

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present: - Hon'ble Mr. Justice Subhendu Samanta.

WPA 3668 of 2024

IN THE MATTER OF

Paltu Kumar Kar.

Vs.

The State of West Bengal & Ors.

For the Petitioners : **Mr. Debajyoti Deb, Adv.,**
Mr. Tamal Ghosh, Adv.,
Mr. Subrata Ghosh, Adv.,
Ms. Somdyuti Parekh Adv.

For the State : **Mr. Suman Sengupta, Adv.,**
Mr. D. Basu Mallick, Adv.,
Mr. Sanatan Panja Adv.

Reserved on : **07.08.2024**

Judgment on : **20.09.2024**

Subhendu Samanta, J.

1. The petitioner by way of filing the present writ petitioner has challenged the rejection of his application for engagement of FPS dealership in Birinchi Bari 193, Basanti, South 24 Parganas.

2. In terms of Notification under Memo No. 614/SCF&S/Can/vacancy/ 2022 dated 8th August, 2022, the petitioner applied for engagement as FPS dealer. The enquiry was conducted upon the proposed godown and show room. Since after enquiry, the petitioner did not got any information of the fate of his

application, he searched the Official Website of the Department wherefrom he came to learn his application has been rejected. It is the case of the State Authority that the roof of the godown has proposed by the petitioner is not concrete but was made asbestos. Furthermore, one family member of the petitioner was already dealer.

3. Thus, the application of the petitioner was rejected on the ground, Firstly-- the godown had asbestos roof, and another ground that the petitioner's brother viz- Pranab Kumar Kar also has existing FPS shop.

4. It is the further case of the State Authority that none of the candidates appears to be fulfilled the eligible criteria. Thus the State Authority has issued a vacancy notification for fresh vacancy.

5. Learned Counsel, for the petitioner submits that the vacancy notification dated 08.08.2022 refers the suitability of proposed godown in terms of notification dated 21.07.2014, the said notification disclosed that the applicant should possessed the godown "which must be well ventilated pakka structure with concrete floor" he submits that no G.O. requires the roof of the godown should be concrete. Thus the grounds for rejection of the petitioner's application by the concern authority is not tenable in the eye of law. He further submits, if it is requirement of the State that in cyclone prone area the roof of the godown should be concrete, then the requirements must have to be notified. He further submits that the present petitioner has applied for the FPS dealer in respect of notification published on 08th

August, 2022. The petitioner has satisfied of eligible criteria has specified for the FPS vacancy notice. He further argued by virtue of notification dated 17th August 2023 'brother' is included within the meaning of the relative; such notification dated 17th January 2023 could never be given retrospective effect. Thus, the said notification dated 17th January 2023 cannot have any effect the application of the petitioner which he filed in pursuance of the notification dated 08th August 2022.

6. Mr. Suman Sengupta Learned Counsel, appearing on behalf of the State Authority submits that this Hon'ble Court as well as the different Benches of Supreme Court has affirmed the position that when an amendment/ notification is clarifacatory in nature, it would have retrospective effect. It is true that the 'brother' was included in the definition of relative in Section 2 (xa) on 17th January 2023 prior to the rejection of the petitioner's application. The respondent authority has acted upon such notification in deciding the vacancy notification dated 08.08.2022. Mr. Sengupta further submits that the retrospective operation of a notification under the control order 2013 on the ground of the same being clarificatory in nature, has been affirmed by the Hon'ble Division Bench in **2024 SCC Online Cal 2550 (Shakina Bibi Vs. Saidur Rahaman and Ors.)** as well as in another Division Bench of **Gurupada Das Vs. State of West Bengal.**

7. Refuting the contention of the respondent authority, Learned Counsel, for the petitioner argued that the vacancy notification was

published on 08th August 2022 on the basis of which the present petitioner has applied for FPS vacancy but it cannot be suddenly and whimsically cancelled by the State on the ground that the law has been changed. He submits that the ratio laid down in **Sakina Bibi** is not applicable in this case. further more, the Hon'ble Supreme Court has specifically dealt with the issue of retrospective effect of subsequent notification in **Sri Sankaracharya University of Sanskrit and Ors. Vs. Dr. Manu and Anr.** reported in **2023 SCC Online SC 640.**

8. Learned Counsel, for the petitioner submits that the notification cannot be said to be clarificatory and it must not have affect settled position with an unanticipated burden or withdrawing from any party and anticipated benefit.

9. Heard the Learned Advocate perused the observation of Hon'ble Apex Court as well as the Divison Bench of this Court. the State Authority rejected the application of the petitioner on two grounds. Firstly, it is the case of the State Authority that the roof of the proposed godown is not made concrete. On perusing the vacancy notification as well as the notification dated 21st of July 2014, it is the clear findings and requirement for the applicant that the godown must be made Pakka with concrete floor nothing has been said in the notification regarding the roof.

10. The petitioner has applied on the basis of vacancy notification dated 08th August 2022 the godown and shop room of the petitioner

appears to be within the eligible criteria as enumerated in the notification itself thus the State Authority cannot whimsically import new criteria regarding requirements of concrete roof of the proposed godown. Thus the rejection of application of the petitioner on that ground appears to be not justified.

11. Let me consider about regarding the retrospective operation of the notification dated 17th January 2023 upon the vacancy notification dated 08th August, 2022. In the case of **Sakina Bibi** (Supra) the Hon'ble Division Bench has decided the issue of notification dated 13.12.2022 in Sub-Clause (iv) of Clause (2) (m) of the words "widow of predeceased son" has been substituted by "son's spouse". It is the observation of the Hon'ble Division Bench that the substitution of "widow of predeceased son" in Sub-Clause (iv) Clause 2 (m) by the words "Son's spouse" is mere clarification to overcome a situation. It is the further observation of the Hon'ble Division Bench that where amendment is mere clarificatory, explanatory or declaratory, usually, its operation is retrospective in nature.

12. In the case of **Sakina Bibi** the proposed amendment regarding "the widow of predeceased son" and the "Son's spouse" denote a same unidentical person thus, the amendment as observed by the Hon'ble Division Bench in **Sakina Bibi** obviously clarificatory and declaratory in nature.

13. In perusing the present case it appears that initially under the definition of relative in Clause 2 (xa) (iii) the entry was "Brother's

spouse, son or daughter” by virtue of the notification dated 17.01.2023, it was substituted with the term “brother, his spouse, son or daughter”. Thus in the same entry the amendment has introduced “brother”; the said amendment is not denoting same person, rather a inducted a new relation. Thus, it cannot be said that the amendment is explanatory or declaratory in nature. Moreover, it appears that at the time of vacancy notification dated 08th August 2022 the definition of “relatives” includes only “brother’s spouse, sons and daughters”. By virtue of amendment vide notification dated 17.01.2023 the ‘brother’ i.e. a new relative was included the definition of relative. Such notification of inclusion of a new relative ‘brother’ cannot be said to be clarificatory in nature. Moreover the said notification has deprived right of expectancy of the petitioner for getting the FPS license. It is true, if the ‘brother’ was included in the definition of relative at the time of vacancy notification dated 08.08.2022; the petitioner must not have applied for the vacancy. The notification dated 17th January 2023 must have withdrawn the legitimate benefit of the petitioner to have the license

14. Hon’ble Apex Court in **Sri Shankaracharya university of Sanskrit** (supra) has specifically dealt with the issue as follows:-

52. From the aforesaid authorities, the following principles could be culled out:

i) If a statute is curative or merely clarificatory of the previous law, retrospective operation thereof may be permitted.

ii) In order for a subsequent order/provision/amendment to be considered as clarificatory of the previous law, the pre-amended law ought to have been vague or ambiguous. It is only when it would be impossible to reasonably interpret a provision unless an amendment is read into it, that the amendment is considered to be a clarification or a declaration of the previous law and therefore applied retrospectively.

iii) An explanation/clarification may not expand or alter the scope of the original provision.

iv) Merely because a provision is described as a clarification/explanation, the Court is not bound by the said statement in the statute itself, but must proceed to analyse the nature of the amendment and then conclude whether it is in reality a clarificatory or declaratory provision or whether it is a substantive amendment which is intended to change the law and which would apply prospectively.

53. Applying the law as discussed hereinabove to the facts of the present case, we are of the view that the subsequent Government Order dated 29th March, 2001 cannot be declared as a clarification and therefore be made applicable retrospectively. The said order has substantively modified the Government Order dated 21st December, 1999 to the extent of stating that teachers who had already got the benefit of advance increments for having a Ph.D. degree, would not be eligible for advance increments at the time of their placement in the selection grade. As noted above, the law provides that a clarification must not have the effect of saddling any party with an unanticipated burden or withdrawing from any party an anticipated benefit. However, the Government Order dated 29th March, 2001 has restricted the eligibility of lecturers for advance increments at the time of placement in the selection grade, only to those who do not have a Ph.D. degree at the time of recruitment and subsequently acquire the same.

15. Following the Hon'ble Apex Court in **Sri Shankaracharya university of Sanskrit** (supra) I am of a view that the ratio laid down by the Hon'ble Division bench in **Sakina Bibi** is not at all applicable in this case rather the law laid down by the Hon'ble Supreme Court in **Sri Shankaracharya university of Sanskrit (supra)** is more applicable.

16. Under the above observation it appears to me that the State Authority has illegally and arbitrarily rejected the application of the petitioner on the ground that his "brother" is having FPS license.

17. On the above score the writ petition appears to be meritorious one.

18. The order of rejection of petitioner's application in respect of the FPS dealer in Birinchibari, 193 Basanti, South 24 Parganas is hereby set aside.

19. The writ petition is disposed of with a direction to the concerned authority to issue an order of appointment in favour of the writ petitioner in the above mentioned location, if he otherwise found eligible according to the law.

20. The concern authority shall conclude the exercise as directed above within 06 weeks from the date of passing of this order.

21. Subsequent vacancy notification in respect of the cited location is also consequently set aside.

22. Parties to act upon the server copy and urgent certified copy of the judgment be received from the concerned Dept. on usual terms and conditions.

(Subhendu Samanta, J.)