

22.08.2023
SL No.28
Court No.8
(Sayandeep)

**FMA 858 of 2021
CAN 01 of 2021**

**The State of West Bengal & Ors.
Vs.
Amirul Islam & Ors.**

Mr. Shamim-ul-Bari
...for the respondent Nos. 2 & 3

1. The learned counsel for the appellants is not represented nor any accommodation is prayed for on behalf of the appellants. No affidavit-of-service has been filed. Showing service of notice of the stay petition upon Md. Ysuf Ali, learned advocate was represented the petitioner before the learned Single Judge.
2. The appeal is arising out of an order passed by the learned Single Judge in connection with the writ petition filed for grant of compassionate appointment in terms of the Rules Regulating Recruitment and Leave of Teachers of Primary School in West Bengal, 1991(in short 1991 Rules). A procrastinated legal battle pertaining to grant of compassionate appointment culminated in an order dated 8th

February, 2018 passed by the respondent No. 2 rejecting the claim of the petitioner. Shorn of redundant details, the facts are that the father of the petitioner namely, Md. Ersad Ali (in short Ersad) while working in the post of assistant teacher in a primary school under the Malda District Primary School Council submitted an application to the respondent No. 4 on 8th August, 1998 praying for pre-mature retirement on medical ground and for grant of compassionate appointment in favour of the petitioner. At that point of time, Ersad was 57 years 2 months and 24 days of age. Due to non consideration of the said representation, a writ petition was filed being AST 2607 of 1998 which was disposed of by an order dated 24th December, 1998. Pursuant to the said order passed in the writ proceedings Ersad was medically examined and declared unfit on 15th January, 2000 and the respondent No. 4 by a memo dated 28th February, 2000 intimated the Sub-Inspector of School that the petitioner would be “**deemed to have**

been allowed to retire from service with effect from 15th January, 2000”.

In the said Memo, it was further stated that excess payments, if any already made be recovered from the terminal benefits. Since the prayer for compassionate appointment was not being considered Ersad again filed a writ petition being WP 19640(w) of 1999 which was disposed of by an order dated 25th June, 2003.

3. In the said order, it was inter alia observed that:

“Although the declaration was ultimately made either on 10.12.99 or 5.01.2000, but the process of declaration of permanent incapacitation was initiated prior to attaining the age of 58 years. In such case, it can be construed by this Court that the process was initiated after 58 years to debar the petitioner from getting any benefit in connection with such declaration”. Pursuant to the said order the petitioner’s claim was considered and the respondent no.4 issued a memo dated 19th September, 2003 observing inter alia that Ersad was not unfit at least two years before he attained the age of superannuation. However, by the said memo all relevant records

relating to the petitioner's claim were sent to the respondent no.2 for appropriate orders but since no final decision was taken thereafter by the respondent no.2 another writ petition being W.P. No. 16928 (W) of 2004 was preferred. The same was disposed of by an order dated 24th November, 2005. As directed by the Court, the respondent no.2 considered the petitioner's claim and rejected the same by an order dated 24th May, 2007. The said order was again challenged by the petitioner in a writ petition being W.P. No. 13074 (W) of 2012 which was disposed of by an order 11th January, 2012 setting aside the order of the respondent no.2 dated 24th May, 2007 and directing the respondent no.4 to forward the medical report with recommendation to the respondent no.2 to enable him to take a decision for approval. The respondent no.4 thereafter issued a memo dated 6th May, 2013 stating that the family suffers from financial distress. As thereafter no order was passed by the respondent no.2, the petitioner again preferred a writ petition being W.P. No. 14149 (W) of 2017 and by an order dated 19th May, 2017 the issue was again relegated to the respondent no.2 for consideration. The respondent no.2 thereafter passed the order dated 8th February, 2018 rejecting the petitioner's claim.

4. The principal argument before the learned single Judge on behalf of the respondents was that declaration of permanent incapacitation after the employee crossed 58 years of age, would debar his dependent son from compassionate appointment. The Recruitment Rules are required to be followed strictly.
5. The petitioner's father was declared unfit in lieu of permanent incapacitation declared by the Medical Board constituted for the purpose. He was an existing teacher upto 15th January, 2000 and he drew the monthly salary on regular basis even after he crossed 58 years of age. Therefore, as per rule 14(b) of the 1991 Rules, the petitioner cannot be given appointment to the post of primary school teacher on compassionate ground in permanently incapacitation category. The right towards consideration for compassionate appointment accrues only when an incumbent is declared medically unfit prior to attainment of

58 years of age. The petitioner herein was declared medically unfit after he had crossed the age of 58 years. Furthermore, in the 1991 Rules, there is no provision for accepting the premature retirement of the teacher from his date of application.

6. The contention of the petitioner appears to be that the Ersad applied within the prescribed age for premature retirement as well as for compassionate appointment of his son being the petitioner herein. Belated medical examination should not stand in the way towards consideration of petitioner's application for compassionate appointment especially when Ersad declared ultimately declared unfit and was allowed to retire prematurely. The delay towards grant of declaration as permanently incapacitated is attributable to the respondent and they cannot take advantage of their own wrong and refused to grant compassionate appointment to the petitioner and in this regard reliance was placed upon

an unreported decision in the case of **Anil Chandra Majhi vs. State of West Bengal**(FMA No. 178 of 1999) dated 20th April, 2001. It was further submitted that the reason of the orders passed in the earlier writ proceedings, more particularly the orders dated 25th June, 2003 and 11th January, 2012 respectively. The learned Single Judge on consideration of the rival contentions, inter alia observed:

“Indisputably the petitioner’s claim is required to be considered in terms of Rule 14 (b) of the said Rules, 1991 inasmuch as Ersad was declared permanently incapacitated during subsistence of the of the 1991 Rules. Any subsequent amended circulars/statutory Rules, which have not been made to operate retrospectively, can apply [See the judgments delivered in the case of *Abhishek Kumar -vs- State of Haryana and Ors.*, reported in 2007 (2) Supreme 519 and in the case of *Sayra Banu & Anr -vs- The State of West Bengal & Ors*, reported in 2012 (3) CHN 636].

The 1999 Rules do not provide that an employee is required to apply seeking declaration towards permanent incapacitation on any

particular date. Nowhere in the 1999 Rules has it been provided that such application has to be made at least few months before attainment of 58 years. There is no dispute that Ersad applied on 8th August, 1998, i.e., about nine months prior to attainment of 58 years. Such application was thus made within a reasonable time before attainment of 58 years. However, Ersad was called for medical examination for the first time on 27th March, 1999, i.e., more than eight months after receipt of the application. The petitioner was not responsible for such delay and for such inaction on the part of the respondents the petitioner cannot be made to suffer.

Pursuant to the order dated 24th November, 2005 passed in the writ petition being W.P. No. 16928 (W) of 2004, the respondent no.2 considered the petitioner's claim and rejected the same by an order dated 24th May, 2007. The operative part of the said order runs as follows:

“Since the petitioner did cross 58 years of age on 15.1.2000, thereby his prayer cannot be considered under Rule 14(b) of the Notification No.768 Edn (P) dated 22.11.1991. Hence the decision of the D.P.S.C., Malda communicated under Memo No.82/DPSC/Law dated 19.9.2003 appears to me a correct decision and an interference into the

said decision only will hamper the natural Justice.”

The said order passed by the respondent no.2 was set aside by an order 11th January, 2012 passed in writ petition being W.P. No. 13074 (W) of 2012. The operative part of the said order runs as follows:

“Admittedly, the Medical Board did not declare the deceased employee unfit but advised to continue on medicine but after several examinations ultimately found the deceased employee unfit to continue in service. It is obvious that the Medical Board was not of the firm view at the time of first examination that the deceased employee was fit to continue in service but ultimately found him unfit. Therefore, there is no justification in the stand of the respondent authorities, as has been made in the impugned decision, for rejection of the application of the petitioner.”

The respondents did not challenge the said order. The respondent no.2 thereafter passed an order dated 8th February, 2018 rejecting the petitioner's claim on the self-same ground as stated in the earlier order dated 24th May, 2007. The operative part of the said order 8th February, 2018 runs as follows:

“Considering the above facts and circumstances it is well settled that the petitioner's father was an existing teacher upto 15.01.2000 when he crossed 58 years of age, and he was

declared unfit in lieu of permanently incapacitation by the Medical Board constituted for the purpose. Therefore, as per provision of the rule 14(b) of the said recruitment rules published vide notification No.768-Edn(P) dated 22.11.1991, the petitioner cannot be given appointment to the post of primary school teacher on compassionate ground in the permanently incapacitation category. In the said recruitment rules, there is no provision for accepting the premature retirement of the teacher from his date of application for this purpose.”

The observations made in the order dated 8th February, 2018 of the respondent no.2 are contrary to the findings as arrived at by the Court in the order 11th January, 2012 passed in writ petition being W.P. No. 13074 (W) of 2012. The said order dated 8th February, 2018 is thus not sustainable in law. It is well settled that any order passed by an authority in derogation to the order of the Court is a nullity [See judgment delivered in the case of *Manohar Lal (D) by Lrs. -vs Ugrasen (D) by Lrs. & Ors*, reported in 2010 (4) Supreme 519].

The petitioner fulfils the requisite qualification as provided in the 1991 Rules. His claim has neither been rejected on the ground of lack of qualification nor on the ground that the family is not in financial distress. No such argument has been advanced on behalf of the respondents. The

respondent no.4 by an order dated 6th May, 2013 recommended and forwarded the petitioner's claim to the respondent no.2 opining that the family of the employee was suffering from financial hardship and that it had no income from landed property. The fact that the petitioner has survived the onslaught of the vagaries of life due to premature retirement of his father, who was the earning member, cannot act to his prejudice while consideration of his claim for compassionate appointment."

7. In absence of the State, the factual aspect narrated in the Judgment as matrix culled out from the pleadings justify compassionate appointment. The order dated 8th February, 2018 rejecting the prayer for compassionate appointment. Equity regards as done, which should have been done. The Court required to ensure that a person is not deprived of fair treatment and should not be made to suffer the **"distraught pain and was kept in animated tenterhooks in anticipation of an employment and faced stone walled response from an apathetic administration."**

8. We agree with the observation of the learned Single Judge that once the arbitrary conduct of the petitioner is manifest and unreasonable the Court itself can grant relief and need not direct the petitioner to approach the authority for reconsideration (**Government of India & Ors. vs. B. Anil Kumar & Ors. reported in 2010(4) Supreme 77)**)
9. In such circumstances, we do not find any reason to interfere with the Judgment passed by the learned Single Judge. The order of the learned Single Judge should be implemented within a period of four weeks from date.
10. Since the respondents have not been served, the department concerned is directed to communicate this order to the petitioner at the address mentioned in the cause title and to the office of the Government pleader in course of this week.

11. The Registrar Administration (L & OM) is directed to ensure compliance of this order.
12. Accordingly, the appeal is thus dismissed without any order as to costs.

(Uday Kumar, J.)

(Soumen Sen, J.)