

17 **19.06.
2024**

Ct. No. 08

Ab

**MAT 2514 of 2023
IA No. CAN 1 of 2024**

**Dipak Kumar Jana
Vs.
The State of West Bengal and others.**

**Mr. Gourav Das,
Ms. Mitali Mondal.
... for the petitioner/appellant.**

**Mr. Bhaskar Prasad Vaisya,
Mr. Sagnik Chatterjee.
... for the State.**

**Mr. Salil Kumar Maiti,
Ms. Pinki Saha,
Ms. Dolan Samanta.
... for the respondent no. 4 & 5.**

**Ms. Koyeli Bhattacharya,
Mr. Bibek Dutta.
... for the WBBSE.**

The writ petitioner/appellant is trying to take a rebound after being benefited by an order passed by this Court in an earlier round of litigation assailing inaction on the part of the Managing Committee in not taking any decision in regularization of the inordinate absence from the school having been suffered from Tuberculosis, the Court directed the Managing Committee to take a conscious decision thereupon.

By a reasoned order, the Managing Committee did not find any substance in the stand of the writ petitioner/appellant that he is entitled to a leave with full pay rather the Managing Committee arrived at the opinion that the writ petitioner/appellant could not produce the requisite documents evincing the claim made in the said application. It appears from the service book annexed with the affidavit-in-opposition

filed by the respondent no. 4 and 5 that the leave was granted to the writ petitioner/appellant for the aforesaid period but without pay.

The moot claim of the writ petitioner/appellant in the instant appeal is not only that the Managing Committee have acted contrary to the Rules but had no power to take any decision in relation to the claim made by the writ petitioner/appellant. According to the learned Counsel for the appellant, the Board is a competent authority to grant or not to grant the leave and the Managing Committee cannot usurp such power and decide the same.

There appears to be a fallacy in the stand of the writ petitioner/appellant for the simple reason that in an earlier round of litigation, it was the specific stand of the writ petitioner/appellant that the Managing Committee is the competent authority to take a conscious decision thereupon and on the basis thereof, the writ petition was disposed of directing the Managing Committee to take a decision. The moment the decision went against the writ petitioner/appellant, he cannot take a rebound and say that the Managing Committee was incompetent to take any decision thereupon.

A person cannot be permitted to approbate and reprobate at the same time. Be that as it may, even a decision of the Managing Committee needs approval from the competent authority, which appears from the provisions contained in the said Rules.

Once the Managing Committee found that the claim of the writ petitioner/appellant is not substantiated by cogent evidence and there is a complete silence over more than a decade, we do not think that such decision can be impinged. Apart from the same, we find from the service book that despite the Managing Committee have taken a decision not to grant

special leave in exceptional circumstances, the leave was granted to the writ petitioner/appellant for his absence of more than eighteen months, but without pay.

The writ petitioner-appellant was conscious that there is a provision in the Rules relating to a special leave in exceptional circumstances. He relied upon Rule 5 of the Management of Recognized Non-Government Institutions (Aided and Unaided) Rules, 1969, which provides for a special leave in exceptional circumstances. The said Rule is quoted as under:

“5. Special leave in exceptional circumstances

(1) Special leave on medical ground may be granted to a teacher or non-teaching employee of a school for a period not exceeding eighteen months, provided the cases reported to the Board with a concrete proposal which shall have to be approved by the Board. Leave under this rule may be granted with the approval of the Board to a teacher or non-teaching employee of any school suffering from prolonged illness such as tuberculosis, injury to limbs requiring plastering, cancer, heart trouble or any other serious ailment making him or her bed-ridden for a long time, when he or she has exhausted all other leave admissible to him or her under these ‘rules’.

(2) Special leave on full pay may be granted to a teacher or non-teaching employee of an institution who intends to appear at any of the examination noted below, for the period examination and a week prior to its commencement and also the period of journey to enable him/her to resume his/her duties after completion of examination.

(a) For teachers’ examination for obtaining B.Ed. Examination as a deputed candidate such leave may be granted by the school authority without referring the matter to the Board.

(b) For non-teaching employees-any of the examination – Madhyamik, H.S., Madrasah, Bachelors, B.Ed. or a Master Degree.

Such leave shall not be granted more than once for the same level or examination in the total period of service of a teacher or non-teaching employees.”

It is manifest from the aforesaid provision that the special leave on medical ground may extend to the teacher or non-teaching staff of a school provided the teacher and non-teaching staff was suffering from prolonged illness such as Tuberculosis etc. The writ petitioner/appellant submits that he was suffering from Tuberculosis and, therefore, is entitled to a special leave in exceptional circumstances.

After meticulous reading of the aforesaid Rules, we find a stark distinction in the language employed in sub-rule (1) and sub-rule (2) of Rule 5 of the said Rules. The noticeable distinction is manifest that in case of sub-rule (2), the special leave on full pay may be extended to a teacher or non-teaching employee of the educational institution provided the eventualities contemplated therein is a matter of consideration. Sub-rule (1) of Rule 5 does not contained any such provision relating to a grant of special leave with full pay, but the note appended to the said Rules is indicative of the fact that for the purpose of both the sub-rules, determination of leave salary, namely, half pay or full pay shall be made by the Managing Committee with the approval of the Board.

We are conscious on the applicability of the note appended to the statutory provisions, which though does not supplant or override the enabling provision but facilitates of the applicability of the enabling provision in the form of clarification and/or explanation. It does not control the operation of the enabling provision but has its significance on the exercise of powers conferred upon the authority on the basis of the enabling provision contained in the statute or the subordinate legislation.

Though the entitlement to full pay, as appearing in sub-rule (2) of Rule 5, is conspicuously absent in

sub-rule (1) thereof, yet it is within the domain of the Managing Committee to take conscious decision whether to permit such leave with full or half pay. The exercise of jurisdiction and/or discretion vested upon the authority has to be judged on the parameters of the reasonableness as opposed to capricious or arbitrary exercise of such power.

The Court, more particularly, exercising the power of judicial review, should be slow and circumspect in interfering with the decision of the authority, upon whom the discretion is vested, in interfering with such discretionary order provided the order appears to be in contravention to the statutory provisions or the discretion so exercised is unreasonable and irrational and not in consonance with the settled provisions of law applicable in this regard.

A plea is sought to be taken that the Managing Committee has not taken into consideration the other statutory leaves attached to the post while calculating the total period of absence and, therefore, in absence of any clarity and/or detailed disclosure of the facts, the order is infirm and warrant interference.

We are not impressed with the submission for the simple reason that despite the Managing Committee having held that the writ petitioner/appellant is not entitled to a special leave yet the leave was granted to him by a competent authority, but in the facts and circumstances as discerned, without pay.

The employee is the best person to take a decision depending upon the realities, conduct and behavior of a person in discharge of duties. If the authority has decided to grant the leave without pay unless such decision is contrary to the Rules or based upon irrational and/or irrelevant factors, the Court should

not interfere with such discretionary order.

We further find that sub-rule (1) of Rule 5 provides the grant of leave upon approval of the Board and since leave has already been granted, which is appearing from the service book annexed to the application, we do not find any infirmity and/or illegality in the decision of the authority that the circumstances disclosed by the writ petitioner/appellant does not warrant such leave to be extended with full pay. As a consequence whereof, we do not find any infirmity and/or illegality in the order of the Single Bench.

The appeal is, thus, dismissed. The connected application being CAN 1 of 2024 is also dismissed.

There shall, however, be no order as to costs.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)