

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION NO. 12799 of 2012****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE K.M.THAKER**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 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 ?
 - 5 Whether it is to be circulated to the civil judge ?
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PRAVIN JESHINBHAI GOHIL....Petitioner(s)

Versus

STATE OF GUJARAT THRO SECRETARY & 4....Respondent(s)

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Appearance:

MR KJ DWIVEDI, ADVOCATE for the Petitioner(s) No. 1

MR. NIRAJ ASHAR, LD. AGP for the Respondent(s) No. 1 - 5

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CORAM: HONOURABLE MR.JUSTICE K.M.THAKER

Date : 28/03/2013

ORAL JUDGMENT

1. The petition is preferred after the petitioner received communication dated 02.10.2011 whereby the Competent Authority has asked for certain details from the petitioner.

1.1 Instead of supplying the details as asked for by the competent authority, the petitioner has preferred present petition.

2. In the present petition, the petitioner has prayed, inter-alia, to quash and set aside the order/decision dated 02.10.2011 passed by the respondent No.4 and further prayed to direct the respondents to consider the case of petitioner for compassionate appointment.

3. So as to consider and appreciate the petitioner's case in present petition, it is necessary to take into account some of the relevant facts.

4. The petitioner has claimed that his mother was working as a nurse in Referral hospital and General Health Center at Sihor, District:Bhavnagar and she died while on service on 25.04.2011. About a month thereafter i.e. on or around 20.05.2011, the petitioner made an application for appointment on compassionate ground. It appears that the authority who received the application, forwarded the application to the Competent Authority for consideration on or around 25.05.2011. Subsequently, according to the petitioner, he received a communication dated 02.10.2011 (Annexure-D, page 11).

The petitioner has considered the said communication as a rejection of his application for appointment on compassionate ground. The petitioner appears to have also assumed that he would be offered lump-sum compensation as per the policy, which has been introduced on 05.07.2011. On such construction of the communication dated 02.10.2011, the petitioner has preferred present petition and prayed for above quoted relief.

5. It is pertinent that the challenge is raised against the said communication, without waiting for the final decision by the competent authority in respect of the petitioner's application (after considering the details called for vide letter dated 02.10.2011) and without supplying the details asked for by the competent authority vide said communication dated 02.10.2011.

6. Mr. Dwivedi, learned counsel has appeared for the petitioner and submitted that the petitioner made application for appointment on compassionate ground. He submitted that when the petitioner made application, the policy which was in operation, required the respondent to grant appointment on compassionate ground and therefore, the petitioner made the application. He submitted that the petitioner demanded appointment on compassionate ground and not lump-sum compensation (which he has been now offered vide communication dated 02.10.2011). Learned counsel for the petitioner also submitted that

in view of the policy which was prevailing at the relevant point of time, the petitioner has legitimate expectation to get appointment.

7. Learned counsel for the petitioner has, in response to the query made by the Court, clarified and submitted that the petitioner is not interested in accepting lumpsum compensation, but he is interested only in appointment and is not ready and willing to be satisfied with the lump-sum compensation as per the policy, which is prevailing, and has been brought into force since 05.07.2011.

8. I have heard learned counsel for the petitioner and considered the material on record.

9. At the outset it is relevant to mention that the petitioner has otherwise also not even challenged the policy decision to cancel erstwhile policies. Therefore, petitioner's claim has to be considered in light of the position that there is no policy in existence under which appointment on compassionate ground can be granted or directed and the policy which is in operation, provides for lumpsum compensation.

10. According to the details mentioned in the application, the petitioner made application seeking appointment on compassionate ground on 20.05.2011.

10.1 So far as the claim for appointment on compassionate ground is concerned, it is relevant to

mention that such appointment on compassionate ground cannot be claimed as a matter of right.

10.2 Actually, appointments in public sector should be made on the basis of merits and strictly as per rules and by inviting applications i.e. on open invitation providing all eligible candidates to compete and it should always conform to the constitutional scheme. That is the mandate of Article 14 and Article 16 of the Constitution of India.

10.3 Appointment on compassionate ground is an exceptions to the said rule or a concession in special circumstances, given to the heirs & dependents of deceased employees, and it is not a right. Appointment on compassionate ground cannot be turned into source of recruitments, since such appointments are exceptions to regular mode of recruitment-appointment.

10.4 While considering the claim for appointment on compassionate ground, the Court should also be alive to those qualified and eligible persons who are waiting in queue for appointment after getting their names registered at employment exchange. The claim and rights of such persons cannot be overlooked by the Court.

10.5 Besides this, in absence of any clear vacancy on sanctioned permanent post on regular establishment of the respondent, any direction against an employer to

make appointment on compassionate ground cannot be passed.

10.6 Appointment on compassionate ground can be made and any direction to consider claim for such appointment can be made, only in accordance with rules/policy and not de-hors the rules.

11. In this context, it would be appropriate to refer to observations by Hon'ble Apex Court in the case between Mohan Mahto versus Central Coal Field Ltd. And Others [(2007) 8 SCC 549] in paragraph Nos.14 and 15 as under:

"14. In I.G. (Karmik) v. Prahalad Mani Tripathi this Court observed:

"6. An employee of a State enjoys a status. Recruitment of employees of the State is governed by the rules framed under a statute or the proviso appended to Article 309 of the Constitution of India. In the matter of appointment, the State is obligated to give effect to the constitutional scheme of equality as adumbrated under Articles 14 and 16 of the Constitution of India. All appointments, therefore, must conform to the said constitutional scheme. This Court, however, while laying emphasis on the said proposition carved out an exception in favour of the children or relatives of the officer who dies or who becomes incapacitated while rendering services in the public department. See Yogendra Pal Singh v. Union of India.

7. Public employment is considered to be a wealth. If in terms of the constitutional scheme cannot be given on descent. When such an exception has been carved out by this Court, the same must be strictly complied with. Appointment on compassionate ground is given only for meeting immediate hardship which is faced by the family by reason of the death of the bread earner. When an appointment is made on compassionate ground, it should be kept confined only to the purpose it seeks to achieve, the idea being not to provide for endless compassion.

8. In National Institute of Technology v. Niraj Kumar Singh this Court has stated the law in the following terms:

'16. All public appointments must be in consonance with Article 16 of the Constitution of India. Exceptions carved out therefore are the cases where appointments are to be given to the widow or the dependent children of the employee who died in harness. Such an exception is carved out with a view to see that the family of the deceased

employee who has died in harness does not become a destitute. No appointment, therefore, on compassionate ground can be granted to a person other than those for whose benefit the exception has been carved out. Other family members of the deceased employees would not derive any benefits thereunder.'"

15. In *State Bank of India v. Somvir Singh* this Court held:

"10. There is no dispute whatsoever that the appellant Bank is required to consider the request for compassionate appointment only in accordance with the scheme framed by it and no discretion as such is left with any of the authorities to make compassionate appointment dehors the scheme. In our considered opinion the claim for compassionate appointment and the right, if any, is traceable only to the scheme, executive instructions, rules, etc. framed by the employer in the matter of providing employment on compassionate grounds. There is no right of whatsoever nature to claim compassionate appointment on any ground other than the one, if any, conferred by the employer by way of scheme or instructions as the case may be."

11.1 Similarly, reference may also be made to the observations by Hon'ble Apex Court in the case between *Steel Authority of India Ltd. v. Madhusudan Das & Ors.* [AIR 2009 SC 1153] in paragraph Nos.14 and 16 as under:

"14..... The Division Bench of the High Court, however, proceeded on the premise that the employer was bound to provide appointment on compassionate appointment in all cases involving death of an employee. The Division Bench, in our opinion, was not correct in its view. This Court in a large number of decisions has held that the appointment on compassionate ground cannot be claimed as a matter of right. It must be provided for in the rules. The criteria laid down therefor, viz., that the death of the sole bread earner of the family, must be established. It is meant to provide for a minimum relief. When such contentions are raised, the constitutional philosophy of equality behind making such a scheme be taken into consideration. Articles 14 and 16 of the Constitution of India mandate that all eligible candidates should be considered for appointment in the posts which have fallen vacant. Appointment on compassionate ground offered to a dependant of a deceased employee is an exception to the said rule. It is a concession, not a right.

16. It may be that such a provision was made as a measure of social benefit but it does not lay down a legal principle that the court shall pass an order to that effect despite the fact that the conditions precedent therefor have not been satisfied. This aspect of the matter has been considered by this Court in *Umesh Kumar Nagpal v.*

State of Haryana and Others[(1994) 4 SCC 138] in the following terms:

" As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependants of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased."

11.2 In this context, it would be appropriate to also refer to observations by Hon'ble Apex Court in the case of *M/s. Eastern Coalfields Ltd. v. Anil Badyakar & Ors.* [AIR 2009 SC 2534] in paragraph No.19 as under:

"19. The principles indicated above would give a clear indication that the compassionate appointment is not a vested right which can be exercised at any time in future. The compassionate employment cannot be claimed and offered after a lapse of time and after the crisis is over. In the instant case the employee died-in-harness in the year 1981 and after a long squabble by the dependants of the deceased, they arrived at a settlement that the son-in-law of the second daughter who is unemployed may request for appointment on compassionate grounds. The request so made was accepted by the Personnel Manager of the Company subject to the approval of the Director of the Company. The Director (P), who is the competent authority for post facto approval, keeping in view the object and purpose of providing compassionate appointment has cancelled the provisional appointment on the ground that nearly after 12 years from the date of death of the employee such an appointment could not have been offered to the so-called dependent of the deceased employee. In our considered view, the decision of the employer was in consonance with *Umesh Kumar Nagpal's* case and the same should not have been interfered with by the High Court."

11.3 In the case of State of Chhattisgarh & Ors. v. Dhirjo Kumar Sengar [AIR 2009 SC 2568] in paragraph No.15 Hon'ble Apex Court has observed:

"15. Appointment on compassionate ground is an exception to the constitutional scheme of equality as adumbrated under Articles 14 and 16 of the Constitution of India. Nobody can claim appointment by way of inheritance.

In Steel Authority of India Ltd. v. Madhusudan Das and Ors. [2008 (15) SCALE 39] this Court held:

"...This Court in a large number of decisions has held that the appointment on compassionate ground cannot be claimed as matter of right. It must be provided for in the rules. The criteria laid down therefor, viz. That the death of the some bread earner of the family, must be established. It is meant to provide for a minimum relief. When such contentions are raised, the constitutional philosophy of equality behind making such a scheme be taken into consideration. Article 14 and 16 of the Constitution of India mandate that all eligible candidates should be considered for appointment in the posts which have fallen vacant. Appointment on compassionate ground offered to a dependant of a deceased employee is an exception to the said rule. It is a concession, not a right."

12. So far as the petitioner is concerned, it is not the case of the petitioner that at the relevant time, there was any clear and existing vacancy on permanent establishment of respondent, where, the petitioner could have been granted appointment at the relevant time i.e. immediately when the petitioner submitted his application and despite such vacancy he was not granted appointment on compassionate ground.

12.1 It is also not the case of the petitioner that before the policy which came to be introduced with effect from 05.07.2011, being brought in force, any other person whose application was subsequent to petitioner's application, has been granted actual appointment by the respondent, whereas, petitioner's application remained unattended/pending.

12.2 Differently, it is not the case of the petitioner that while depriving petitioner's claim for appointment on compassionate ground, any other person, who had submitted application subsequent to petitioner has been granted appointment and in case of petitioner, the policy which came into operation with effect from July 2011 is being taken into consideration.

12.3 Thus, in present case any application, filed subsequent to the application submitted by present petitioner has not been considered, much less granted.

12.4 It is not in dispute that the policy under which (i.e. the policy in light of which and on strength of which the application was made) is now not in existence and the said policy is cancelled/withdrawn.

12.5 It is not in dispute that the policy to consider request/s for appointment on compassionate ground, which was prevailing until 04.07.2011 came to be withdrawn/cancelled within only 6 weeks after the application and such policy is now not in existence.

12.6 In absence of policy to grant appointment on compassionate ground i.e. when such policy is withdrawn and is not in existence, any direction to grant appointment on compassionate ground cannot be passed by the Court. The claim for appointment on compassionate ground would flow only from a duly

introduced scheme. Differently put the said claim, as observed by Hon'ble Apex Court, "is traceable only to the scheme framed by employer and there is no right whatsoever outside the scheme."

12.7 Thus, if and only if a policy or a scheme for appointment on compassionate ground is in existence, direction to the respondent to act as per and in consonance with such policy can be granted and that too if other requirements are complied but if any policy does not exist then any direction to the respondent to grant appointment (even on compassionate ground) cannot be passed.

12.8 Existence of duly declared policy is *sine qua non* for passing such direction.

12.9 Similarly no appointment on compassionate ground can be made contrary to the terms of the duly declared scheme. Such appointment must conform to the terms of the scheme. Consequently Court cannot pass any direction *de hors* the terms of the scheme or in absence of scheme.

13. At this stage, it is also relevant to mention that the decision/action to withdraw/cancel the policy to grant actual appointment on compassionate ground is not challenged by the petitioner.

14. Therefore the petition and the claim have to be examined and considered by the Court on the premise

that the policy does not exist and its withdrawal is an accepted and undisputed position.

15. In present case, the respondents have, as a matter of policy, introduced and implemented new policy with effect from 05.07.2011, whereby the respondents have started paying lump-sum compensation instead of actual appointment.

16. Even otherwise, instruction and/or withdrawal-cancellation (complete or partial) and/or modification and/or supersession of policy and/or introduction of new policy are matters and subjects in the realm and discretion of State.

17. It appears that in view of the said change in policy, the respondents, by virtue of the communication in question i.e. communication dated 02.10.2011, called for certain details from the petitioner, so that, petitioner's application can be considered in light of and in consonance with the policy, which is prevailing.

18. However, instead of providing the details called for by the respondents, the petitioner has chosen to prefer present petition. Learned counsel for the petitioner has made it clear, in response to the query made by this Court that the petitioner is interested only in appointment.

18.1 It is pertinent to note that the mother of

petitioner died while in service on 25.04.2011. About a month thereafter i.e. on or around 25.05.2011, the petitioner made application seeking appointment on compassionate ground.

18.2 It is also pertinent to note that within period of about 6 weeks after petitioner's application, the policy dated 05.07.2011, came in force and the erstwhile policy came to be cancelled and withdrawn and it ceased to be in operation within period of 6 weeks after the petitioner filed his application.

Under the circumstances, the said interregnum of six weeks cannot be treated as unreasonable delay.

18.3 As mentioned above, it is not the case of the petitioner that in the said interregnum of 6 weeks, any application, which might have been submitted subsequent to petitioner's application, has been considered and any appointment on compassionate ground is granted to such person. It is also not possible to hold that period of 6 weeks amounts to inordinate or unjustified delay on part of the respondents in considering petitioner's application. Moreover from the communication dated 02.10.2011, it prima-facie appears that petitioner's application was not complete in all respects and details and some details/documents were necessary for considering the application. Therefore, the said period of 6 weeks needs to be considered having regard to the said fact as well.

18.4 It is also not the case of the petitioner that

when he made application, there was any clear and existing vacancy on permanent establishment of the respondent.

18.5 Even if it is presumed that, the policy of granting actual appointment on compassionate ground is in operation or such policy should be taken into consideration and petitioner's application should be considered as per said erstwhile policy, then also, petitioner's case can be and could have been considered only if there was a clear and existing vacancy on permanent establishment of respondent.

18.6 In absence of such vacancy, the respondent may not be able to grant any appointment even on compassionate ground. In that event any fault cannot be found with the respondent, more so when there is neither any allegation about discrimination, nor any allegation about mala-fide or unreasonable, unexplained and inordinate delay.

18.7 Furthermore, if the communication dated 02.10.2011 is taken into consideration, it gives out that the respondents have merely called for certain details from the petitioner.

19. It appears that the respondents have made reference of the policy which has been introduced with effect from 05.07.2011. However, the said communication dated 02.10.2011 does not convey any particular decision rejecting petitioner's

application.

20. Thus it appears that, any decision granting or rejecting petitioner's application is not conveyed vide said communication dated 02.10.2011 and by the said decision, merely certain details have been called for.

21. This is not a case where the consideration of petitioner's application can be said to have been inordinately delayed by the respondents and/or that the respondent authorities did not take any decision for unreasonably long time. In present case there is no allegation about any discrimination or mala-fide. In absence of any allegation about mala-fides or discrimination and when it is not even claimed by the petitioner that any clear and existing vacancy was available and when the respondents do not appear to be guilty of any delay, the action of the respondents vide communication dated 02.10.2011 cannot be faulted.

21.1 In view of the fact that as a matter of policy, the respondents have discontinued to grant actual appointment on compassionate ground and instead introduced policy of paying lump sum compensation, the petitioner does not appear to be justified in claiming that petitioner should be granted actual appointment.

21.2 Furthermore the new scheme specifically provides that all pending applications shall be decided as per the new scheme. In this view of the matter also, the

grievance of the petitioner is unjustified and unsustainable.

21.3 In this context reference may be made to the decision by Hon'ble Apex Court in the case of State Bank of India V/s. Rajkumar. The facts in light of which the said proceedings commenced are mentioned in the said decision (2010) 11 SCC 661, in paragraph No.2, 4 and 5, which read thus:

"2. The respondent's father employed as a Messenger in the appellant Bank, died on 1-10-2004. The respondent's mother made applications dated 6-6-2005 and 14-6-2005 requesting for his appointment on compassionate grounds. When the applications were being processed and verified, the Compassionate Appointment Scheme was substituted by the "SBI Scheme for payment of ex gratia lump sum amount" with effect from 4-8-2005. The new Scheme abolished the old Scheme for compassionate appointments and instead provided for payment of an ex gratia lump sum amount as per its terms.

4. As the old Scheme came to be abolished and compassionate appointment was no longer permissible after the new Scheme came into force, the Bank on 31-1-2006 advised the family of the deceased to make an application under the new Scheme for ex gratia payment. Feeling aggrieved, the respondent filed a writ petition before the Allahabad High Court.

5. A learned Single Judge of the High Court by order dated 8-5-2008 directed the appellant to reconsider the case of the respondent for appointment on compassionate grounds, holding that the old Scheme applied and the new Scheme was only prospective in operation. The said order was affirmed by the Division Bench by order dated 1-9-2008, which is under challenge in this appeal by special leave."

In background of said facts Hon'ble Apex Court observed that;

"16. In this case the employee died in October 2004, the application was made only in June 2005. The application was not even by the respondent, but by his mother. Therefore, it was necessary to ascertain whether the respondent really wanted the appointment, whether he possessed the eligibility, and whether any post was available. Within two months of the application, the new Scheme came into force and the old Scheme was abolished. The new Scheme specifically provided that all pending

applications will be considered under the new Scheme. Therefore it has to be held that the new Scheme which came into force on 4-8-2005 alone will be apply even in respect of pending applications.

19. *The above observations were made in the context of rejecting the widow's request for additional payment under the 2005 Scheme. In fact, this Court allowed the Bank's appeal and dismissed the writ petition filed by the widow for additional benefits. The said observations, cannot therefore be of any assistance to consider the applicability of the old Scheme for compassionate appointment vis-a-vis the new Scheme for ex gratia payment.*

20. *The respondent was not entitled to be considered for compassionate appointment. The High Court was not justified in quashing the communication dated 31-1-2006 or in directing reconsideration of the case of the respondent for compassionate appointment."*

Thus, in light of the above quoted observations by Hon'ble Apex Court in the said decision – wherein almost similar facts are considered – the decision by the respondents cannot be faulted.

21.4 It is petitioner's choice to decide that he does not want to receive lump-sum compensation.

21.5 However, policy of granting actual appointment has been discontinued and that, therefore, this Court cannot issue directions to the respondents to consider the petitioner's application and grant him actual appointment on compassionate ground.

22. Though, the learned counsel for the petitioner has, in response to Court's query, made it known to Court as well as to the respondents that petitioner is not interested to receive lump-sum compensation but, he is interested in actual appointment, Court

considers it appropriate to clarify that such stipulation by the learned counsel for petitioner may not be held against the petitioner and if the petitioner is still willing to receive lump-sum compensation in consonance with policy dated 05.07.2011, it would be open to the petitioner to give appropriate response to the respondent in reply to the communication dated 02.10.2011, within period of 2 weeks from today. If, such details are supplied and if the petitioner, unequivocally declares that he is ready to receive lump-sum compensation and does not insist for actual appointment, then his application may be considered on its own merits in accordance with law and taking into consideration terms and conditions of policy No.RHM-102009-1651-K dated 05.07.2011.

23. For the foregoing reasons in view of the facts of the case, the relief prayed for by the petitioner cannot be granted. The petition fails and deserves to be rejected and is accordingly rejected.

(K.M.THAKER, J.)

Ankit*