**IN THE HIGH COURT OF CALCUTTA**

M.A.T. No.1270 of 2011 in A.S.T.A. No. 337 of 2011

Decided On: 13.09.2011

Appellants: **Gopal Mondal**
**Vs.**
Respondent: **State of West Bengal & Ors.**

**Hon'ble Judges/Coram:**
Amit Talukdar and Raghunath Bhattacharya, JJ.

**JUDGMENT**

1. On the strength of Division Bench decision of this Court in Sajal Kumar Mondal v. State of West Bengal & Ors., reported in 1999 LAB. IC. 3405, the Hon'ble Single Judge dismissed the writ application filed by the present appellant on the ground that at the time of demise of his father he was a minor and in view of Rule 14 of the Leave and Recruitment Rules, 1991 (hereinafter referred to as 'the said Rules') framed under section 106 of the West Bengal Primary Education Act', 1973 he was not entitled for compassionate appointment. Shri Bari for the Appellant has submitted before us from the various annexures of the stay petition that the father of the Appellant passed away on 11.2.2002. The Appellant attained the age of 18 years in 2005 and on 30.1.2006 the District Inspector of Schools, Paschim Medinipur (Respondent No.3) wrote to the Chairman of the District Primary School Council, Paschim Medinipur (Respondent No.5, Pg.28 of the Application) recommending his case for compassionate appointment. On the basis of such recommendation the Respondent No.5 (Chairman, of the District Primary School Council. Paschim Medinipur) wrote to the Respondent No.2 (The Director of School Education) forwarding the claim of the appellant on 3.5.2006. But as he did not receive any response he approached the Hon'ble Writ Court and in course of hearing of the Writ Application, according to Shri Bari, on the directions passed by His Lordship an affidavit was used by the State which incorporated the letter (annexure R-2) written by the Director of School Education to the Respondent No. 1 that on the ground of the Appellant being a minor his case could not be considered.

2. Shri Bari has distinguished the decision of the Division Bench in Sajal Kumar Mondal's case (supra). According to Shri Bari as the prayer for compassionate appointment was already in process when the appellant had attained majority, in the meantime the said decision of Sajal Kumar Mondal (supra) would have little application and furthermore when the Respondent No.2 (Director of School Education) has himself sought for clarification from the Respondent No. 1 as to whether the Rules be relaxed for the purpose of giving compassionate appointment, the situation cannot remain static.

3. Shri Bari, as a part of his submission, referred to a Division Bench decision of Syed Ifticar Ali v. State of West Bengal, reported in 2011 (2) CHN (CAL) 17. According to Shri Bari the said Division Bench decision in Syed Iftikar Ali (supra) took note of the decision of the Supreme Court in Syed Khadim Hussain v. State of Bihar, reported in 2006(9) SCC 195 which had not been taken note of by the Hon'ble Trial Court and the said Division Bench decision which was later, in point of time, took the earlier Division Bench decision in Sajal Kumar Mondal's case (supra) without having taken note of the Supreme Court Judgment in Syed Khadim Hussain (supra), which is required to be followed.

4. This matter was heard on the last occasion and was adjourned today for further hearing even on second call none has appeared on behalf of either the State or any other Respondents. We heard Shri Bari in extenso.

5. Earlier Shri Bose for the State has referred to Pg.6 of the affidavit which Shri Bari has relied to show from the communication dated 11.11.2006 by the Respondent No.2 to the respondent No. 1 and was of the view that when his initial prayer was not maintainable as he was a minor the entire steps taken on the basis of the application of the Appellant even after he attained majority was not maintainable and cannot be subsequently cured in view of the defect that attracts the provisions of Rule 14 of the said Rules.

6. We have heard the submission made at the Bar and find that primarily the Hon'ble Single Judge was of the view that as the Division Bench decision of Sajal Kumar Mondal (supra) has decided the question that when the appellant was a minor, at the relevant time his prayer for compassionate appointment was not maintainable as-Rule 14 of the said Rules clearly states.

7. Sinha J. (as His Lordship then was) writing the Judgment for the aforesaid Division Bench interpreted the provisions of Rule 14 of the said Rules and was of the view that when at the time of the death of the father of the said appellant he was a minor - "he had no legal right to be appointed on compassionate ground in terms of Rule 14 of the Leave and Recruitment Rules, 1991......"

8. In a coordinate Division Bench we are absolutely bound due to judicial propriety to abide by the views of Sinha, J. (as His Lordship then was) for the Division Bench in Sajal Kumar Mondal's case (supra). More so, as we are aware of the fact that selfsame Hon'ble Single Judge has referred this question before the First Bench as being unable to persuade to the ratio of a decision of another Division Bench in this context. Necessarily it would be required either we also refer this matter before the First Bench or abide by the ratio of the decision in Sajal Kumar Mondal's case (supra).

9. We propose to do neither for the reason, which we will set out hereunder:

10. There is a very thin hair split difference in the issue which Shri Bari has brought before us in Appeal against the Order passed by the Hon'ble Single Judge in W. P. No.2519(W) of 2011. We would not do anything i.e. different but we would simply, do it in a different fashion that that will make all the difference itself as it would be manifest from he order proposed to be passed by us.

11. Ordinarily speaking, the Hon'ble Single Judge was absolutely correct in His Lordship's approach on the strength of the decision in Sajal Kumar Mondal's case (supra) as otherwise the provisions of Rule 14 of the said Rules which has been interpreted in the Order, if it has given its plain meaning without any amplified interpretation. That way the Appellant would have hardly any case in Appeal. But as we have said although we would not do anything i.e. different from the statute as it is necessarily forbidden. But in the event, if we look at it in a different way perhaps, it would not foreclose forever the right of the Appellant who has a case before us as we have perceived from our appreciation of the entire issue.

12. Again at the cost of repetition we would emphasize that as on 11.2.2002 the breadwinner of the family was lost when death claimed him. This resulted in the Appellant being heir of the late teacher to seek for compassionate appointment immediately thereafter.

13. In other words he was a minor when such a claim was made and obviously the Division Bench decision in Sajal Kumar Mondal's case (supra) has its full application. He cannot recuse himself from the said position and retrieve his lost fortune before the Hon'ble Trial Court. But there is a rider as rightly pointed out by Shri Bari that on 30.01.2006 the respondent No.3 (D.I.O.S.) had forwarded the application to the respondent No.5 (The Chairman, The District Primary School Council, Paschim Medinipur) This would bring us to a very important aspect of the said matter. At the point of time when such facilitation of the application was made by the Respondent No.3 (D.I.O.S.) before Respondent No.5 (The Chairman, the District Primary School Council, Paschim Medinipur) the Appellant had attained his majority as he crossed 18 years in 2005, according to Shri Bari.

14. Thereafter, as we have found from the papers which are otherwise unimpeachable as they are documents of office of the Respondent No. 3 and respondent No.5 that on 3.5.2006 the Respondent No.5 (The Chairman, the District Primary School Council, Paschim Medinipur) had processed the application before the Respondent No.3 (D.I.O.S.), All these exercise took place when the appellant was major. Obviously, the rigors of the said Division Bench which has been referred to by the Hon'ble Single Judge would have no application as at the relevant point of time when the fulcrum effect of the application was reaching its fusion at that point of time the Appellant was very much a major.

15. There is another aspect of the matter, in the event, if we abide by the communication between Respondent No.2 and the Respondent No. 1 (Annexure R-2 of the affidavit filed by the Respondent No.2, Director of School Education, West Bengal) it is clear from the last line of the said letter, "In the above circumstances he is requested to let this office know whether the age be relaxed or not on compassionate ground. Supporting documents are enclosed herewith."

16. We are not apprised of any action taken by Respondent No. 1 in pursuance thereof. What is more that the Respondent No.2 was himself in a quandary with regard to the fate of the appellant. As such, when the situation as was in an efflux as evident from the confusion which dominated the mind of the Respondent No.2, no conclusive decision was arrived at. At this stage, simply going by the Rule Book and to abide by the decision of the Division Bench on the aforesaid score, more so it being quite discernible, in our opinion, does not serve the ultimate end of justice. Accordingly, we set aside the order under Appeal and direct the Respondent No.3 (D.I.O.S.) to take the application, for compassionate appointment to its logical conclusion within a period of three weeks from the date of communication of this Order.

17. It may be argued that the application for compassionate appointment is need to be made within two years from the date of such death (see Clause (a) of Rule 14 of the said Rules). Whether the appellant would come within the rigors of the same is a question requires slight discussion. He lost his father on 11.2.2002. Now, as we have found that on 30.1.2006 the Respondent No.3 (D.I.O.S.) had written to the Respondent No.5 for necessary action in respect of the prayer for compassionate appointment. Without going into the actual date on which such application was preferred, as to whether the Appellant was minor at the relevant time since the Respondent No.3 had already acted upon the application for compassionate appointment and the said process was being facilitated when the authorities had proceeded on such basis, it can be deemed that they have accepted a part of the claim and it cannot be made to abandon midway, more so, in view of the confusion that pervades the mind of the Respondent No.2 (Annexure R-2).

18. Before we part we would also refer to the Division Bench decision of Syed Iftikar Ali (supra) wherein Shri Bari had shown from paragraph 6 of the said Division Bench decision that, their Lordships had followed Syed Khadirn Hussain (supra) to show that the application was in time. The authorities are required to consider the same. Shri Bari had referred to the said Division Bench decision also on the score that the Hon'ble Single Judge in His Lordship's Judgment and order under appeal did not take note of the said Division Bench decision in Syed Iftikar Ali (supra) wherein the decision of the Supreme Court in the case of Syed Khadim Hussain (supra) was considered. As such, Shri Bari was of the view that the Order under Appeal cannot be sustained simply on the basis of Sajal Kumar Mondal's case (supra) as it did not take into account the later Division Bench decision in Syed Iftikar Ali's case (supra).

19. We would, however, not entered into such discussion as we have prima facie held on the ground that once the application for compassionate appointment have been processed, when the appellant had already attained majority, the situation becomes quite distinct from one faced by Sinha, J. (as His Lordship then was) in Sajal Kumar Mondal's case (supra). More so, as the Respondent No.2 himself had let the situation float in a fluid state (Annexure R-2) and had sought clarification whether the age be relaxed, no ultimate fusion, at least not known, having been brought before us. We can safely conclude that we need to look beyond the dry contours of the situation on the anvil of Rule 14 of the said Rules, which we have found makes all the difference. Appeal is allowed and the application for appropriate order being A.S.T.A. 337 of 2011 is accordingly disposed of.

No order as to costs..

Urgent xerox certified copy of this order, if applied for, be given to the parties.