

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SECOND APPEAL NO. 66 of 2003****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE N.V.ANJARIA**

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | No |
| 2 | To be referred to the Reporter or not ? | No |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | No |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ? | No |
| 5 | Whether it is to be circulated to the civil judge ? | No |

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STATE OF GUJARAT....Appellant(s)

Versus

MANOJ GOVINDBHAI SHILU....Respondent(s)

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Appearance:

MR RAHUL DAVE, AGP for the Appellant(s) No. 1

MR ANSHIN H DESAI, ADVOCATE for the Respondent(s) No. 1

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CORAM: HONOURABLE MR.JUSTICE N.V.ANJARIA**Date : 30/04/2013****CAV JUDGEMNT**

The State through the Secretary, Panchayat and Gram Gruh Nirman Vibhag, has preferred this Second Appeal invoking powers of this Court under Section 100 of the Code of Civil Procedure, 1908,

against the judgement and order dated 4th January 2003 passed by learned District Judge, Junagadh in Regular Civil Appeal No.162 of 2000, whereby he dismissed the appeal and confirmed the judgment and order dated 3rd May 2000 of learned Civil Judge (S.D.), Junagadh, whereby the trial court had decreed Regular Civil Suit No. 29 of 1998.

1.1 By the aforesaid judgment and decree, the trial court declared that decision of the defendant dated 30th August 1997 rejecting the plaintiff's proposal for appointment on compassionate ground was illegal. It was further ordered that the defendant shall give suitable appointment to the plaintiff.

2. The appeal was admitted by formulating the following questions.

"(A) Whether after a lapse of 10 years, an application for compassionate appointment can be filed when the compassionate appointments are given for the purpose of immediate relief to the family members of the deceased who died in harness?"

"(B) Whether after a lapse of 10 years, an application for compassionate appointment can be filed when the compassionate appointments are given for the purpose of immediate relief to the family members of the deceased who died in harness?"

"(C) Whether the suit filed by the plaintiff-respondent was time-barred as it was filed after a period of 10 years of the death of the deceased employee?"

3. The relevant facts may be stated. The respondent original plaintiff instituted Regular Civil Suit No. 29 of 1998 for declaration and mandatory injunction contending that he was entitled to be offered employment on compassionate basis upon death of his mother Smt. Manjulaben Mohanlal Raviya. She was serving as Assistant Teacher in Pay Center School at Kalsari, Taluka Visavadar. She died on 02.02.1988 during her service in mysterious circumstances out of the burns she suffered. At that time, the plaintiff was of minor age. On becoming major, he made application to get employment on compassionate basis. The said application came to be rejected giving a reason that husband of the deceased Manjulaben was serving, and therefore, the plaintiff was not entitled to get employment under the scheme.

3.1 It was the case of the plaintiff that after death of her mother, the father got remarried. It was further stated that the father never looked after the plaintiff and his two sisters; that they starved. It was stated that the father had also a daughter born out of remarriage and he refused to keep the plaintiff with him. It was stated that the plaintiff stayed in the house of maternal grand-parents and father did not give any kind of assistance to the

plaintiff in his and his sisters' upbringing, much less any monetary assistance at any stage of life. The plaintiff stated that since he had become major and passed S.S.C. Examination, he applied for compassionate appointment which was wrongly rejected by the respondents on technical ground.

3.2 The defendant State Government by filing Written Statement (Exh. 14) contested the suit. It was stated that the suit of the plaintiff was not legal and no cause of action arose. Disputes regarding non-issuance of notice under section 80 of Civil Procedure Code, 1908 and regarding the court fee amount were raised. It was contended that the court had no jurisdiction to decide the suit. It was stated that an application of plaintiff dated 29.10.1994 was considered from all the aspects by Gruh Nirman and Gram Vikas Vibhag, Gandhinagar, and it was decided that as the husband of the deceased was in service, the claim for compassionate appointment was not valid. It was, therefore, contended that the decision not give compassionate appointment to the plaintiff was rightly taken and the plaintiff was communicated the decision on 30.08.1997.

4. Learned Assistant Government Pleader Mr.Rahul Dave for the appellant raised various contentions with reference to the substantial questions of law formulated. He submitted that the application of the plaintiff for compassionate

appointment was rightly rejected because once it was obtained that the father was earning, the benefit of the scheme could not be extended to the plaintiff. He next submitted that the object of giving compassionate appointment was to help the family rendered in distress because of death of the bread-earner in service. It was submitted that in the present case it could not be said that the said condition was satisfied. Learned Assistant Government Pleader further submitted that in any view, looking to the passage of time intervened since the making of the application by the plaintiff, at this belated stage, the plaintiff could not be offered the appointment, as giving him the appointment after gap of several years would be against the very purpose of offering such appointment.

4.1 Learned Assistant Government Pleader then submitted that in the facts of the case, yet another substantial question of law was arising. It was submitted that the claim for compassionate appointment asserted by instituting the Civil Suit was time barred. In the said connection it was also submitted that the delay on part of the plaintiff disentitled him for the appointment. It was submitted that substantial question of law could be formulated even if the same was not formulated at the time of admission of the appeal. He placed reliance on decision of the Supreme Court in **N.V. Srinivasa Murthy Vs N.V. Gururaja Rao and others [(2005) 10 SCC 566]** to submit that the jurisdiction under Section

100, CPC can be exercised in Second Appeal on the basis of question of law framed at the time of admission or modified or substituted later.

4.2 In order to buttress contentions, learned Assistant Government Pleader relied on various decisions of the Supreme Court as well as of this Court. On the basis of decisions in **State of Manipur Vs Md. Rajaodin [(2003) 7 SCC 511]**, **State of J&K Vs Sajad Ahmed Mir [(2006) 5 SCC 766]** and **Rajendragiri Somgiri Gosai Vs State of Gujarat [(2003) 2 GLH 349]**, it was submitted that no appointment could be given at this stage, belated in point of time. Reliance was placed on Supreme Court decision in **Sanjay Kumar Vs State of Bihar and others [(2000) 7 SCC 192]** to submit that when long time intervened before the aspirant attained the age of majority, compassionate appointment could not have been given. Decision of this Court in **State of Gujarat Vs Upendra Barot [2003 (2) GLH 490]** was also referred by the learned Assistant Government Pleader for contending that the directions to consider application for appointment on compassionate ground overlooking the instructions and policy of the Government cannot be issued by the High Court and that the Court cannot direct appointments de-hors the provisions of the Scheme in force.

4.3 On the other hand, learned advocate for the respondent Mr. Anshin H. Desai relied on the following decisions to contend that in those cases, similar situation was obtained and that the courts upheld the

claim for compassionate appointment. Learned advocate for the respondent relied on oral judgment dated 02nd August, 2011 in **Junagadh Municipal Corporation through Authorised Officer Vs Dinesh Ganeshchandra Patadia** delivered in **Second Appeal No.34 of 2008**, wherein this High Court upheld the judgment and decree of the Courts below giving compassionate appointment. It was pointed out from the said judgment that in that case, the suit was filed after six years from the date of the death of the bread-earner when the claimant attained majority. Considered from the date of the death of the employee concerned, which was in 1995, there was a span of 16 years when this High Court dismissed the Second Appeal confirming entitlement of the plaintiff in respect of his claim for compassionate appointment which was decreed by the Courts below. Another oral judgment dated 15th July, 2008 in **State of Gujarat Vs Dipakkumar Jaysukhlal Bhatt** in **Second Appeal No.63 of 2007** was next relied on and it was submitted that in that case the Court okayed the compassionate appointment for the defendant after time gap of 28 years. Yet another decision in **Second Appeal No.140 of 2009** in **State of Gujarat and others Vs Muktaben Mandvia**, was relied on wherein the judgment and decree dated 25th October, 2005 was passed for giving compassionate appointment and the first appellate court dismissed the appeal in July, 2008. After this High Court dismissed the appeal, Special Leave to Appeal (Civil) No.25987 of 2009 was dismissed by the Supreme Court on 12th July, 2010. Learned advocate

produced copy of the order of the Supreme Court to highlight that the order was complied with and the fact that the petitioner was given appointment noted by the Apex Court in its order.

4.4 Decision in **Pravinchandra Jeram Sindhal Vs GSRTC [1993 (2) GLH 816]** was relied on to submit that in the cases of appointment on compassionate ground, the approach should be humanistic and not pedantic. Several other decisions were relied on being decision dated 27th August, 2009 in **Letters Patent Appeal No.403 of 2009** to buttress the submission that passage of time for the reason that the claimant was minor at the time of death of the employee could not be treated as delay to disentitle the claimant from being appointed when found eligible. Another decision dated 14th December, 2010 in **Letters Patent Appeal No.2615 of 2010, 2005 (2) GHL 116, (2006) 9 SCC 195.**

4.5 Learned advocate for the respondent submitted that the time which was consumed during the pendency of appeal could not be a factor against the applicant. He submitted that Civil Application was filed for vacating the stay by the respondent and the Court directed early hearing of the appeal. He emphasized that the need for compassionate appointment was still persisting as the respondent is without job even today and he has been doing miscellaneous work.

5. This Court considered the facts and evidence

on record, and also went through the judgments of both the Courts below. Anxious consideration was given to the rival contentions in the context of the facts, evidence on record and the findings reached by both the Courts.

5.1 The trial court after framing the issues at Exh.17 and considering the evidence on record held that the ground given by the respondents for rejecting the application for compassionate appointment was erroneous on facts because since the plaintiff never stayed with his father and the father was staying separately and had remarried. It was found by the courts below that the father did not give any monetary help to the plaintiff. The lower appellate court further considered the evidence and the findings and concurred and confirmed the same to hold that it was proved that the mother of the plaintiff had died while in service. It was proved that the children including the plaintiff were not looked after by the father and even their names from the ration card (Exh. 52) were removed upon an application of the father dated 26.09.1998. The father had got remarried and was staying with second wife. It was found that the plaintiff and his sisters were neglected by the father. After appreciation of the evidence, the courts recorded that the plaintiff lost his mother, which was the bread earner for him. It was held that in the facts and circumstances of the case, that father was in service, could not be a ground not to give

compassionate appointment. It was recorded that the plaintiff had requisite qualifications including the educational qualifications for appointment as Junior Clerk on compassionate ground.

5.2 It could also be seen that in recording the findings, the Courts below had before them relevant documentary and other evidence. Those evidences were properly appreciated and considered. The Government Resolutions providing guidelines and the scheme regarding employment on compassionate ground produced at Exhibit 39, Exhibit 40 and Exhibit 59 on record were considered by the court below. In arriving at the aforesaid findings, the ration card (Exh.52) and other evidence including Exh.29 being the certificate issued by the Treasury Officer regarding family pension and the documents at Exhibit 33, Exhibit 35 and Exhibit 36 with regard to the educational qualifications of the plaintiff were considered. The plaintiff deposed at Exhibit 41. On the basis of the circumstances proved on evidence the finding of fact was arrived at that the plaintiff and his two children were rendered destitute after the death of the mother. A further important aspect in this regard was shown from the record that after the death of mother, there was a dispute about amount of gratuity, etc., which was not made available to the children. For getting the amount of gratuity and provident fund, the plaintiff had to take legal action.

6. Therefore, it could be seen that in the

context of the evidence on record, the trial court reached definite findings and the lower appellate court confirmed those findings. Firstly, it is a finding of fact recorded by both the Courts that the father had remarried and was staying separately. In other words, he was not one on whose income, the family was dependant. It has specifically come on record that the father while living separately with second wife did nothing to contribute in the upbringing of the plaintiff and his two sisters, which was further highlighted by the aspect emerging from Exhibit 52 that the names of the children were deleted from the ration card. There was nothing to indicate that the plaintiff was dependant on father. On the contrary, what is recorded is that father did not render any financial help to the plaintiff or his two sisters. Therefore, when the mother died while in service, the family was rendered economically destitute and there was no bread-earner for them. Evidently therefore, the decision of the respondents resting on the premise that since father was in service, the plaintiff was not entitled to be given a compassionate appointment, was irrational and was not supported by the facts proved. The evidence was otherwise. The decision was not only erroneous but once it was suggested on facts and from evidence that the in loss of the mother, the bread-earner of the family was lost, the rejection of the application of the plaintiff for compassionate appointment was not only erroneous, but it amounted to misinterpreting the Scheme and policy of such appointment, and

misjudging the very purpose intended to be achieved by giving such appointment.

6.1 The findings arrived at by both the courts are pure findings of fact. The courts have held that the rejection of claim for compassionate appointment on the ground of father's income was erroneous and mistaken. For coming to the said conclusion, the courts have duly appreciated the evidence on record, which established that the father was living separately with the second wife and had taken no care of the plaintiff and his two sisters. Therefore the ground for rejection of application that the father was in service was rightly held not tenable. The finding of fact recorded after appreciation of evidence cannot be interfered with in exercise of the second appellate jurisdiction by this court.

7. Given the aforesaid position, the questions of law formulated at the time of admission of appeal may now be adverted to. As regards the first question as to whether the suit for declaration seeking compassionate appointment could be filed in civil court, from the case of the plaintiff in the plaint, it was evident that he was seeking to claim rights under the scheme of compassionate appointment adopted by the State Government. The case of the plaintiff was that he fell within the criteria laid down in the Scheme to be eligible for the appointment. The rights asserted were required to be adjudicated on leading of evidence. It cannot be said

that the suit was not maintainable because it prayed for compassionate appointment. It is trite that under Section 9, CPC, the Civil Court has jurisdiction to try and entertain all the disputes which are of civil nature. Ouster of jurisdiction of the Civil Court cannot be lightly inferred, which is the another well-settled principle. It is also well propounded that in respect of all the disputes where the parties seek enforcement of some right of civil nature, the jurisdiction of the Civil Court has to be presumed. A claim for exclusion of Civil Court's jurisdiction in a given case is a matter of a heavy burden to be discharged by one who contends for the exclusion. In the present case and having regard to the nature of dispute involved, the Civil Court's jurisdiction was duly attracted. In **Ramesh Chand Ardawatiya Vs Anil Panjwani [(2003) 7 SCC 350]** it was observed that the civil court jurisdiction has to be determined primarily on the submissions made in the plaint.

7.1 With regard to the second question, learned Assistant Government Pleader submitted that on the ground that considerable time has passed the compassionate appointment cannot be granted as the object of such appointment is to give immediate relief. As regards this, it is to be observed that the contention is not well conceived inasmuch as this court is not giving any direction for the first time to give compassionate appointment to the plaintiff. The decree to the said effect was passed as back as in 2000 by the trial court and came to be

confirmed by the lower appellate court. Therefore, a right for the plaintiff accrued and such right flows from the decree. He has waited for years together to have the fruits of the decree. In **P.K. Vasavada Vs State of Gujarat {2007 (3) GLR 2372}**, this Court took view that disposal of the petition cannot defeat right of the petitioner.

7.2 It was submitted by learned advocate for the respondent that the plaintiff is still without job and the crisis of earning of bread still subsists. Therefore, when it is being held that the concurrent findings of fact by the courts below are not liable to be interfered with and when the decree in favour of the plaintiff is based on the findings which are being upheld, passage of time cannot be put forward as a ground to deny the consideration of the claim of the plaintiff.

7.3 So far as the third question is concerned it cannot be said that the suit was time-barred. The mother died on 02.02.1988. Immediately thereafter the father of the plaintiff remarried. The application for compassionate appointment was made by the plaintiff when he became major on 29.10.1994. The authorities took three years in deciding the application, which was rejected in the year 1997. The suit was instituted in 1998. The decree was passed in 2000 and the lower appellate court dismissed the appeal in 2003. Therefore, since the plaintiff became major in 1994 and at that time he

filed application which remained pending for three years with the authorities. In the circumstances, it could not be said that the suit instituted in the year 1998 was time-barred. A Division Bench of this Court in **State of Gujarat Vs Ajitsinh Chandrasinh Gohil** being **Letters Patent Appeal No.403 of 2009** decided on 27th August 2009 took view that the case of compassionate appointment could have been considered on the date when the applicant-aspirant attained majority. When the application of the plaintiff remained undecided with the Authorities for about three years, a long time in itself, decision of the Apex Court in **Smt.Sushma Gosain Vs Union of India [AIR 1989 SC 1976]** deserves a reference, in which the Supreme Court was dealing with a claim for compassionate appointment. The applicant's husband had died in 1982. Upon application, she was told that her case was under consideration, which was thereafter rejected after three years on the ground that there was a ban on appointment. The Court held that the decision was not justified. Thus, when delay is not attributable to the applicant and when the applicant is otherwise eligible and entitled to be offered compassionate appointment, denial of the same would itself be arbitrary. In the aforesaid view, the learned advocate was right in submitting that no substantial question of law arises in the appeal.

8. The ambit of exercise of powers under section 100, CPC, by the High Court was reiterated in **Sansar Chand Vs Swami Vivekanand Adarsh Vidha Mandir**

[(2010) 15 SCC 155] in which the Supreme Court concluded from its own earlier decision in **Gurudev Kaur v. Kaki [(2007) 1 SCC 546]** as under.

"Now, after 1976 Amendment, the scope of Section 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering under Section 100 C.P.C. only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble"

8.1 In **Manicka Poosali (dead) by LRs. Vs Anjalaiammal and another [(2005) 10 SCC 38]**, the Supreme Court reiterated that the High Court while exercising its power under Section 100 of the CPC cannot re-appreciate the evidence and on that basis cannot set aside the finding recorded by the First

Appellate Court unless it is possible for the High Court to come to the conclusion that the findings recorded by the First Appellate Court were perverse, i.e. based on misreading of evidence or based on no evidence. As discussed hereinabove, in the present case, both the Courts below have duly considered the evidence on record and on the basis of appreciation thereof, reached findings of fact. The findings being properly recorded and emanating from the evidence on record, they are not liable to be intercepted or interfered with in exerciser of second appellate jurisdiction by this Court.

9. The court cannot be unmindful of the fact that while examining the legality and propriety of the judgments of the two Courts below which have recorded concurrent findings, this Court sits within the confines of the jurisdiction bound under Section 100, CPC. The nature of civil second appellate jurisdiction by the High Court is different, when juxtaposed with the original jurisdiction or the writ jurisdiction. The parameters are different. In above context, it may be observed that a decree holder-plaintiff held entitled to compassionate appointment, as the present respondent is, and a petitioner approaching the Court in writ jurisdiction claiming compassionate appointment stand on a different pedestal. The former seeks enforcement of his right crystallised by virtue of decree passed by the competent Court, whereas the later would be pleading his claim. A decree holder has an established right.

A writ petitioner seeks to establish his right. In other words, this Court dealing with the second appeal against the concurrent judgment and decree of the Courts below which have adjudicated the claim of the plaintiff for compassionate appointment, it confines to its second appellate jurisdiction. When the judgment and decree of both the Courts are being upheld, a contention that the plaintiff has no right to be appointed on compassionate basis after passage of years cannot be accepted on the same touchstone as a writ Court exercising jurisdiction under Articles 226 or 227 of the Constitution. When the Trial Court and the lower Appellate Court has held in favour of the plaintiff for his entitlement of appointment on compassionate basis, it cannot be said to be an abstract claim for compassionate appointment, but it assumes character of an enforceable right flowing from the decree passed by a competent court.

9.1 It is also a factor weighed with this Court that as was submitted by the learned advocate for the respondent, the need for compassionate appointment still persists for the respondent inasmuch as he has no job even today and has no secured earnings. This submission and statement of learned advocate for the respondent has remained uncontroverted.

10. In view of the above discussion, the appeal deserves to be dismissed. However, in the last paragraph of the operative portion of the order/decreed by the trial court runs to read that "it

is ordered that the defendant is hereby also directed to give suitable appointment to the present plaintiff on compassionate ground within two months from the date of receipt of the judgment of this court and also directed to communicate the decision arrived at by the authority to the present plaintiff, without any delay." The lower appellate court has dismissed the appeal and confirmed the judgment and decree of the trial court in the same form.

11. Therefore, while otherwise upholding the judgment and decree passed by both the courts below, it is to be observed that the courts could not have issued direction to the defendants to give appointment to the present plaintiff. The courts could only direct consideration of the case of the plaintiff in light of what it held in its judgment. Accordingly, while dismissing the appeal, the operative order of the trial court which was confirmed by the appellate court is modified by deleting the above part whereby the defendants are directed to give appointment to the plaintiff. The rest of the part of the judgment and order/decrees shall stand confirmed subject to the modification that the defendant-competent authorities shall consider the case of the plaintiff-respondent for compassionate appointment pursuant to the judgments passed by the courts below.

(N.V.ANJARIA, J.)

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