of the deceased teacher made an application on 13th April, 2000 for appointment of her son on compassionate ground. The said application is not disposed of by the authorities. While the same was still pending, the petitioner No. 2 made an application on 26th June, 2003 praying for his appointment on compassionate ground. Simultaneously, the mother of the petitioner No. 2 also made an application on the same date seeking appointment of the petitioner No. 2 on compassionate ground.

2. The Director of School Education issued a Memo, bearing No. 713-SC/P/7P-12P-2003 dated 17th April, 2003, requesting the Chairman, District Primary School Council, Murshidabad to submit the proposal for appointment of the son of the petitioner along with all relevant papers with his commentary and recommendation for taking several steps in this regard. Instead of forwarding the recommendation, as desired by the Director of School Education, the Chairman, District Primary School Council, by the impugned decision, rejected the said application of the petitioner, in terms of Memo No. 1132/SC-P/7P-12P-2003 dated 24th July, 2006.

3. Mr. Bari, learned Advocate appearing for the petitioner, submits that the Rules regulating the Leave of the Teachers in Primary School, promulgated in the year 1991 provides that on the death of the teacher while in service one of the members of the family as defined therein can be appointed on compassionate ground provided other qualifications, as envisaged therein, are fulfilled. He further submits that within the statutory period, as enshrined under Rule 14 of the said Rules of 1991, the widow made an application and during pendency of the said application, the petitioner acquired the eligibility qualification for being appointed to the post of an assistant teacher on compassionate ground and subsequently made an application for consideration before the relevant authorities. The said application cannot be thrown on the touchstone of relevant circular which came into existence subsequent to the death of the teacher. In support of his contention, reliance is placed upon the judgment of the Apex Court in case of Syed Khadim Hussain vs. State of Bihar & Others, reported in (2006) 9 SCC 195 and a Division Bench judgment of this Court in the case of Chairman, District Primary School Council vs. Prithwish Samanta & Ors., reported in (2011) 1 WBLR (Cal) 664, Sk. Ansur Rahaman vs. The State of West Bengal & Ors., reported in (2011) 2 WBLR (Cal) 579 and [Syed Iftikar Ali Vs. State of West Bengal](#), .

4. It is contended that if initiation is made within the statutory period, even if one of the ward, who was minor at the time of making an application, makes an application after attaining majority, the said application cannot be rejected by the authorities on the ground that the same has been filed beyond the statutory period.

5. Lastly, it is submitted that subsequent/amended Rule has no manner of applicability while deciding an application filed at an earlier point of time and placed reliance upon a Division Bench judgment in the case of Shib Karam Pal Sahu vs. The State of West Bengal, reported in (2011) 2 WBLR (Cal) 757.

6. Mr. Das, learned Advocate appearing for the State respondents, vehemently opposes the submission of Mr. Bari in contending that the statutory Rules provides that the application should be made within the prescribed period Mr. Das contends that the application, having been filed by the petitioner beyond the statutory period, was rightly rejected by the authorities. According to him the object of appointment on compassionate ground is to mitigate the family who has suffered sudden

financial crisis because of the death of the breadwinner and thus does not confer a right of appointment upon any member of the family. He strenuously argues that the application, made by the widow, would be for her appointment and not for appointment of her son. He further submits that while considering an application, seeking appointment on compassionate ground, the authorities are bound by the statutory rules and cannot depart therefrom.

7. In support of the above, contention, reliance is placed upon several judgments of the Apex Court, namely, [Umesh Kumar Nagpal Vs. State of Haryana and Others](#), [National Institute of Technology and Others Vs. Niraj Kumar Singh](#), [State Bank of India and Another Vs. Somvir Singh](#), [A. Umarani Vs. Registrar, Cooperative Societies and Others](#), [State of Jharkhand and Others Vs. Shiv Karampal Sahu](#), [I.G. \(Karmik\) and Others Vs. Prahalad Mani Tripathi](#), [Indian Drugs and Pharmaceuticals Ltd. Vs. Workman, Indian Drugs and Pharmaceuticals Ltd.](#), and [Life Insurance Corporation of India Vs. Mrs. Asha Ramachandra Ambekar and another](#),

8. Having considered the submission of the respective Counsels, the point, which emerges for consideration, is whether the application filed by the ward, after attaining majority, can be rejected on the ground of limitation when an earlier application, filed by the widow, was within the statutory period.

9. Before dealing with the question framed as above, it would be profitable to quote the relevant statutory provisions for proper and effective adjudication.

10. In exercise of the power conferred u/s 106(1) of the West Bengal Primary Education Act, 1973, the Government, vide Notification No. 768-Edn (P) dated 29th November, 1991 framed the Rules regulating recruitment and leave of the teachers in primary school in West Bengal Rule 6 of the Recruitment & Leave Rules of Primary Teachers of 1991 provides the eligibility criteria for appointment to the post of a primary teacher which reads thus:

Rule 6. Qualifications:

(a) No person shall be appointed by the Council, as a teacher unless he satisfies the conditions:

(i) that he is a citizen of India; and

(ii) that he is not below 18 years of age and above 40 years of age, and

(iii) that he possesses the minimum educational qualifications as mentioned in sub-rule (b).

(b) The required educational qualifications for the post of a teacher shall be--

(i) School Final/Madhyamik pass or equivalent, or

(ii) Higher Secondary (XI-Class) pass under the West Bengal Board of Secondary Education or equivalent.

(c) The decision of the State Government on the question of equivalence for the purpose of sub-rule (b) shall be final.

(d) No extra credit shall be given for higher academic qualification at the time of selection of a teacher:

Provided that a trained candidate shall be given extra credit in the manner prescribed under sub-rule (c) of the Rule 9.

(e) A trained candidate belonging to scheduled tribe category who have not passed Madhyamik examination or its equivalent shall be eligible for appointment as teacher in Primary School.

11. Rule 14 of the said Rule provides for appointment on compassionate ground which reads thus:

14. Appointment on compassionate ground.--The Council may appoint primary, teachers, with the approval of the Director on compassionate ground in the following cases where, in the opinion of the Council, the cases deserve compassionate consideration:--

(a) when a teacher dies-in-harness before the date of the superannuation leaving a family which, in the opinion of the Council, shall be in extreme financial hardship. (1) unemployed widowed wife, or the unemployed son, or the unemployed unmarried daughter of the deceased teacher possessing required educational qualifications as laid down in sub-rules (a) and (b) of Rule 6 and found eligible to teach, may make within two years from the date of such death, a prayer in writing 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 consideration.

(b) when a primary teacher is declared permanently incapacitated by the competent medical board set up according to the procedure laid down in the Government order and he has been allowed to retire at least two years before he attains the age of superannuation and his family is in extreme economic hardship after such retirement, (1) the unemployed wife, or (2) the unemployed son, or (3) the unemployed unmarried daughter of the incapacitated and prematurely retired primary teacher possessing the required educational qualifications, as laid down in sub-rules (a) and (b) of Rule 6 and found eligible to teach, may make within two years from the date of such retirement, a prayer in writing to the Council for appointment as primary teacher on compassionate ground:

Provided that only one member of the incapacitated and prematurely retire primary teacher possessing the required Educational qualifications and found eligible to teach may be appointed on compassionate ground.

12. On a conjoint reading of Rules 6 and 14 of the said Rules of 1991, it is clear that on the death of the primary teacher, where the family, in the opinion of a Council, is in extreme economic hardship may make a prayer, within two years from the date of such death, in writing, for appointment on compassionate ground of any one member of the deceased primary teacher's family. Family has been defined in the said Rule which includes unemployed widow, unemployed son and the unemployed unmarried daughter. As such, appointment can be given to any one of the family members provided the said member has requisite qualification, as enshrined under sub-rules (a) and (b) of Rule 6 of the said Rules of 1991.

13. There is no dispute about the proposition that appointment on compassionate ground is an exception to the general rule of appointment. The object of incorporating the provision for appointment on compassionate ground is to tide over the family which faces a sudden financial crisis because of the death of the sole breadwinner/bread earner.

14. In the instant case, the Director of School Education requested the Chairman, District Primary School Council, Murshidabad, to submit the proposal for appointment of the petitioner with all relevant papers along with his commentary and recommendation for onward transmission to the Education Department for necessary orders. The Chairman, District Primary School Council, Murshidabad, without adhering to the said request, rejected the said application of the petitioner, in terms of the Memo No. 1132/SC-P dated 24th July 2006. Thus there is no reason recorded in the said impugned order dated 9th February, 1997 by the Chairman, District Primary School Council, Murshidabad, regarding the financial crisis of the family of the deceased teacher. But it has been argued before this Court that the said application has been rejected as the same has not seen the light of the day within the statutory period.

15. Admittedly the widow made an application within the statutory period and the subsequent application was filed by the son after attaining majority beyond the statutory period. Similar question came up for consideration before the Supreme Court in the case of Syed Khadim Hussain (supra) where the widow had made an application within time but the said application was not disposed of by the authority which constrained the widow to file another application which was admittedly beyond the prescribed period. The said application was rejected by the authority on the ground that the same has been filed beyond the statutory period. However, the son took out a third application after attaining majority, which suffered the same dismissal at the hands of the authorities. The said order of dismissal was assailed by the son and ultimately, came up for consideration before the Apex Court and the Apex Court held that once initiation is made within the prescribed period, the subsequent application should not be thrown on the touchstone of limitation. Similarly in the instant case it is not in dispute that the application by the widow was filed within the statutory period and as such the subsequent application tiled by the

son is in fact the continuation of the earlier application and should not have been dismissed on the ground of limitation.

16. A Division Bench of this Court, in the case of Syed Iftikar Ali (supra) by placing reliance on upon the above judgment of the Apex Court, rendered in the case of Syed Khadim Hassain held:

4. We have heard the appellant's counsel and counsel for the respondent. Counsel for the appellant points out that after the death of the government servant his wife submitted an application and it was rejected without giving any reasons and the counsel for the State submits that the same must have been rejected as it was not in the prescribed format. If the applicant had not submitted the application in the prescribed format the State authorities should have asked the applicant to submit the application in the prescribed format giving out the details of the procedure. In the matters of compassionate appointments the authorities should extend the service in an effective manner so that the eligible candidate may avail the opportunity. Though the orders of rejection of the application of the appellant's mother was not challenged the appellant pursued the matter and submitted the application filed after 5 years after the date of death of the government employee will not be considered and the further submitted that the application filed on 7.9.1995 was rightly rejected by the authorities.

17. There is no dispute that the widow of the deceased teacher had applied for compassionate appointment within the prescribed time limit. Pending disposal of the said application by the concerned authority, the said widow waived her claim in favour of her son and requested the authorities to appoint her son on compassionate ground.

18. There is no dispute that the Chairman, District Primary School Council, sent the proposal for appointment of the son of the deceased teacher on compassionate ground, but the Director of School Education refused to approve such proposal on the ground that the said son of the deceased teacher attained 18 years of age after lapse of six years.

19. Considering the aforesaid decisions of the Hon'ble Supreme Court, I am also of the opinion that the Director of School Education should not have refused to send proposal for appointment of the petitioner herein on the ground that he had reached 18 years of age after six years from the date of death of the teacher concerned without appreciating the fact that the widow of the deceased teacher, claiming appointment on compassionate ground, had applied well within the prescribed time limit.

20. On identical facts another Division Bench of this Court, in the case of Sk. Anisur Rahaman (supra) held:

21. The social philosophy behind enactment of the scheme, which provided for employment to the kith and kin of the departed soul who had served the Establishment for so long so as to enable them to tide over the crisis occasioned on account of his death--was completely lost sign of.

22. In the prism of the entire paradigm we would see that the entire scheme was put into effect for amelioration of the plight of the employees, their near and dear ones, who were exposed to the vagaries of life on account of the loss of the breadwinner of the family.

23. An employment in the died-in-harness category, even though it cannot be claimed as a matter of right and is de hors the normal Rule of Recruitment, after all, is a special feature in the service jurisprudence, which has to be viewed on a case to case basis.

24. There are several instances operating in the field as to what would be the criteria and what would be the cut off date and what would be the laensure or the yardstick of the need of a distressed family.

25. Perhaps like Article 21 of the Constitution of India, the last word in its ever widening horizon is yet to be said.

26. Once we have found that all through here has been simple objective analysis of the claim of the appellant devoid of any clinical appreciation thereof, we feel thus far and no further and it would be our bounded duty to put an end to the protracted long agony of this poor appellant, who have suffered the distraught pain of losing his father, kept in animated tenterhooks in anticipation of an employment and faced stone walled response from a apathetic administration with no success before the various, stages of the Trial Court.

27. The situation, which can be summed up, shows that when there was a prayer for compassionate appointment, the scheme for died-in-harness category was very much in existence, simply the same not being in vogue at the time of the death of his father--cannot preclude him from claiming employment in that category, As otherwise, if the Court abides by the views of respondent No. 5, it would veritably close down the legislative intent behind initiation of such a scheme.

21. In the case of Prithwish Samanta & Ors., (supra), the Division Bench was considering point whether the application, which was filed beyond the period of two years, can be dismissed on the ground of limitation and held:

24. Inter play of the Limitation Act, which has been found fault with by Shri Maiti--even if excluded from our consideration, we opine that delay, if any, can be countenanced by the simple fact that it is a continuous wrong, which is being suffered by the appellant and the cause of action being arrived, there is no delay at all in his seeking relief after securing up to age 18.

22. Even I had an occasion to consider the same point in the case of Arpita Sen vs. State of West Bengal & Ors. (W.P. 5236(W) of 2009) where it has been held that if the process of making the first application started even at that point of time when the son was minor his second application, upon attaining majority, should be considered as the continuation of the earlier one and the said application cannot be dismissed on the ground of limitation.

23. Let me now consider the judgments cited by the learned Advocate appearing for the State.

24. In the case of Niraj Kumar Singh (supra) the Apex Court was considering a case where there was no scheme and/or statutory rules, providing appointment on compassionate ground. The Apex Court has held in the said case that appointment on compassionate ground would be illegal in absence of any scheme provided thereof. The same ratio has been decided by the Apex Court in the cases of Indian Drugs & Pharmaceuticals Ltd., (supra) and Somvir Singh (supra).

25. There is no dispute with regard to such proposition of law, as has been laid down in these reports, that in absence of any scheme and/or statutory rules for providing appointment on compassionate ground, the authorities, in clear violation of Articles 14 and 16 of the Constitution, cannot give appointment.

26. In the instant case, the Legislature has framed a statutory rule, in exercise of the power conferred u/s 106(1) of the West Bengal Primary Education Act, 1973, which provides appointment on compassionate ground. Therefore, it cannot be said that the application, seeking appointment on compassionate ground, is liable to be rejected in absence of either any scheme or any statutory rule.

27. A point has been taken that appointment on compassionate ground can only be offered to a post for which he is suitable. I am afraid, that this point has neither been taken by either of the parties nor is at all application the instant case. There is no ambiguity that a person can be appointed to the post in commensurate to his eligibility and not otherwise. In the instant case, the statutory rules provide that appointment to the post of an assistant teacher/primary teacher can be offered to a candidate who has the requisite eligible qualification, as envisaged under Rule 6 of the said Rules. It is nobody's case that the petitioner does not possess the requisite qualification as enshrined under Rule 6 of the said Rules.

28. Learned Advocate for the State places reliance upon a letter dated 21st February, 2002 by which the Assistant Secretary of the Government of West Bengal directed the petitioner No. 1 to furnish an application for appointment of her son with the District Inspector of Schools, Murshidabad and places reliance upon a judgment of the Apex Court in the case of A. Umadevi (supra) to contend that appointment cannot be made on political consideration and in violation of the Government directions. I am afraid, neither an application was routed through the authorities not recognized under the statutory rules nor there is any political consideration

which was required to be taken into consideration while considering the said application. As indicated above, the application was filed by the widow within the statutory period and the said application cannot be said to have been rejected on the ground of political consideration. Furthermore, this point has neither been taken by the authorities nor the petitioner has made any submission on such point. Thus the stray argument, without any basis, should not be permitted to be raised for the first time before a Writ Court.

29. In the case of Shiv Karampal Sahu (supra) the Apex Court was dealing with a matter relating to appointment on compassionate ground made by the person whose family member had died or injured in a terrorist incident. The State of Bihar adopted a Scheme for granting appointment on compassionate ground to those killed in terrorist attack. The scheme was confined to Government servants. The father of the applicant therein was not a Government servant. On the backdrop of the said fact, it is held that if a scheme provides that appointment on compassionate ground can be given to the dependants of the Government servant, the same cannot be extended to the dependants of non-government dependants. Admittedly this is not a case here. The statutory rules provide appointment on compassionate ground to any one of the family members, subject to legal parameters set up on Rule 14 of the said Statutory Rules.

30. None of the judgments, cited by the learned Advocate appearing for the State, is on the issue that a subsequent application, filed by the ward after attaining majority beyond the prescribed period when initiation is made within the statutory period by the widow, is liable to be rejected on the ground of limitation. Rather, I do not find any reason to deviate from the ratio laid down in the cases of Syed Khadim Hossain, Prithwish Samanta & Ors., Sk. Anisur Rahaman and Syed Iftikar Ali (supra).

31. Another point which is required to be considered in this matter is that the Chairman, District Primary School Council, Murshidabad has rejected the application filed by the petitioner on the basis of the Memo/ Circular dated 24th July, 2006 which came into existence subsequent to the death of the teacher. It is settled law that an application should be decided on the basis of the Circular/Statutory Rules prevalent at the time of the death of the teacher. Any subsequent amended circulars/statutory rules, which have not been made to operate retrospectively, cannot apply. Thus on such score also the impugned memo is not sustainable.

32. Thus the impugned decision of the Chairman, District Primary School Council, Murshidabad is not sustainable and is liable to be set aside. Accordingly, the impugned decision, vide Memo No. 4422/D/H dated 9th February, 2007 is hereby quashed and set aside.

33. The Chairman, District Primary School Council, Murshidabad is directed to consider the said application afresh in the light of the direction made by the Director of School Education vide Memo dated 17th April, 2003 as well as in the light of the

observation made in this order within four weeks from the date of communication of this order and shall file compliance report on the next date. Let this writ petition be listed after four weeks.