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Neutral Citation No. - 2023:AHC:156925-DB

Court No. - 39

Case :- SPECIAL APPEAL No. - 309 of 2019

Appellant :- Oriental Insurance Company Limited

Respondent :- Priyanka Agarwal

Counsel for Appellant :- Amaresh Sinha

Counsel for Respondent :- Vijay Prakash Jaiswal

Hon'ble Saumitra Dayal Singh,J.

Hon'ble Vinod Diwakar,J.

1. Heard Sri Anubhav Sinha, Advocate, holding brief of Sri Amaresh Sinha, learned counsel for the respondent-appellant and Sri Vijay Prakash Jaiswal, learned counsel for the petitioner-respondent.

2. The present intra-court appeal has been filed against the order of the learned single-judge dated 22.2.2019 passed in ***Priyanka Agarwal Vs. Union of India and 2 Ors. (Writ-A No. 51712 of 2017)***. By that order, the learned single-judge has allowed the writ petition and directed the appellant-respondent to consider the claim of the respondent-petitioner for grant of compassionate appointment, ignoring the cut-off date i.e. 1.11.2014 arising under the Scheme for Compassionate Appointment in Public Sector and General Insurance Companies, introduced vide communication dated 7th August, 2014, issued by the Director, Department of Financial Services, Ministry of Finance, Government of India.

3. The petitioner's husband Sri Surendra Kumar Agarwal died-in-harness on 6.9.2014, while working on the post of Assistant, with the Oriental Insurance Company Ltd., Moradabad. Undisputedly, on the date of occurrence of his death, there did not exist a scheme for grant of compassionate appointment, to his family members. In fact, there existed and was enforced a scheme for grant of *Ex-gratia* payment, to the family of the deceased-employees of the Oriental Insurance Company Ltd.

4. Later, on 7.8.2014, vide communication issued by the Director, Department of Financial Services, Ministry of Finance, Government of India, the Scheme for Grant of Compassionate Appointment, was published. For ready reference, Clause 8 of the Scheme for Grant of Compassionate Appointment, reads as below:

“8. The scheme comes into force prospectively from 01st November 2014. Application for employment under the Scheme from eligible dependent should normally be considered up to five years from the date of death or retirement on medical grounds taking place on or after 01st November, 2014 and decision to be taken on merit in each case.”

5. On 12.12.2014, the present petitioner-respondent filed her application for grant of compassionate appointment. It was rejected by communication dated 5.3.2015 for the reason that the death had occurred prior to the cut-off date. Here, it may also be noted, much earlier there existed a scheme for grant of compassionate appointment. However, it was discontinued with effect from 1.6.2002 and replaced with the scheme providing for *Ex-gratia* payment.

6. In the writ petition, the only prayer made reads as below:

“(a) Issue a writ, order or direction in the nature of mandamus directing the respondent nos. 1 and 2 to appoint the petitioner on compassionate ground as soon as possible and in this regard efforts may be done by the respondents.

(b) Issue a writ, order or direction in the nature of mandamus directing the respondent no.2 to decide the representations of the petitioner pending before him.

(c) Issue any other writ, order or direction which this Hon'ble Court may deem fit and proper in the circumstance of the case.”

7. While allowing the writ petition, the learned Single Judge has observed as below:

“I have considered the submissions of the parties.

An employee or the dependent cannot decide his/her date of death. It is not in the hands of dependent of an employee or the employee himself/herself when he/she would die. Even before 1.11.2014 there was old scheme of 2002 and there is no dispute that under the old scheme, the petitioner was entitled for being given compassionate appointment. The petitioner's claim for appointment on compassionate ground is being denied on the ground of new scheme

in which an artificial date of death of an employee i.e. 1.11.2014 is fixed, which has no basis. Even otherwise, the petitioner was entitled for consideration of appointment on compassionate ground under the old scheme when the death of the husband of the petitioner was occurred on 6.9.2014

Considering the fact that the date of death of an employee has been fixed in an artificial manner, the same cannot be made basis for denying the legitimate claim of the petitioner for appointment on compassionate ground.

Accordingly, the present writ petition is allowed and the respondents are directed to consider the claim of the petitioner for compassionate appointment ignoring the cut off date i.e. 1.11.2014 and take a decision in accordance with law and appoint the petitioner on compassionate ground, if she is otherwise found eligible and qualified, within a period of one month from today.”

8. Having heard counsel for the parties and having perused the record, we find, on the date of occurrence of the death of Sri Surendra Kumar Agarwal, there did not exist any scheme for grant of compassionate appointment. On that date, there existed a scheme to provide *Ex-gratia* payment to the family of the deceased-employee. The scheme for compassionate appointment that was earlier discontinued with effect from 1.6.2002, was first re-introduced by communication dated 7th August, 2014 written by the Director, Department of Financial Services, Ministry of Finance, Government of India. As noted above, that scheme was made effective prospectively from 1.11.2014 with further clarification, it would apply only to cases where the death may occur on or after 1.11.2014.

9. In absence of any challenge raised to Clause 8 of that Scheme, it remains well settled in law that grant of compassionate appointment is not a fundamental right. In fact, that concession exists by way of an exception to the fundamental right to equality in employment. Being an exception, it has to be construed strictly in terms of the scheme under which that exception has been created. Here, it may be noted, from the earliest time, under our Constitutional scheme, claims for appointment on public posts on descent only, were looked down upon being in violation of the fundamental right to equality in public employment as was observed in a five judge Bench decision of the Supreme Court in ***Gazula Dasaratha Rama Rao Vs. State of Andhra Pradesh & Ors., AIR 1961 SC 5377***, at

the same time grant of compassionate appointment to a family member of an employee who may have suffered death-in-harness, thereby suddenly visiting the circumstances of destitution on his hapless family, was recognized as a permissible exception to the general rule of equality arising under Articles 14 and 16 of the Constitution of India. Thus, in ***Umesh Kumar Nagpal Vs. State of Haryana, (1994) 4 SCC 138***, it was held:

“2. The question relates to the considerations which should guide while giving appointment in public services on compassionate ground. It appears that there has been a good deal of obfuscation on the issue. 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. 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 to one of the dependants of the deceased who may be eligible for such 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. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependent of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz., relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the

Change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned.”

10. In the present facts, the Scheme for Compassionate Appointment clearly provides that that exception to the rule of equality in employment may be granted only in deserving cases, where death may occur on or after 1.11.2014. Therefore, in the first place, it never became open to the learned single-judge to confer any right to claim compassionate appointment on any person who may not have been eligible owing to that stipulation of the cut-off date.

11. Then, in the absence of any challenge raised to the validity of Clause-8 of the Scheme for Grant of Compassionate Appointment, first introduced with effect from 1.11.2014, it further never became open to the learned single-judge, either to consider or to read that cut-off date was arbitrary. Before such conclusion may have been drawn, there must have existed a direct challenge raised to the cut-off date prescribed by the Scheme for Grant of Compassionate Appointment. Since, the petitioner chose to only seek a direction to decide her application without challenging the cut-off date prescribed under the scheme for grant of compassionate appointment, that observation of the learned single-judge that Clause 8 is arbitrary, is not founded, either on facts or in law, as neither any fact was pleaded to base that premise nor any relief was sought, of that nature.

12. In that light, the submission of learned counsel for the respondent-petitioner, on the strength of five-judge bench decisions of the Supreme Court in *Ajay Hasia Vs. Khauid Mujib Sehravardi (1981) 1 SCC 722* and *R.K. Garg Vs. Union of India and others (1981) 4 SCC 675*, cannot be entertained with any seriousness.

13. Matters of constitutional validity are to be considered only in deserving cases, where necessary facts are first pleaded and specific challenge is raised on such pleadings. The Writ Court may never entertain such a challenge or enter into that exercise in a cavalier manner. A

presumption as to validity of the law pre-exists under our jurisprudence. In absence of specific challenge raised, the submission advanced could not have been taken up less so decided in favour of the petitioner-respondent.

14. The further submission attempted to be advanced on the strength of Section 17(A) of the General Insurance Business (Nationalisation) Act, 1972 also does not merit any acceptance, as Clause 1 thereto applies to terms and conditions of service of officers and employees of the Corporation. It has nothing to do with the claim for grant of compassionate appointment to a family member of a deceased-employee. Therefore, no benefit may be drawn from the language of Section 17(A) (6) of the Act.

15. Though, parties are at variance as to the law to be applied with respect to the date of death or with respect to the date of claim being filed or with respect to the date of being considered, we may only note that in **State Bank of India and Others Vs. Jaspal Kaur (2007) 9 SCC 571**, the employee died in harness on 01.8.1999. The application for grant of compassionate appointment, made by his wife on 05.2.2000 came to be rejected on 07.1.2002. Later a scheme for grant of compassionate appointment was introduced on 04.8.2005. The High Court issued a direction to the bank to consider the application filed earlier, under the new scheme. That decision of the High Court was reversed by the Supreme Court. The same principle was reiterated in **Bhawani Prasad Sonkar Vs. Union of India and Others (2011) 4 SCC 209**. In **State Bank of India Vs. Raj Kumar (2010)11 SCC 661**, it was opined, the Scheme for Grant of Compassionate Appointment existing on the date of decision will govern the fate of all pending applications. That view was reiterated in **MGB Gramin Bank Vs. Chakrawarti Singh (2014) 13 SCC 583**.

16. Again in **Canara Bank and Another Vs. M. Mahesh Kumar (2015) 7 SCC 412**, the death occurred on 10.10.1998 whereas the

application for grant of compassionate appointment was filed on 30.11.1998. While that application remained pending, the Scheme for Grant of Compassionate Appointment was withdrawn and replaced with another scheme providing for *Ex-gratia* payment, in the year 2005. After considering the earlier law laid down by it, a two judge bench of the Supreme Court reached the conclusion that the case of the claimant (in that case) could not be dealt with in terms of the subsequent scheme. It required that claim to be reconsidered in accordance with the scheme that was in existence on the date of occurrence of death and also on the date of claim being made.

17. Then, in **Indian Bank and Others Vs. Promila and Another (2020) 2 SCC 729**, the death occurred on 15.1.2004 whereas the application for grant of compassionate appointment was made on 24.1.2004. The scheme for grant of compassionate appointment was introduced on 27.4.2004 i.e., after the occurrence of death and filing of the claim petition. Following **Canara Bank** (supra), a two judge bench of the Supreme Court held, the claim would be determined in accordance with the scheme that was existing on the date of occurrence of death and filing of the claim petition.

18. Later, in **N.C. Santosh Vs. State of Karnataka and Others (2020) 7 SCC 617**, a three judge bench of the Supreme Court considered, amongst others, the earlier decisions of that Court in **State Bank of India Vs. Raj Kumar** (supra), **MGB Gramin Bank Vs. Chakrawarti Singh** (supra) as also **Canara Bank and Another Vs. M. Mahesh Kumar** (supra). In that case, death had occurred on 25.1.1998, application for grant of compassionate appointment was made on 29.6.2000 whereas the rule providing for compassionate appointment stood amended w.e.f. 01.4.1999 thereby taking away the enabling provision to grant compassionate appointment. Nevertheless, appointment was granted on 25.8.2000. It was later withdrawn on 04.11.2003. It was observed as below:

“19. Applying the law governing compassionate appointment culled out from the above cited judgments, our opinion on the point at issue is that the norms, prevailing on the date of consideration of the application, should be the basis for consideration of claim for compassionate appointment. A dependent of a government employee, in the absence of any vested right accruing on the death of the government employee, can only demand consideration of his/her application. He is however disentitled to seek consideration in accordance with the norms as applicable, on the day of death of the government employee.”

19. Later in State of **Madhya Pradesh Vs. Amit Shrivastava (2020) 10 SCC 496**, another three judge bench of the Supreme Court again had the occasion to consider the claim for compassionate appointment. In that case, the death occurred on 11.12.2009 whereas the scheme for grant of compassionate appointment was made under policy dated 18.8.2008. It was rejected on 19.8.2010. It was found that the policy did not provide for grant of compassionate appointment to a work charge/contingency fund daily wage employee. Following **Indian Bank and Others Vs. Promila and Another** (supra), it was observed that the scheme in force, on the date of occurrence of death would be decisive to the claim. Later, in State of **Madhya Pradesh and Others Vs. Ashish Awasthi and connected matters (2022) 2 SCC 157**, that view was reiterated by a two judge bench decision of the Supreme Court.

20. Still later in **Secretary to Government Department of Education (Primary) and Others Vs. Bhemesh alias Bheemappa 2021 SCC OnLine 1264**, a two judge bench of the Supreme Court chose to consider the entire gamut of law laid down by the Supreme Court and thereafter interpreted its earlier three judge bench decision in **N.C. Santosh Vs. State of Karnataka** (supra) and the other existing law to only mean that compassionate appointment would remain an exception to the rule of equality in employment and that wherever, either under the unamended scheme or an amended law that equality was sought to be restored by taking away the right to grant of compassionate appointment, the Courts would enforce the law in favour of equality and against the exception

made to it, whether prior or after the death of the employee. Paragraph-17 of the report reads as below:

“17. Keeping the above in mind, if we critically analyse the way in which this Court has proceeded to interpret the applicability of a new or modified Scheme that comes into force after the death of the employee, we may notice an interesting feature. In cases where the benefit under the existing Scheme was taken away or substituted with a lesser benefit, this Court directed the application of the new Scheme. But in cases where the benefits under an existing Scheme were enlarged by a modified Scheme after the death of the employee, this Court applied only the Scheme that was in force on the date of death of the employee. This is fundamentally due to the fact that compassionate appointment was always considered to be an exception to the normal method of recruitment and perhaps looked down upon with lesser compassion for the individual and greater concern for the rule of law.”

21. Once, the Supreme Court itself clarifies the law laid down by it, whether by speaking through a bench of two judges of that Court or three judges, it leaves very little or no space to reason to the High Court to itself explore the correct law. Any reasoning that the High Court may express as to the correct/true law laid down by the Supreme Court, it would remain academic as in the scheme of the Constitution it would not cross swords with the further opinion of the Supreme Court, as to the law to be applied, pending the reference made to a larger bench of the Supreme Court in ***Ajay Hasia Vs. Khauid Mujib Sehravardi (1981) 1 SCC 722 and R.K. Garg Vs. Union of India and others (1981) 4 SCC 675***. That is the effect caused by a two-judge bench of the Supreme Court in ***Bhemesh alias Bheemappa (supra)***.

22. Recently a coordinate bench of this Court was faced with a similar dilemma in ***State of U.P. and 3 Others Vs. Himanshu Yadav (Special Appeal No. 126 of 2023, decided on 07.7.2023)***, followed the dictum of the Supreme Court in ***Secretary to Government Department of Education (Primary) and Others Vs. Bhemesh alias Bheemappa (supra)***. Paragraph-43 of the said judgment reads as below:

*“43. Considering the principles laid down in ***N.C. Santhosh (supra)*** and the discussion made in ***Bhemesh Alias Bheemappa (supra)*** as noted above, it is more than evident that existing benefits in a scheme*

for compassionate appointment, if diluted or taken away by the amended scheme, cannot be applied on any pending application after modification of the scheme. However, in case the benefits under the modified scheme are larger than the existing scheme prevailing on the date of death of the employee or on the date of moving of the application, such benefits cannot be granted to the dependent of a deceased employee, inasmuch as, the scheme of compassionate appointment is applied in perspective manner and no retrospective effect can be given for the purposes of consideration of even pending claim of a dependent of a deceased.”

23. We are also aware that the reference made to Larger Bench of the Supreme Court in ***State Bank of India Vs. Sheo Shankar Tewari*** is still pending before that Court. However, in view of the discussion made above as to the law laid down by the Supreme Court, since the occurrence of that reference vide order dated 08.02.2012 we do not find any doubt exists as to the law to be applied in matters of compassionate appointments, in the meanwhile. For that reason as well, since on the date of occurrence of death of Sri Surendra Kumar Agrawal, on 06.9.2014, there did not exist any scheme for grant of compassionate appointment, the claim made by the petitioner would fail.

24. The order of the learned single judge is set aside. Consequentially the appeal is **allowed**.

25. Since there is no other dispute surviving, the **writ petition itself shall stand disposed of** with the observation that the appellant-respondent shall pay out the amount of *Ex-gratia* payment to the respondent-petitioner within 30 days from today.

Order Date :- 4.8.2023
CS/-

(Vinod Diwakar,J.)

(S.D. Singh,J.)