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**(2006) 11 CAL CK 0053**

**Calcutta High Court**

**Case No:** F.M.A. No. 998 of 2005 and W.P. No. 9331 (W) of 2003

Chand Mohammad and Another

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

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**Date of Decision:** Nov. 21, 2006

**Acts Referred:**

- Recruitment and Leave Rules, 1991 - Rule 14

**Citation:** (2007) 1 CHN 497 : 110 CWN 1086 : (2007) 113 FLR 964

**Hon'ble Judges:** Tapan Mukherjee, J; Ashim Kumar Banerjee, J

**Bench:** Division Bench

**Advocate:** Ashok Kumar Maity, Prallad Chandra Ghosh and Subir Hazra, for the Appellant; Partha Sarathi Deb Barman and Tarun Kumar Das, for the Respondent

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### **Judgement**

Ashim Kumar Banerjee, J.

Appellant No. 1 was a primary teacher under the Malda District Primary School Council. His date of birth was July 14, 1942. His natural date of superannuation was July 31, 2002 when he was to attain the age of 60 years.

2. Under Rule 14(b) of the Recruitment and Leave Rules, 1991 in case a primary teacher was declared permanently incapacitated by competent medical board set up therefore and he was allowed to retire prematurely at least two years before he attained the age of superannuation and it was found that his family was in extreme economic hardship due to sudden retirement, his or her dependant would be considered for compassionate appointment. The appellant No. 1 was ill and he applied on November 24, 1999 to the District Primary School Council for his premature retirement coupled with a prayer for consideration of his son being appellant No. 2 for compassionate appointment. At that time the appellant No. 1 was well within the cut off date for being eligible to apply for premature retirement coupled with a prayer for compassionate appointment of his dependant. He was also not attending school since then.

3. Alleging non-action on the part of the council he filed a writ petition being W. P. No. 626(W) of 2000 in this Court. It was disposed by the learned Single Judge by an order dated February 2, 2000, inter alia, directing the council to act on his representation. In compliance with the said order dated February 2, 2000 medical board was constituted which examined the appellant No. 1 and declared him medically fit vide their certificate dated April 29, 2000.

4. Being aggrieved by the finding of the medical board second writ petition being W. P. No. 7440(W) of 2000 was filed which was disposed of by the learned Single Judge vide order dated July 12, 2000 appearing at page 20-22 of the paper book. It was contended before His Lordship that the Council did not follow the required procedure under Rule 14(b). His Lordship directed the council to have petitioner's case enquired into by the enquiry committee. It was also observed by His Lordship that in case the council was satisfied as to the case made out by the writ petitioner his case would be forwarded to the medical board and it would take steps in accordance with the rules to declare him permanently unfit to continue his duties and to provide his dependant with suitable appointment under the appropriate rules His Lordship also directed the Council to refer the issue to the medical board within two weeks from the date of enquiry to be made by the enquiry committee.

5. On July 31, 2000 the petitioner attained the age of 58 years. The council presumably was satisfied with the case made out by the petitioner and as such referred him again to the medical board which called the writ petitioner for his examination on August 26, 2000. Such examination was cancelled as would appear at page 23 of the Paper Book. The medical board re-examined the petitioner on September 23, 2000 and declared him fit again. Within a span of 35 days on October 28, 2000 writ petitioner was again examined by the medical board where he was declared medically unfit.

6. The appellant No. 1 was duly communicated the decision of the Medical Board vide their communication dated December 1, 2000 appearing at page 24 of the Paper Book and he was allowed to go on premature superannuation.

7. Third writ petition was filed being W. P. No. 7190(W) of 2001 by the appellant No. 1 which was disposed of vide order dated August 7, 2002 asking the Director, School Education to consider the representation and dispose of the same within the stipulated date.

8. In terms of the direction of this Court in the third writ petition reasoned order was passed by the Director on December 18, 2000 appearing at page 48-50 of the paper book. By the said reasoned order the Director rejected the prayer of the appellant No. 1 for compassionate appointment of the appellant No. 2. It was observed by the Director in the said reasoned order that since the appellant No. 1 was declared medically unfit after attaining the age of 58 years his prayer for compassionate appointment of his son could not be considered.

9. The reasoned order passed by the Director was impugned in the fourth writ petition being W. P. No. 9331(W) of 2003. The said writ petition was dismissed by the learned Single Judge by order dated August 28, 2003 appearing at page 63-64 of the paper book.

10. By the said order the learned Single Judge observed that since he was found fit to work even after his application when he was within the prescribed age further declaration by the medical board after appellant No. 1 had attained the age of 58 years did not have any relevance in the matter of compassionate appointment. His Lordship further observed that why a third medical board examined the petitioner on October 28, 2000, could not be answered by the learned Advocate for the petitioner. His Lordship held that since Rule 14(b) stipulated a condition that the incumbent must be declared medically unfit for becoming eligible for compassionate appointment of his dependant the prayer of the writ petitioners in the instant case could not be acceded to. His Lordship further held that there was no scope for setting up a third medical board which was "de hors of statutory provision.

11. Being aggrieved by, and dissatisfied with, the judgment and order of the learned Single Judge the appellants filed the present appeal.

12. Mr. Ashok Kumar Maity, learned Counsel appearing for the appellants contended before us that since the petitioner applied within the prescribed age for premature retirement as well as for compassionate appointment of his son belated medical examination should not stand in the way in getting a consideration of his application for compassionate appointment especially, when he was ultimately declared unfit and was allowed to go on superannuation prematurely. In support of his contention he relied on an unreported decision of the Division Bench of this Court in the case of Haridas Roy and Anr. v. State of West Bengal and Ors. (MAT No. 941 of 2000) dated September 16, 2003. In the said case, the incumbent applied within the prescribed age of 58 years. The Medical Board declared him unfit, however by that time the incumbent crossed the age of 58 years. Considering such fact the Division Bench was of the opinion that the incumbent was entitled to have consideration in the matter of compassionate appointment.

13. Mr. Partha Sarathi Deb Barman learned Counsel appearing for the Primary School Council while opposing the appeal contended before us that the facts and circumstances involved in the case of Haridas Roy (supra) were totally different from the present one. In the said case there had been delay in holding the medical examination. Hence, the Division Bench granted relief to the incumbent. In the instant case, the application was considered by the Council in terms of the order of this Court passed in the first writ petition where the incumbent was declared medically fit. His further medical examination might have found him unfit at a subsequent stage. This would not be a relevant factor for consideration of his prayer for compassionate appointment of his son as by this time he had crossed the age of 58 years. Mr. Deb Barman further contended that by making the application the

incumbent did not acquire any right. His right accrued only when he was declared medically unfit. The writ petitioner was declared medically unfit after he had crossed the age of 58 years. Hence, he did not have any right to ask for consideration of his son's case for compassionate appointment.

14. In support of his first contention Mr. Deb Barman relied on an unreported decision of FMA No. 93 of 2005 dated September 21, 2006 of a Division Bench of this Court. In the said decision the incumbent applied after he had attained the age of 58 years. His case was sent to the Medical Board in terms of a direction of this Court where he was found medically unfit. The learned Single Judge on the basis of such finding directed consideration of the prayer of compassionate appointment. The Division Bench set aside the decision of the learned Single Judge holding that since the petitioner applied after attaining the age of 58 years, his prayer for consideration for compassionate appointment could not arise.

15. In support of the second contention Mr. Deb Barman relied on the decision of the Apex Court in the case of Chief of Marketing (Marketing Division) Coal India Ltd. and Anr. v. Mewat Chemicals & Tiny SSI Coal Pulverising unit and Ors. In the said case the Apex Court held that there was no vested right when a person made an application for allotment of quota and linkage in respect of supply of coal. Such right could accrue only when allotment was made on the said application.

16. We have considered the rival contentions of the parties. We have perused the precedents cited before us. In the instant case, the application for premature retirement coupled with a prayer for compassionate appointment was duly considered by the Council well within the prescribed period. The appellant No. 1 was declared fit by the Medical Board before he had attained the age of 58 years. The issue did not rest there. The second writ petition was disposed of by the learned Single Judge within a direction upon the Council to form an Enquiry Committee to consider such application and then to send it to the Medical Board. No appeal was preferred from the said order. The Council acted on the said order and referred his case to the Medical Board again. Hence, the declaration made on April 29, 2000 in our view, has no relevance herein.

17. In terms of the order of the learned Single Judge in the second writ petition he was called to appear before the Medical Board on September 23, 2000, by this time he had crossed the age of 58 years. The learned Single Judge passed the order on July 12, 2000 when the appellant No. 1 was about to cross 58 years. Hence, the report of the second Medical Board was relevant. The second report was also not in favour of the appellant No. 1. Hence, he could not have been considered on the basis of the second report for compassionate appointment.

18. The learned Single Judge, however, could not find any plausible answer to a big question why he was examined third time on October 28, 2000 that to within 35 days after he was declared medically fit. The learned Judge observed that no answer

was forthcoming from the writ petitioner. In our view, here the learned Judge went wrong. It is true that the learned Counsel could not apprise the Court as to why he was examined third time. The Council and the State respondents, in our view, could not avoid their responsibility to answer this question. We could not get any assistance from the learned Counsel appearing for the parties as to what was the occasion for the medical board to re-examine the petitioner within 35 days. We adjourned the hearing of the appeal to enable the Counsel for the respondent to get appropriate instruction in the matter. The Council in turn wrote to the Chief Medical Officer of Health, Malda on November 8, 2006 to inform them or directly to this Court as to why the appellant No. 1 was re-examined on October 28, 2000. No reply came till this judgment is delivered.

19. Mr. Deb Barman could not assist us properly in absence of appropriate instruction. He pleaded his helplessness in view of non-cooperation on the part of the Health authorities of the State.

20. Coming back to the reasoned order we are of the view that the Director did not consider the controversy from the above angle. The learned Judge was right that to determine the present controversy answer to such query was a must. In our view, since no answer was coming from the State authorities the benefit must go in favour of the appellants.

21. With all humility may we observe that the learned Judge should have considered the issue from this angle as highlighted above.

22. The appeal, thus, succeeds. The order of the learned Single Judge dated August 28, 2003 appearing at pages 63-64 of the paper book impugned herein is quashed and set aside. The reasoned order dated December 18, 2000 appearing at pages 48-50 of the paper book is also quashed and set aside. The matter is sent back to the Director of School Education who is directed to consider the issue afresh in the light of the observations made herein. We further make it clear that quashing of the reasoned order must not be construed to the effect that we are convinced with the claim of the appellants for compassionate appointment.

23. The appeal is disposed of accordingly without, however, any order as to costs.

24. Urgent xerox certified copy would be given to the parties, if applied for.

Tapan Mukherjee, J.

25. I agree.