

Form No.J(2)

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Harish Tandon

And

The Hon'ble Justice (Shampa Dutt (Paul), J.)

MAT 798 of 2019

Parveen Halima @ Parveen Begum
Vs.
The State of West Bengal & ors.

For the appellants	:	Mr. Ziaul Islam
For the State	:	Mr. Tapan Kr. Mukherjee Mrs. Sukla Das Chandra
For the WBCHSE	:	Mr. Santanu Kr. Mitra
Heard on	:	1 st August, 2024
Judgment on	:	1 st August, 2024.

Harish Tandon , J:

The instant appeal is at the behest of the sister of the deceased Group-D employee of a High Secondary School who died while in service.

The facts as unfold would reveal that the sister of the appellant was a Group-D staff of Anjuman Girls High School (H.S) and unfortunately died on 14.12.2012. It is pleaded that she was the sole bread earner of the family and left behind her surviving two sisters, a

brother and mother. The appellant being the married sister claimed appointment on compassionate ground as the brother and the other sister are also married and live elsewhere. The authority rejected the application as the appellant did not have minimum educational qualification required for appointment to Group-D post and, therefore, cannot be considered for compassionate appointment. It would further reveal that subsequently the appellant passed class-VIII examination and further claimed for appointment but the Single Bench rejected the said application on the ground that since the appellant did not have the requisite educational qualification as on the date of the death of the employee i.e., her sister and also does not come as the heirs within the Hanafi Law, therefore, her claim is not tenable.

The counsel for the appellant vociferously submits that the Notification dated 2nd April, 2008 issued by the Labour Department, Government of West Bengal provides for an appointment on compassionate ground in the event of the death of the Government employee and includes within itself, the dependent which has been interpreted by the Division Bench of the Jharkhand High Court in LPA No. 617 of 2017 with LPA 457 of 2017 decided on 16.09.2019 where the sister is included within the definition of dependent/family.

It is further submitted that there is no intelligible differentia in creating a classification within a class and the sister, being dependent upon the said Government employee, cannot be kept outside the purview of the Scheme framed for compassionate appointment.

The counsel for the State took a plea that the sister being not included in the definition of a dependent/family under the relevant Rules, the claim of the appellant is unsustainable. It is further submitted that the Notification dated 2nd April, 2008 relied upon by the counsel for the appellant is inapplicable in the instant case as those Notifications are restricted to a Government employee and not an employee of the School under the education department.

The counsel for the State submits that specific Rules have been framed for appointment of a non-teaching staff in the Schools which imbibes within itself the provision relating to compassionate appointment and, therefore, this Court should not proceed on the basis of the notification dated 2nd April, 2008. It is submitted that the Government framed West Bengal School Service Commission (Selection of Persons for appointment to the post of Non-Teaching Staff) Rules, 2009 which governs the field not only for the recruitment, appointment and the procedure to be adopted but also the mode and the modalities of appointing the person on compassionate ground.

It is thus submitted that the definition given in the Schedule appended to the said Rule neither includes brother nor sister of the deceased non-teaching staff and, therefore, the Judgment of the Jharkhand High Court is not applicable rather distinguishable on facts.

On the conspectus of the aforesaid stand taken by the respective counsels and the facts emanating from the record, we hasten to add that the Notification dated 2nd April, 2008 as relied upon by the

counsel for the appellant is inapplicable to an employee being a non-teaching staff in a School for the simple reason that the moment specific statutory provision is provided for a particular class of an employee taking out from the general provisions applicable to the Government employees, the specific Rules would apply. The Rules of 2009 was promulgated expressly for the purpose of appointment to the post of a non-teaching staff in a different educational institutions within the State and the deceased being the Group-D staff in the school, the claim for compassionate appointment on her death is required to be considered under the aforesaid Rule. Rule 20 of the said Rule provides thus:

“20. Manner of selection on compassionate ground. - (1) *Notwithstanding anything contained in these rules, the concerned District Inspector of Schools (Secondary Education) 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 his name against suitable post of Clerk or Group D staff, as the case may be.*

(2) The Regional Commission shall thereafter prepare a panel for the candidates to be appointed on compassionate ground –

(a) in the post of Clerk on the basis of aggregate of marks obtained in the Madhyamik Examination or its equivalent;

(b) in the post of Group D on the basis of date of receipt of the application by the respective District Inspector of Schools (Secondary Education).

(3) The panel shall be prepared on medium wise, category wise and gender wise as per the procedure laid down in Schedule V and recommend the name of a suitable candidate for appointment on compassionate ground to the concerned school through district wise counseling, on the basis of availability of district wise vacancy, medium wise, category wise and gender wise and a copy of the letter recommending the name shall be sent to the candidate as well as the school where the vacancy exists, through registered post or speed post with acknowledgement due:

Provided that such vacancies for the appointment on compassionate ground shall not include the vacancies of a

particular Regional Level Selection Test and such recommendation of the candidates in on compassionate ground by the Regional Commission shall take place after publication of a panel of a particular Regional Level Selection test and before advertisement of next Regional Level Selection Test for the post of non-teaching staff.

(3) On receipt of the recommendation under sub-rule (2), the concerned School authority shall issue the letter of appointment to the candidate by registered post with acknowledgement due and upon receipt of appointment letter from the concerned School authority the candidate shall join the post within stipulated period as mentioned in the appointment letter.

(4) The conditions laid down in sub-rules (1), (2), (4) (5), (6) and (7) of rule 18 shall be applicable mutatis mutandis in the case of recommendation of candidates for appointment on compassionate ground for the post of Clerk or Group D staff, as the case may be

(5) For removal of any doubt it is hereby, declared that the employment on compassionate ground is not confined to the school in which deceased or incapacitated Teacher or non-teaching staff had been working and it shall be given anywhere within a district or region, as the case may be, depending upon availability of a suitable vacancy meant for the purpose of appointment on compassionate ground.”

It is manifest from the said provision which starts with a non-obstante Clause that it is imperative on the part of the respective District Inspector of Schools (Secondary Education) to maintain a roaster of the candidates who are seeking appointment on compassionate ground strictly in terms of the procedure provided in Schedule V appended thereto. The above quoted provision does not contain any expressions like the dependent/family but by way of a reference the procedures and the mechanism incorporated in Schedule V thereto has to be followed and in the event the definition has been provided in the said Schedule, it would partake a statutory character by virtue of reference in the enabling/substantive provisions. Schedule V of the said Rule defines the family to mean spouse, son and

daughter. It does not includes within its fold any other persons like the brother, sister or the parents.

It is no longer res integra that the appointment on compassionate ground offends Article 14 of the Constitution of India which provides that the State cannot discriminate or deny any person equality before law or equal protection of law.

The Article 16 Sub Article 2 of the Constitution eradicates the sense of discrimination in employment on the ground of religion/caste, race, sex, decent, place of birth, residence or any of them. By virtue of Article 16, the discrimination cannot be perpetrated on the ground of gender in case of public employment and, therefore, any action taken by the authorities either in legislative or executive fiat offending the mandates given in part III of the Constitution more particularly Article 16, the same is liable to be struck down having legislated or formulated against the constitutional ethos. The discrimination on the ground of gender cannot be permitted nor a particular gender in the society would be entitled to be put at the higher degree or a higher pedestal than the other gender. The equality must be ensured without discriminating the persons on a gender basis to which we do not have any iota of doubt nor we could ever think of envisioning such discrimination which would offend Articles 14 and 16 of the Constitution of India.

The submission of the counsel for the appellant is misconceived for the reason that the State cannot exclude the sister from the purview of the family or the dependent while promulgating the Scheme for

compassionate appointment. The aforesaid impression appears to have been drawn from the Judgment of the Jharkhand High Court as noted above wherein it is held that the parents or the sister cannot be discriminated nor be kept outside the purview of the definition of the family/dependent. It is trite law that the ratio is to be culled out from the facts discerned from the Judgment. The decision is what is decided on the basis of the facts of the case and the ratio to be culled out from the context in which the same is used. A stray sentence used in the Judgment cannot be termed as the ratio of the Judgment but the ratio has to be decided upon reading the Judgment as a whole in the backdrop of the facts involved therein.

Both the cases decided by the Division Bench of the Jharkhand High Court were in relation to Clause 9.3.3. of the National Coal Wage Agreement relatable to the claim of a sister on the death of the deceased sister who was admittedly the Government employee and died-in-harness. The said Clause defines the word “dependent” for the purpose of compassionate appointment in the event of a death of a worker while in service to mean include the wife/husband, married daughter, son and legally adopted son. It further provides that in the event none of the above dependents are available, the brother, widowed daughter/widowed daughter-in-law or son-in-law who were residing with the deceased and wholly dependent upon his earning can be regarded as a dependent for the purpose of compassionate appointment. The question that fell for consideration before the

Division Bench of the High Court was whether the sister can be kept outside the purview of the dependent when the brother is included within the definition thereof as such inclusion offends Articles 14 and 16 of the Constitution of India.

In the backdrop of the aforesaid facts, the Division Bench of the Jharkahnad High Court held as under:

“24. So far as the sister is concerned, we find from a plain reading of Clause 9.3.3 of NCWA quoted above that the brother of the deceased workman dying unmarried, if fully dependent upon him, is also entitled to be considered for appointment on compassionate ground. In that view of the matter, there is no reason as to why, sister, whether married or unmarried, should be deprived of such benefit, If a sister is denied the benefit of compassionate appointment only on the ground that she is not included as dependent under Clause 9.3.3 of NCWA, this is a clear case of gender bias and the same cannot be sustained in the eyes of law, also on the touchstone of Articles 14 and 15 of the Constitution of India. At this juncture, we are tempted to quote Section 13 of the General Clauses Act, even though the General Clauses Act relates to Central Acts and Regulations. We are referring to this Section as admittedly the respondent Coal India Ltd is also 'State' within the meaning of Article 12 of the Constitution of India, and Section 13 of the General Clauses Act aims at non-discrimination only on the basis of gender. In other words, it prohibits gender discrimination. Section 13 of the General Clauses Act reads as follows:-

"13. Gender and number.- In all Central Acts and Regulations, unless there is anything repugnant in the subject or context,--

(1) words importing the masculine gender shall be taken to include females; and

(2) words in the singular shall include the plural, and vice versa.

A plain reading of this Section clearly shows that all the words importing the masculine gender shall be taken to include females and in that view of the matter also, if brother is included in the list of dependents under Clause 9.3.3 of NCWA, there is no reason as to why the word 'brother' shall not include sister also.”

We have no hesitation in this regard that there was an apparent discrimination on a gender basis and, therefore, authorities cannot act in flagrant violation of the rights guaranteed under part III of the

Constitution of India. The counsel of the appellant relies heavily upon the observations made in paragraphs 26 and 27 of the said judgment to buttress his stand that once the sister is found to be a dependent, there is no rational in creating a classification within a class and the said Judgment has its persuasive value in the instant case as well.

As indicated above, the ratio has to be decided on the basis of the language used in the context of the case and the conclusion so arrived is based upon the findings made on the facts involved in the said case and, therefore, the reliefs so granted cannot be set to be a ratio of the Judgment. A little difference in fact may invite a different consideration or the reliefs to be granted and, therefore, the reliance on the aforesaid paragraphs is misconceived and should be understood and read in the perspective of the facts pleaded in the preceding paragraphs more particularly paragraph 24 of the said report.

Had it been a case that the brother of the deceased employee is included within the definition of a family/dependent, there is no hesitation in our mind that keeping the sister outside the purview thereof offends Articles 14 and 16 of the Constitution of India. We also do not find any justification on the stand of the counsel for the appellant that exclusion of the sister invites a classification within a class without any intelligible differentia having shown by the State. The classification within the class is permissible provided based upon intelligible differentia which to withstand on the test of reasonability but it cannot be applied in an adjunct manner when this Court does

not find that the Rules applicable in this regard invites any gender discrimination and, therefore, we do not find that the stand taken by the appellant has any merit.

Accordingly, appeal is hereby dismissed without any order as to costs.

All parties shall act in terms of the copy of this order downloaded from the official website of High Court, Calcutta.

Urgent Photostat certified copy of this order, if applied for, be given to the parties on completion of usual formalities.

(Harish Tandon, J.)

(Shampa Dutt (Paul), J.)