

Item no. 03

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

Present:

The Hon'ble Justice Hiranmay Bhattacharyya

WPA 2415 OF 2018
With
IA No.CAN 1 of 2020
CAN 2 of 2020

MS. SAYANI GANGULY
vs.
THE STATE OF WEST BENGAL & ORS.

Appearance:

For the Petitioner : Mr. Sujash Ghosh Dastidar
Mr. Govind Mohon Ghosh
Ms. Maheswari Sharma
Ms. Tulika Banerjee

For the Respondents : Mr. Tapan Kumar Kukherjee, learned A.G. P.
Mr. Dipankar Das Gupta

Heard on : 29.03.2023

Judgment on : 29.03.2023

Hiranmay Bhattacharyya J.:

1. The writ petitioner has challenged the order of the District Inspector of Schools (SE), Hooghly (for short "DI") dated 5th May, 2017 whereby the claim for appointment of the petitioner on compassionate ground was rejected.

2. The mother of the writ petitioner while working as a headmistress of Boinchee Binapani Balika Vidyalay (for short “the School”) died in harness on January 11, 2015 leaving behind her surviving the petitioner, being her daughter, and her husband. After the death of the mother, the petitioner applied before the concerned authority praying for compassionate appointment in died-in-harness category. The authority, by the order impugned, rejected the claim for compassionate appointment on the ground that the monthly income of the family is more than the monthly gross salary of a group-D staff at the material point of time. The petitioner has assailed the said decision of the authority by filing this writ petition.

3. Mr. Ghosh Dastidar, learned advocate appearing for the petitioner submits that the authority while deciding the financial condition of the family took into account 60% of the family pension, which the authority could not have done, as according to the learned advocate for the petitioner the family pension, being in the nature of deferred payment, cannot be taken into consideration for computing the family income for the purpose of appointment on compassionate ground. In support of such contention the learned advocate for the petitioner places reliance upon a decision of the Hon’ble Supreme Court of India in the case of **Balbair Kaur & Anr. Vs. Steel Authority of India Limited & Ors.** reported in **(2000) 6 SCC 493**. He also referred to the decision of the

Hon'ble Supreme Court in the case of **Govind Prakash Verma vs. Life Insurance Corporation of India** reported in **(2005) 10 SCC 289** and the Division Bench decisions in the cases of **Tapan Kumar Barman vs. State of West Bengal** reported in **(2009) 1 CHN 23** and **Swati Chatterjee vs. State of West Bengal** reported in **(2010) 1 CHN 665**. He also places reliance upon an unreported judgment delivered on July 30, 2015 in **WP 25164 (W) of 2014 (Shib Narayan Das vs. State of West Bengal & Ors.)**. He submits that the Hon'ble Supreme Court as well as this Hon'ble High Court has time and again held that claim for compassionate appointment cannot be refused on the ground that the family has received the terminal benefits and/or is in receipt of family pension. He submits that the concerned authority while rejecting the claim for compassionate appointment has computed the family income in terms of Schedule V of West Bengal School Service Commission (Selection of Persons for Appointment to the Post of Non-Teaching Staff) Rules 2009 (for short "2009 Rules"). He further submits that in view of the well-settled proposition of law laid down by the Hon'ble Supreme Court as well as this Hon'ble Court that pensionary benefit cannot be taken into consideration for deciding the issue of financial hardship, the rule making authority could not have provided for inclusion of pension for deciding the issue of financial hardship. Thus, according to the learned advocate for the petitioner, the provision contained in Schedule V requiring inclusion of family pension for deciding the total income of the family is against the law settled by the Hon'ble Supreme Court as

well as this Court and, therefore, such provision in the 2009 Rules is to be declared as illegal, inoperative and invalid being opposed to the Constitution of India.

4. Mr. Mukherjee, learned Additional Government Pleader submits that the Hon'ble Supreme Court in the case of **State of Himachal Pradesh & Anr. vs. Sashi Kumar** reported in **(2019) 2 SCR 432** after taking into consideration several decisions of the Hon'ble Supreme Court and, in particular, the decision in Govind Prakash Verma (supra) has observed that if the scheme contemplates that payments, which have been received on account of welfare measures provided by the State or public authorities including family pension are to be taken into account, the terms of such scheme cannot be overlooked and the same is to be implemented. He further submits that compassionate appointment is an exception to the general rule for appointment to any public post in the service of State or public authority and has to be made on the basis of principles contained in Articles 14 and 16 of the Constitution of India. He further submits that the object of granting compassionate employment is to enable the family to tide over sudden crisis and family members of the deceased do not have any automatic right to get an appointment to the post in question.

5. Heard the learned advocates for the parties and perused the materials placed.

6. The mother of the petitioner was a headmistress of a secondary school. 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.

7. Since the validity of Explanation to paragraph 1 of Schedule V of 2009 Rules is in issue in this writ petition the same is extracted hereinbelow.

“Explanation – The expression “financial hardship”, in relation to income of a deceased Teacher of 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."

8. 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.

9. The petitioner seeks to challenge such provision in Schedule V only on the ground that the Hon'ble Supreme Court as well as this Hon'ble Court has laid down that family pension, being deferred payment, cannot be a ground for rejecting the claim for compassionate appointment. In other words, family pension cannot be taken into consideration for the purpose of computing the income of the family while deciding the issue of financial hardship.

10. Since the validity of Schedule V to the 2009 Rules has been challenged, this Court shall first decide such issue. It is well settled that appointment in public services should be made strictly on the basis of open invitation of applications on merit and no other mode of appointment is permissible. However, to such well-recognized principle an explanation has been carved out in favour of the dependants of an employee dying in harness thereby leaving his/her family without any means of livelihood. The Hon'ble Supreme Court in the case of **Umesh Kumar Nagpal vs. State of Haryana** reported in **1994 SCC 138** had laid down the principles relating to compassionate appointment. The Hon'ble Supreme Court held thus-

“2.....As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for

the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependants of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment.....”

11. The Hon’ble Supreme Court in **Sashi Kumar** (supra) noticed the decision in **Umesh Kumar Nagpal** (supra) and reiterated the well settled principle of law that there is no right to compassionate appointment and a family member 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 prescribed by the State.

12. However, since the petitioner has challenged the validity of 2009 Rules insofar as the issue of financial hardship is concerned only relying upon the proposition of law that pensionary benefit cannot be taken as a ground for rejecting the claim for compassionate appointment, it is to be now

considered whether such contention of the petitioner can be accepted.

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).

16. The Hon'ble Supreme Court in Sashi Kumar (supra) held thus :

“20. While considering the rival submissions, it is necessary to bear in mind that compassionate appoint 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 recognizes that a family of a deceased employee may be placed in a position of financial hardship upon the ultimately 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.

36. 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.

37. We find merit in this submission, for the simple reason, that it is in accord with the express terms of the Scheme of 18 January, 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)

17. In **Sashi Kumar** (supra), the Hon’ble Supreme Court noticed the decision in the case of **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.

18. As observed hereinbefore onetime 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. Therefore, applying the ratio laid down in Sashi Kumar (supra) this Court is of the considered view the prescription in the 2009 Rules for including 60% of the family pension for deciding financial hardship cannot be said to be contrary to the settled proposition of law. For such reason, this Court is not inclined to accept the contention of the

petitioner that prescription in Schedule V to the 2009 Rules for inclusion of family pension for deciding financial hardship is illegal, inoperative and violative of Constitution of India. Inclusion of only a portion (i.e. 60%) for deciding financial hardship cannot also be said to be against the object of compassionate appointment. Therefore, Explanation to paragraph 1 of Schedule V cannot be said to be arbitrary or violative of Article 14 of the Constitution of India.

19. After having steered clear of this issue this Court has to now test the correctness of the decision of the authority concerned. The DI while passing the order dated 5th May, 2017 took into consideration the monthly income of the father from other sources as well as 60% of the family pension. The learned advocate for the petitioner has only challenged the decision of the authority whereby a portion of family pension was included for deciding the financial hardship.

20. The whole object of granting compassionate appointment is to enable the family members of the deceased employee to meet the crisis on account of sudden death of the breadearner. The heirs or dependants of such deceased employee do not have any special right of employment. They only have a right to be considered for appointment in terms

of the relevant policy/scheme. Since this Court has already turned down the challenge as to the validity of the Explanation to Paragraph 1 of Schedule V, this Court has to test only whether the decision making authority has followed the provisions laid down under 2009 Rules while considering the claim of the petitioner for compassionate appointment.

21. It does not appear from the impugned order that the computation of total income is contrary to the provisions laid down in the 2009 Rules read with the Schedule appended thereto. The petitioner has sought for a mandamus to direct the concerned authority to consider the claim for compassionate appointment without taking into consideration the family pension for deciding the issue of financial hardship. If such claim is to be accepted then the authority is to be directed to act contrary to 2009 Rules which the Court cannot do. It is elementary that no mandamus can be issued to direct the authority to act contrary to the rules.

22. Before parting, this Court has to deal with the decision of the coordinate Bench in the case of **Shiv Narayan Das (supra)**. In the said decision the issue 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 (for short “2001 Rules”). The said Rules also do not specify the income to be considered while arriving at a decision of financial hardship. The coordinate Bench noted that extreme financial hardship has not been defined in 2001 Rules. The coordinate Bench further observed that 2009 Rules and 2001 Rules operate in different fields. Since it is not in dispute that compassionate appointment in the case on hand is to be decided as per 2009 Rules, the decision of the coordinate bench in the case of **Shib Narayan Das (supra)** does not have any manner of application to the facts of the instant case.

23. For all the reasons as aforesaid, this Court holds that there is no reason to interfere with the order passed by the DI on 5th May, 2017. The writ petition, accordingly, stands dismissed without, however, any order as to costs. The connected applications also stand **disposed of** accordingly.

24. Urgent Photostat certified copy of this order, if applied for, be delivered to the learned advocates for the parties, on compliance of all formalities.

(Hiranmay Bhattacharyya, J.)

