

02 27.7.2021

Ct-16

WPST 57 of 2021

Sk. Jahiruddin & Anr.

Vs.

The State of West Bengal & Ors.

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Mr. Prasenjit Mukherjee

Ms. Sima Ghosh

... For the Petitioners

Mr. Pratip Kumar Chatterjee

Mr. Chittapriya Ghosh

Ms. Priyanka Saha

... For the Private Respondent

Mr. Pinaki Dhole

Mrs. Kakali Samajpaty

... For the State

The writ petition is directed against an order passed by the West Bengal Administrative Tribunal in OA No. 52 of 2017 on 1st October, 2020 in connection with an application filed by the son of the deceased employer praying, inter alia, for setting aside of Memo No. 2165 dated 18th November, 2016 as also the Labour Department notification no.301-Emp dated 21st August, 2002, No.30-Emp dated 2nd April, 2008 and No. 114-Emp dated 14th August, 2008.

The original applicant also had prayed for disbursement of death benefit like pension and gratuity of the deceased shares to all the legal heirs in equal shares.

The crux of the problem lies with regard to the status of the writ petitioner who happens to be the son of the second wife of the deceased.

Shorn of details, the father of the writ petitioner died on 6th September, 2015 and after his death the mother of the applicant made a representation before the authority on 3rd

December, 2016 praying for disbursement of the retiral benefits of the deceased employee in equal shares among the heirs.

However, the Chief Medical Officer of Health vide memo dated 28th November, 2016 had proposed for settlement for retiral benefit in favour of the two widows in equal shares subject to fulfilment of requisite procedures. The writ petitioner being aggrieved by the said direction for disbursement, made a representation to the authority praying for share of the minor son on 6th December, 2016 and since no response was received by the original applicant, they approached the learned Tribunal.

The respondent no.5 that is, the first wife of the applicant had opposed the entitlement of all the retiral benefits on the basis of the Finance Department notification No.5630-F dated 4th June, 1980 published in the Calcutta Gazette, extraordinary dated 12th June, 1980 and inserted in the APPENDIX No. 6A of the West Bengal Service Rules (in short, WBSR) Part-I. The said respondent No.2 relied upon Rule 5(4) of WBSR and contends that the second wife is not entitled for any pensionary benefit since no permission was granted by the first wife and the Government also. The said Rule 5(4) of WBSR reads:

“5(4) no Government employee who has a wife/husband living shall contract another marriage without obtaining previously the dissolution of the first marriage in accordance with any law for the time being in force notwithstanding such second marriage is permissible under any personal law of the community to which he or she belongs;”

The said respondent further contended that Rule 104 of the WBSR (Death-Cum-Retirement Benefit) Rules 1971 Note which states:

“Where a Government servant is survived by more than one widow, the family pension shall be paid to them in equal shares. On the death of a widow her share of the pension shall become payable to her eligible minor children. If at the time of her death a widow leaves no eligible minor child the payment of her share of the pension shall cease.”

It was contended that since the second marriage is null and void in view of Rule 5(4) (supra) as the deceased did not obtain dissolution of marriage the family pension, Death gratuity and other benefits payable under DCRB Rules 1971 and not payable to the second wife or the son from the second wife.

The Tribunal taking note of the aforesaid rules quashed the memo dated 28th November 2016. However, with regard to the entitlement of the minor and his identification the matter was remanded back to the authority for consideration as per rules. Pursuant to the aforesaid direction the Director of Health Services, West Bengal after hearing the parties passed an order on 16th March 2021 to the following effect:

- “i) In terms of Rule 30 of West Bengal Government Servants’ Conduct Rules, 1959 the second marriage of the deceased with Smt. Manjula Bibi is null & void.*
- ii) The disbursement of death gratuity may be done in terms of Rule 98 & 98(a) of West Bengal Services (Death-cum-Retirement Benefits) Rules, 1971 and family definition for such disbursement may be considered in term of Note 2 of Rule 7 WBS (DCRB) Rules, 1971 read with F.D. Memo No.517-F(Pen) dated 29.07.2008.*
- (iii) In case of GISS, in absence of nomination, legal heir(s) should furnish the indemnity bond and head of office will issue sanction order.*
- (iv) The cash equivalent of leave salary may be disbursed in terms of Rule 168B of West Bengal Service Rules, Part-I.”*

It was after disposal of the said representation the writ petitioner has challenged the order of the Tribunal on 1st October, 2020.

The learned Counsel for the first wife has

questioned the maintainability of the writ petitioner on the ground that the writ petitioner having accepted the order of the tribunal had participated in hearing before the Director of Health cannot now assail the order of the learned Tribunal dated 1st October, 2020 and if the writ petitioner is at all aggrieved by the order of the Director the writ petitioner may approach the learned Tribunal by filing an application. The order passed by the Director cannot be challenged in this proceeding as it may give rise to a fresh cause of action.

The matter was adjourned earlier in order to enable the parties to arrive at a settlement as it appears to us that the second marriage was solemnised as per Muslim law and child is born from the second marriage. We also feel that the petitioner as son of the deceased cannot chose his parent and it would be unfair to deny the petitioner his right. The petitioner is a victim of a plural marriages. However, the fact remains that contracting of second marriage during the existence of the first marriage irrespective of religion without permission from the Government is prohibited by the Rules. The definition of family does not include second wife. The West Bengal Services (Duties, Rights and Obligations) of the Government Employees Rules, 1980 clearly states that no Government Employee who has wife/husband living shall contract another marriage without obtaining previously the dissolution of first marriage in accordance with any law for the time being in force notwithstanding such second marriage is permissible under any personal law of the community for which he/she belongs. This

Rules are not under challenge. Moreover, the primacy is given to the Service rules over personal law in similar matters in ***Khursheed Ahmad Khan vs. State of Uttar Pradesh & Ors.*** reported at **2015 (8) SCC 439**. The entitlement to family pension and the circumstances under which it would be are governed by the terms of appointment and statutory rules made in this behalf. The aforesaid rules makes it clear that the Government servant who has a wife living is prohibited from contracting another marriage without first the dissolution of the first marriage. The wife of the second marriage contracted by the deceased government servant cannot be treated as a member of the family of the Government servant. It is well settled that the family pension has to be paid only to the family members who is entitled to the pension under the provision of the schemes and not otherwise. (See. ***Nitu vs. Sheela Rani and Ors.*** reported at **2016 (16) SCC 229**; ***Maheboob Bee vs. The State of Karnataka and Ors.*** reported at **MANU/KA/2345/2021**; ***Radha Devi vs. Chief General Manager, SECL and Ors.*** reported at **2018 (2) CGLJ 79: MANU/CG/0841/2017**)

On such consideration we do not find any reasons to interfere with the order passed by the learned Tribunal. However, the petitioner could have a claim towards pension during the period when he was minor. It was on such consideration while upholding the order of the tribunal we request the Director to revisit the claim of the petitioner with regard to pension and any other retiral benefits to which the petitioner may be entitled during the period

when he was minor in terms of the applicable Rules. We feel that in the event it is found that the petitioner is entitled to get pensionary benefits for the period till he attains majority the admissible amount may be released in his favour. We direct the Director of Health Service to pass specific orders with regard to such entitlement within two weeks from the date of communication of this order by either of the parties. Till such decision is taken by the Director of Health Services disbursement in terms of the order dated 16th March, 2021 shall be deferred.

WPST 57 of 2021 is thus disposed of without any order as to costs.

Urgent photostat copy of this order, if applied for, be given to the parties upon compliance of all undertakings.

(Hiranmay Bhattacharyya,J.)

(Soumen Sen, J.)