

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Before:

The Hon'ble Justice Hiranmay Bhattacharyya

WPA 44 of 2020

Bitasoke Mahata

VS.

State of West Bengal & ORS.

For the Petitioner : Mr. Ekramul Bari,
Mr. S.P. Lahiriadvocates

Reserved on : 20.07.2023

Judgment on : 26.07.2023

Hiranmay Bhattacharyya, J.:-

1. This writ petition is at the instance of the son of an Assistant Teacher of a high school who died in harness praying for a direction upon the respondents to appoint him on compassionate ground after setting aside the order of the District Inspector of Schools (SE), Bankura dated 14.11.2009.
2. The father of the petitioner who was an approved Assistant Teacher of a High School died in harness on 05.06.2016 leaving behind him surviving his widow and the petitioner as his only heir, heiress and legal representative. The mother of the petitioner submitted a representation before the District Inspector of Schools (SE) hereinafter referred to as "DI" on 22.08.2016. The said application was rejected by the DI by an order dated 24.07.2017 which was set aside by a co-ordinate bench by an order dated 16.07.2019 in WP No. 2291(W) of 2019. The co-ordinate bench directed the DI to consider the case of the petitioner afresh by passing a reasoned order. Pursuant to the said order dated 16.07.2019 passed in WP No. 2291 (W) of 2019 the DI passed an order on 14.11.2019 thereby rejecting the prayer for compassionate appointment. Being aggrieved by the said order of the DI, the petitioner has approached this Court.

3. Mr. Bari, learned advocate for the petitioner assisted by Mr. Lahiri contended that receipt of family pension by the widow of the deceased employee cannot be a ground to reject the prayer for compassionate appointment. He further submitted that pension is a deferred payment in recognition of the past services of the employer. He also submitted that the scheme of compassionate appointment is over and above what heirs and legal representatives are entitled as benefits arising out of the service upon the death of an employee. Mr. Bari placed reliance on the following decisions in support of his contention that while considering an application for compassionate appointment the fact that the family of the deceased is getting family pension and also obtained terminal benefits is of no consequence.
 - a) Canara Bank and Another vs. M. Mahesh Kumar reported at (2015) 7 SCC 412.
 - b) Subimal Sarkar vs. State of West Bengal and others reported at 2012(3) CLJ (Cal) 141
 - c) Shib Narayan Das vs. The State of West Bengal and others delivered on 30.07.2015 in WP No. 25164 (W) of 2014.
4. Mr. Bari further submitted that a Hon'ble Division Bench is in seisin over a similar issue and, therefore, the hearing of this writ petition should be adjourned till the Hon'ble Division Bench decides such issue. In support of such contention he referred to the order passed by the Hon'ble Division Bench on 07.07.2023 in WPST 4 of 2014 in the case of **Rahul Saraswati vs. State of West Bengal and ors.**
5. After going through the said order dated 07.07.2023, this Court found that the same is not a final order. The writ petitioner therein was not receiving any family pension. The Hon'ble Division Bench after observing that the claim for compassionate appointment is required to be assessed on the basis of the declared policy directed the concerned authority to submit a report with regard to the claim for compassionate appointment including the financial eligibility in terms of the relevant notification. The Hon'ble Division Bench also directed submission of report *inter alia* on financial eligibility in terms of the declared policy.
6. The issue raised in the instant writ petition is whether the pensionary benefits can be taken into consideration for deciding the claim for

compassionate appointment. Such issue, in my considered view, as is evident from the said order passed in WPST 4 of 2014 is not involved in the application pending before the Hon'ble Division Bench. For such reason, this Court was not inclined to allow the prayer for adjournment and invited the learned advocate for the petitioner to make his submission.

7. The respondents are, however, not represented.
8. It is now well settled that ordinarily public employment must be made strictly on the basis of open invitation to applications and comparative merit in accordance with the Articles 14 and 16 of the Constitution of India. However, compassionate appointment has been recognised as an exception to the general rule carved out in the interest of justice with the sole object to provide immediate relief to the family of the deceased employee to tide over the sudden financial crisis. Compassionate appointment cannot be claimed as a matter of right. The Hon'ble Supreme Court in the case of **Umesh Kumar Nagpal vs. State of Haryana and ors.** reported at **(1994) 4 SCC 138** held that a compassionate appointment cannot be claimed as a matter of course and only the posts in Clauses III and IV can be offered on compassionate grounds. The Hon'ble Supreme Court held thus-

“The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependent of the deceased employee in such posts has a rational nexus with the

object sought to be achieved, viz., relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned.”

9. The Hon’ble Supreme Court in the case of **Bhawani Prasad Sonkar vs. Union of India** reported at **(2011) 4 SCC 209** after noticing several decisions including that of Umesh Kumar Nagpal have summed up the factors which are to be borne in mind while considering the claim for compassionate appointment. The Hon’ble Supreme Court in paragraph 20 of the said reports held thus-

“20. Thus, while considering a claim for employment on compassionate ground, the following factors have to be borne in mind:

(i) Compassionate employment cannot be made in the absence of rules or regulations issued by the Government or a public authority. The request is to be considered strictly in accordance with the governing scheme, and no discretion as such is left with any authority to make compassionate appointment dehors the scheme.

(ii) An application for compassionate employment must be preferred without undue delay and has to be considered within a reasonable period of time.

(iii) An appointment on compassionate ground is to meet the sudden crisis occurring in the family on account of the death or medical invalidation of the breadwinner while in service. Therefore, compassionate employment cannot be granted as a matter of course by way of largesse irrespective of the financial condition of the deceased/incapacitated employee’s family at the time of his death or incapacity, as the case may be.

(iv) Compassionate employment is permissible only to one of the dependants of the deceased/incapacitated employee viz. parents, spouse, son or daughter and not to all relatives, and such

appointments should be only to the lowest category that is Class III and IV posts.” (emphasis supplied)”

10. The Hon’ble Supreme Court in the case of **State of Himachal Pradesh and another vs. Sashi Kumar** reported at **(2019) 3 SCC 653** reiterated the well settled proposition of law that there is no right to compassionate appointment, but where there is a policy, a dependant member of the family of a deceased employee is entitled to apply for compassionate appointment and to seek consideration of the application in accordance with the terms and conditions which are prescribed by the State. The Hon’ble Supreme Court held thus-

“18. While considering the rival submissions, it is necessary to bear in mind that compassionate appointment is an exception to the general rule that appointment to any public post in the service of the State has to be made on the basis of principles which accord with Articles 14 and 16 of the Constitution. Dependants of a deceased employee of the State are made eligible by virtue of the policy on compassionate appointment. The basis of the policy is that it recognises that a family of a deceased employee may be placed in a position of financial hardship upon the untimely death of the employee while in service. It is the immediacy of the need which furnishes the basis for the State to allow the benefit of compassionate appointment. Where the authority finds that the financial and other circumstances of the family are such that in the absence of immediate assistance, it would be reduced to being indigent, an application from a dependant member of the family could be considered. The terms on which such applications would be considered are subject to the policy which is framed by the State and must fulfill the terms of the Policy. In that sense, it is a well-settled principle of law that there is no right to compassionate appointment. But, where there is a policy, a dependant member of the family of a deceased employee is entitled to apply for compassionate appointment and to seek consideration of the application in accordance with the terms and conditions which are prescribed by the State.”

11. Therefore, an applicant can only seek consideration of his claim for compassionate appointment in accordance with the scheme/ rules framed therefor.

12. The learned advocate for the petitioner vehemently contended that pensionary benefit received by the family member of the deceased employee cannot be taken into consideration while deciding the claim for compassionate appointment. In support of such contention, Mr. Bari heavily relied upon the decision of the Hon'ble Supreme Court in the case of **Canara Bank** (supra). The main question that fell for consideration in **Canara Bank** (supra) was whether the application for grant of compassionate appointment could have been rejected on the basis of a scheme which had come into force after the date of submission of the application. However, after rendering a finding on such question the Hon'ble Supreme Court further held that the grant of family pension or payment of terminal benefits cannot be treated as a substitute for providing employment assistance.
13. The learned advocate for the petitioner strenuously contended that family pension cannot be taken into consideration for deciding the financial hardship as it has been held in **Canara Bank** (supra) that grant of family pension or payment of terminal benefits cannot be treated as a substitute for compassionate appointment.
14. **Canara Bank** (supra) was noticed in **Sashi Kumar** (supra) and the Hon'ble Supreme Court in paragraphs 31 and 32 of the said reports held thus-

“31. Hence, the issue which has been dealt with in Canara Bank (supra) is whether the application for grant of compassionate appointment could have been rejected on the basis of a scheme which had come into force after the date of submission of the application. That, as this Court observed, was the main question which fell for consideration. The Bench of two-Judges, however, also noted that it was urged on behalf of the appellant Bank that the family of the respondent was in receipt of family pension. This, the Court held, was of no consequence in considering the application for compassionate appointment.

32. The learned Senior Counsel appearing on behalf of the appellants has sought to distinguish the above observations, in the judgment in Canara Bank (supra), by submitting that it is not the case of the State of Himachal Pradesh that mere receipt of family pension would disable an applicant from submitting an application for compassionate appointment or preclude consideration of the claim. On the contrary, the submission which is urged is that the scheme requires

consideration of all relevant sources of income and hence, receipt of family pension would be one of the criteria which would be taken into consideration in determining as to whether the family of the deceased employee is in indigent circumstances. We find merit in this submission for the simple reason that it is in accord with the express terms of the Scheme of 18-1-1990 as modified by the State. The Scheme contemplates that payments which have been received on account of welfare measures provided by the State including family pension are to be taken into account. Plainly, the terms of the Scheme must be implemented.” (emphasis supplied)

15. **Canara Bank** (supra) was sought to be distinguished at the bar by contending that whether receipt of family pension can be a bar in either submitting an application for compassionate appointment or for consideration of the same was not in issue therein. It was argued at the bar before the Hon’ble Supreme Court that the scheme requires consideration of all relevant sources of income. Such contention was accepted by the Hon’ble Supreme Court and in **Sashi Kumar** (supra), **Canara Bank** (supra) was explained by observing that the relevant scheme contemplates that payments which have been received on account of welfare measures provided by the State including family pension are to be taken into account. The Hon’ble Supreme Court in **Sashi Kumar** (supra) finally observed that the terms of the scheme must be implemented.
16. What follows from the aforesaid discussion is that compassionate appointment is not a matter of right. It is not an alternative method of public appointment. A person can seek compassionate appointment only if there exists a policy or scheme for such appointment. The claim for compassionate appointment can be considered only if the authority finds that the financial condition and other circumstances of the family are such that the family of the deceased would be reduced to an indigent unless immediate employment assistance is given. However, the applicant can only seek consideration of his claim in accordance with the terms and conditions of the policy/ scheme.
17. The father of the petitioner was an approved Assistant Teacher of a High School who died in harness on 05.06.2016. It is not in dispute that the claim for appointment of the petitioner has to be considered in terms of the provisions of the West Bengal Central Service Commission (Selection of Persons for appointment to the post of non-teaching staff) Rules 2009 (hereinafter referred to as the “2009 Rules”).

18. This court while dealing with the claim for compassionate appointment in terms of the provisions of the West Bengal School Service Commission (Selection of persons for appointment to the post of non-teaching staff) Rules, 2009 (hereinafter referred to as “2009 Rules”) had the occasion to consider various judgments on the issue of compassionate appointment including that of **Govind Prakash Verma** (supra) in WPA 2415 of 2018 in the case of **Ms. Sayani Ganguly vs. State of West Bengal and ors.** and the judgment was delivered on 29.03.2023. The relevant portion of the decision in **Sayani Ganguly** is extracted hereinbelow.

“13. The Hon’ble Supreme Court in the case of Sashi Kumar (supra) noticed the decision in the case of Mumtaz Yunus Mulani vs. State of Maharashtra reported in (2008) 11 SCC 384 wherein it was observed that the decision in Govind Prakash Verma (supra) did not take into consideration the earlier binding precedent of the Hon’ble Supreme Court.

14. In the said decision the Hon’ble Supreme Court also took note of the decision in the case of State Bank of India vs. Surya Narayan Tripathi reported in 2014 (15) SCC 739 wherein Their Lordships observed that the view expressed in Govind Prakash Verma case runs counter to the view taken by the Court earlier in Umesh Kumar Nagpal (supra). The Hon’ble Supreme Court in Sashi Kumar (supra) also took note of two subsequent decisions which also expressed the same view as in the case of Umesh Kumar Nagpal (supra).

*15. The ratio of the decision in the case of Govind Prakash Verma (supra) is that the terminal benefits received by the widow and the family pension could not be taken into account for rejecting the claim for compassionate appointment. The decision of the Hon’ble Supreme Court in the case of Balbir Kaur (supra) also lay down the same proposition. It was held in Balbir Kaur (supra) that family pension scheme cannot be equated with compassionate appointment. The Division Bench decision of this Court in the cases of Tapan Kumar Barman (supra) and Swati Chatterjee (supra) relied upon the decision of the Hon’ble Supreme Court in the case of Balbir Kaur (supra) and the proposition of law laid down by Balbir Kaur (supra) is similar to the proposition laid down by the later judgment of the Hon’ble Supreme Court in Govind Prakash Verma (supra). However, as has been observed by the Hon’ble Supreme Court in Sashi Kumar (supra) that **Govind Prakash Verma** (supra) has not considered the earlier binding precedent of that Court, this Court is inclined to follow the decision in Sashi Kumar (supra).”*

19. The Hon'ble Supreme Court in the case of **Sashi Kumar** (supra) noticed the decision in the case of **General Manager (D & PB) vs. Kunti Tiwary** and held thus-

“General Manager (D & PB) vs. Kunti Tiwary reported at (2004) 7 SCC 71 wherein the Scheme under consideration for the appointment of the heirs of deceased employees contemplated that in order to determine the financial condition of the family, various amounts including Family Pension would have to be taken into consideration. The Hon'ble Supreme Court in Kunti Tiwary (supra) held that decision as to whether the family of the deceased employee was left without any livelihood has to be taken on the review of the overall financial position of the family including amounts received towards terminal benefits. The Hon'ble Supreme Court in Sashi Kumar (supra) took note of several other decisions on the same lines as that of Kunti Tewary (supra) and ultimately held that receipt of family pension would be one of the criteria which would be taken into consideration in determining as to whether the family of the deceased employee is in indigent circumstances.”

20. Now this court has to take into consideration the relevant provisions of the 2009 Rules.
21. In exercise of power conferred by Clause (d) of Sub-Section 2 read with Sub-section 1 of Section 17 of West Bengal School Service Commission Act 1997 (for short “1997 Act”) the 2009 Rules were framed. Chapter IV of the 2009 Rules deals with selection of non teaching staff on compassionate ground. Rule 20 of the 2009 Rules falling under Chapter IV starts with a non obstante clause and provides that the concerned DI shall maintain a roster of the candidates seeking appointment on compassionate ground as per the procedure laid down in Schedule V and forward the names to the respective Regional Commission in the manner as mentioned in that Schedule from time to time for recommendation of the name against a suitable post of clerk or group-D staff as the case may be. It follows therefrom that the procedure laid down in Schedule V is to be followed. Schedule V deals with the procedure, manner of application and preparation of panel for appointment on compassionate ground.

Explanation to paragraph 1 of Schedule V of 2009 Rules is extracted hereinbelow as the same would be relevant for deciding the issue raised in this writ petition.

“Explanation – The expression “financial hardship”, in relation to income of a deceased Teacher or non-teaching staff consisting of up to five members in his family, shall mean an amount of income less than the initial gross salary of Group ‘D’ staff of the State Government at the material point of time. For computation of income of such family, an income of an amount earned by each family member from any other sources than Provident Fund, Gratuity and 40% of Family Pension of the first seven years or upon the attainment of sixty seven years of age of the deceased teacher had he been alive, whichever is earlier, at the material point of time, shall be taken into account.

22. It appears from the said Explanation that for the purpose of deciding the issue of financial hardship, the amount earned by the family member of a deceased teacher from any other sources than the Provident Fund, Gratuity and 40% of family pension for the first seven years or upto attainment of 60 years of age of the deceased who would have been alive shall be taken into account. Thus, it is evident that onetime payments like Provident Fund and Gratuity are excluded from the purview of total income for such purpose. 40% of the family pension has also been excluded from the purview of total income. It necessarily follows therefrom that only 60% of the family pension is to be taken into consideration for the purpose of computing income of a family for such purpose.
23. Therefore, one time payments like provident fund and gratuity have been kept out of the purview of total income for deciding the financial hardship in the 2009 Rules. 2009 Rules only prescribes inclusion of a portion of the family pension for deciding financial hardship.
24. There is no embargo in the 2009 Rules in applying for compassionate appointment or consideration of such application if the family of the deceased had received the terminal benefits or getting family pension. The said rules prescribed how the financial hardship is to be assessed.
25. If the argument of the petitioner, that while considering the issue of financial hardship, the amount of family pension which is being received by the family of the deceased cannot be taken into consideration, is to be accepted, then it goes without saying that certain terms of the said scheme is to be subtracted. It is well settled that the courts cannot substitute a scheme or add to or subtract from the terms thereof. Therefore, for such reason also the argument advanced by the learned advocate for the petitioner that family pension cannot be taken into consideration while deciding the issue of financial hardship cannot be accepted by this Court.

26. The Hon'ble Division Bench in **Subimal Sarkar** (supra) while dealing with the claim for compassionate appointment noted that the relevant scheme did not indicate that the applicant whose family draws family pension on the death of the employee is not entitled to compassionate appointment if the family is living in penury. The Hon'ble Division Bench after taking into consideration the monthly income of the family from family pension and the income earned by another member of the family as well as the amount received by the family on account of death benefit and other circumstances of the family arrived at the finding that the family is in dire financial straits. The Hon'ble Division Bench in **Subimal Sarkar** (supra) also took into consideration the income from family pension and thereafter arrived at a finding as to the financial condition of the family. The said decision also do not support the contention of the learned advocate for the petitioner that family pension cannot be taken into consideration for deciding whether the family of the deceased is in financial stringency.
27. The issue which fell for consideration before the co-ordinate bench in the case of **Shib Narayan Das** (supra) was with regard to compassionate appointment upon the death of a primary teacher to be considered in terms of West Bengal Primary Teacher Recruitment Rules, 2001 (hereinafter referred to as "2001 Rules"). The co-ordinate bench noted that extreme financial hardship has not been defined in 2001 Rules and also that 2009 Rules and 2001 Rules operate in different fields. The case on hand relates to compassionate appointment upon the death of an assistant teacher of a high school and therefore such claim is to be decided as per 2009 Rules. Therefore, the decision in the case of **Shib Narayan Das** (supra) cannot come to the aid of the petitioners.
28. This court in exercise of its powers of judicial review has to consider whether there is any infirmity in the decision making process. The District Inspector of Schools (SE), Bankura rejected the prayer of the petitioner for compassionate appointment by order dated 14.11.2009. The DI arrived at the net family income in the manner as provided in the Explanation to paragraph 1 of schedule V of 2009 Rules and after comparing the net family income with that of the initial gross salary of a Group D staff of State Government at the material point of time as per ROPA 2009 arrived at a conclusion that the family income of the deceased teacher's family exceeds the initial gross salary of a Group D staff of the State Government at the material point of time.
29. It is not in dispute that the family of the deceased teacher at the relevant point of time was receiving the amounts which were taken into consideration by the

DI for assessing the financial hardship as per the terms of the relevant rules. It is to be borne in mind that the object of granting employment is only to enable the family to tide over the sudden crisis.

30. After returning the said factual finding the DI observed that in terms of Rule 2009 the petitioner should not get appointment on compassionate ground. The order of the DI dated 14.11.2019 does not suffer from any infirmity warranting interference by this Court in exercise of the powers of judicial review.
31. For the reasons as aforesaid the writ petition fails and the same stands dismissed. There shall be, however, no order as to costs.
32. Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

(Hiranmay Bhattacharyya, J.)

(P.A.- Sanchita)