

(2006) 08 GAU CK 0007

In the Gauhati High Court

Case No : Cont. Case (Civil) No. 1171 of 1999, 728 of 2005 and 74 of 2006 and Writ Petition (Civil) No's. 4498 of 2000, 1585, 1605, 3483, 4926, 5011 and 7117 of 2002, 1731, 3438, 4546, 4664 and 9831 of 2003, 12, 206, 2666, 2908, 3016, 3114, 4233, 4481, 4490, 4689,

Achyut Ranjan Das and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 03-08-2006

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226

Citation : (2006) 4 GLT 674

Hon'ble Judges : Ranjan Gogoi, J

Bench : Single Bench

Advocate : N.S. Thakuria, S. Chouhan, P. Sarma, S.K. Sarma, M.H. Choudhury, S.K. Medhi, S. Huda, A.S. Choudhury, S.S.S. Rahman, S. Ali, D.K. Sarma, P.P. Das, B.K. Mahajan, B. Hussain, J. Mollah, S.B. Choudhury, P. Upadhyay, A. Verma, M.U. Mondal, M.D. Choudhury, K. Devi, A.K. Sarkar, S.C. Biswas, M. Sarania, S.D. Choudhury, N. Dhar, M.H. Rajbarbhuiya, Md. B. Rahman, HRA Choudhury, R.P. Sarmah, J. Ahmed, A.M. Barbhuiya, A. Sharif, J. Handique, R.P. Kakoti, A. Rashid, A.K. Hossain, J.I. Ahmed, K.R. Patgiri, B. Chetri, M.J. Quadir, B. Ahmed, S.K. Saha, B.K. Bhagawati, B.D. Konwar, P. Katakey, R.M. Choudhury, S.K. Muktar, M.K. Islam, Md. A. Matlib, D.D. Roy, P. Talukdar, S.K. Talukdar, C. Baruah, P.J. Saikia, U.K. Nair, P.J. Baruah, M.U. Mahmud, S.R. Bhattacharjee, S.A. Laskar, M. Khataniar, A.Y. Choudhury, B. Ullah, T.J. Mahanta, B. Bhuyan, J. Sarma, M. Ahmed, J.H. Saikia, D.A. Kaiyum, A.M. Mazumdar, Sk.N. Mahmmd, L. Rofique, K.K. Phukan, B. Sinha, K.C. Roy, M. Bhuyan, K. Gogoi, R. Das, D.R. Gogoi, G.K. Bhattacharjee, B.N. Sarma, J. Bora, Z. Hussain, B. Bhowmick, Md. A.H. Laskar, J. Singh, B.K. Takukdar, P.K. Goswami, S.M.T. Chistie, Y.S. Mannan, S.K. Sarma, DCK Hazarika, D. Saikia, A.M. Barbhuiya, A.C. Buragohain, M. Sarania, A. Choudhury, N.H. Mazarbhuyan, K.K. Mahanta, M. Deb, A.K. Maheswari, N. Ahmed, D.K. Saikia, M.A. Sheikh, K. Gogoi and J. Deka, for the Appellant; K.N. Choudhury, M.R. Pathak, R.K. Bora, H.K. Mahanta, V.M. Thomus and I. Choudhury, for the Respondent

Judgement

Ranjan Gogoi, J.—Certain common questions having confronted the Court, this

group of cases were listed analogously, heard together and are being disposed of by this common judgment and order. The core question that arises in the writ petitions under consideration relates to the principles governing appointment in public service on compassionate ground and more importantly the correct modalities that should govern exercise of the powers in the matter of compassionate appointment by the State Authorities. Such exercise of powers in making compassionate appointment by the State, either on its own or on the strength of Court orders passed from time to time, being clearly discernible not to be in conformity with the laid down principles evolved by a long process of judicial precedents, the Court is of the view that time has come for a judicial rethinking and, in the absence of necessary governmental action, for exercise of the powers under Article 226 of the Constitution, in public interest, to lay down the correct parameters that should govern the exercise of the power of compassionate appointment.

2. To understand the principles governing the exercise of power and to determine what should be the correct modalities for its exercise, the elaborate arguments advanced by the learned Counsels appearing on behalf of the claimants have been heard. Such arguments, however, have centered around, what the claimants contend to be a better right vested in them for appointment on compassionate ground. Shri K.N. Choudhury, learned Additional Advocate General, Assam, Shri I. Choudhury, learned Standing Counsel, P.W.D. and Shri M.K. Choudhury, learned Standing Counsel, Education have been heard to understand the precise practice and procedure prevailing as on today in making compassionate appointment. Learned Counsels have very painstakingly explained to the Courts the details of the ground realities of the situation. The Court had also appointed Shri H. Roy, learned senior Counsel as the Amicus Curiae in the case. Shri H. Roy, learned Amicus Curiae, in the course of his arguments, has tried to place before the Court the principles applicable in the case as evolved by the judicial pronouncements made from time to time commencing with the case of Smt. Sushma Gosain and Others Vs. Union of India (UOI) and Others, Shri Roy, learned Amicus Curiae has cited several other decisions, out of which the case of Umesh Kumar Nagpal Vs. State of Haryana and Others, constitutes the half way mark in the process of evolution of the law and the principles governing compassionate appointment. Placing certain other decisions, particularly, the one reported in General Manager (D and PB) and Others Vs. Kunti Tiwary and Another, Shri Roy has concluded by citing a judgment dated 16.7.2006 delivered by the Apex Court in the case of State of Jammu & Kashmir and Others Vs. Sajad Ahmed Mir, The submissions advanced by the learned Counsels for the contesting parties including the learned Amicus Curiae and the numerous case laws and judicial precedents cited at the Bar have been duly considered by the Court.

3. At the very outset, this Court would like to make it clear that in rendering the present judgment and order, this Court does not intend and in fact cannot intend to depart from the various order passed by Coordinate Benches of this Court. Judicial discipline would require conformity with the said orders which are

basically to the effect that eligible claims should be considered within a time bound programme in accordance with the policy in force. What is sought to be attempted in the present exercise is to discern the correct principles of the law that should guide the actions of the administrative authority so that the process of implementation of the policy of compassionate appointment can be in conformity with the correct principles of law, which principles, of late, appear to have been lost sight of.

4. The numerous precedents cited at the Bar will not require a detailed enumeration. Reference to the leading cases has already been made in the preceding paragraph of this order. It will, therefore, be convenient and appropriate, for the sake of brevity, to cull out the essential principles that appear to emanate from the aforesaid decisions. Compassionate appointment, being on humanitarian consideration, has been permitted to hold the field, though, at the first blush or from a particular perspective, such appointment being without selection and without consideration of inter se merit tends to offend Articles 14 and 16 of the Constitution. It is a specie of appointment that would be justified only if the ultimate rationale behind such appointment i.e., the need based on humanitarian considerations, is satisfied. The qualifications of a claimant and the post held by the deceased prior to his death would not be relevant considerations in making compassionate appointment. A claimant will not have a right of consideration for any particular post and he must accept what is available and offered to him, regardless of his qualification. If a claimant is not willing to accept what is being offered, he must be necessarily skipped over and the case of the next eligible must receive consideration. Penury and destitution are the touchstones on which compassionate appointment is required to be made. It is to save the family of the deceased from starvation and destitution that compassionate appointment is required to be made. In this regard, the view of the Apex Court laid down in the case of *G.M. v. Kunti Tiwari* (supra) that the criteria of "not very well to do" would not be the correct guideline or standard to be adopted, must be noticed. The object of compassionate appointment being to save the family from destitution and penury, naturally, compassionate appointments are required to be made within the earliest possible time. Delay in making such appointment would be fatal; with the passage of time, the State and the Courts must understand that the family of the deceased has been able to meet the crisis caused by the death of the sole bread-earner. Once appointment on compassionate ground is made to a particular post, there is no further right vested in the incumbent to claim a better job that may have become available subsequently. Appointment on compassionate ground can only be made against available vacancy. No post can be created; not even supernumerary posts. These would be the broad principles governing the matter of compassionate appointment as laid down by the Apex Court in the decisions commencing from *Sushma Gosain* (supra) to *State of J and K and Ors.* (supra).

5. Having noticed the principles governing compassionate appointment, the Court may now proceed to understand what has been contemplated by the policy

in force as circulated by the Office Memorandum dated 9.9.1983 and the Circulars/Office Memorandums issued by other departments to give effect to the principal Office Memorandum dated 9.9.1983. The Office Memorandum dated 9.9.1983 restricts appointment on compassionate ground only to posts in Class-III and IV Service. It defines the expression "near relative" to clarify the category of persons, who could be given compassionate appointment. It also earmarks a quota of 5% of vacancies for being filled on the basis of compassionate appointment. While the Office Memorandum dated 9.9.1983 requires a person to be eligible, in terms of qualifications, for the post before he can be appointed on compassionate ground, it does not envisage any selection amongst eligible persons or even the order of seniority of the claim or date of death as the criteria for appointment. Rather in paragraph 7 of the Office Memorandum dated 9.9.1983 the need for providing immediate assistance to the family of the deceased has been laid down as the guiding factor. This is in consonance with the principles laid down by the Apex Court that penury or destitution should be the yardstick for compassionate appointment. The Office Memorandum dated 9.9.1983, having been issued over two decades back, passage of time and experience in implementation of the scheme reveals significantly "grey" areas that are not covered by the Office Memorandum in question. For instance, the scheme framed by the Office Memorandum dated 9.9.1983, does not envisage any particular period within which compassionate appointments are required to be made. How the available vacancies in various Departments of the Government, which constitute the basic resource, are to be harnessed to achieve the desired result; how the activities of different departments in this regard are to be coordinated and streamlined, are matters that the Office Memorandum dated 9.9.1983 had not laid down perhaps with the expectation that with the working of the scheme new principles may emanate which will be required to be filled up by subsequent Office Memorandums by way of addendum. No such action of the state has, however, been forthcoming except that the Department of Education had circulated an Office memorandum dated 20.10.2003 to effectively implement the scheme circulated by the principal Office Memorandum dated 9.9.1983. Not much of significance is discernible from the aforesaid Office Memorandum dated 20.10.1983 except that the said Office memorandum contemplates a District Level Committee to scrutinize existing claims, which Committee is required to be met once every year to consider eligible cases that may have accumulated during the preceding period of 12 months. What the Apex Court has time and again emphasized is the urgency in making prompt appointments; immediate appointment is the need of the hour and delay would have the fatal effect of distentitling a claimant to compassionate appointment. Can it be said that an yearly meetings of the District Level Committees to scrutinize eligible cases of compassionate appointment conforms to the aforesaid laid down law?

6. Not only the laid down parameters as available in the two Office Memorandums fail to meet the essential requirements spelt out by the

pronouncements of the Apex Court, the ground realities as prevailing in the departments reveal a even more distressing picture. Compassionate appointments in the State, as on today, are being primarily made in the very office in which the deceased bread-earner of the family was working. The date of death and in some cases the dates of application have been taken to be the guiding factor to consider eligible cases. The number of vacancies being limited and the number of candidates being far in excess, there is a long waiting list. In a situation where eligible cases are being considered with reference to the date of death or date of applications, naturally, by the time, a case can be taken up for consideration, a sufficiently long period of time elapses. Appointments, therefore, are being made long after the death of a bread-earner. In some departments, even selections are being resorted to amongst eligible candidates seeking compassionate appointment. There is no fixed time within which cases are to be considered. Everything is being done on piecemeal and adhoc basis. Consideration for appointment on compassionate ground is being made at the convenience of the administrative authority. Meetings are being convened, wherein considerations are made, whenever the administrative authority considers such meetings to be necessary. In the process, accumulation of claims have taken place resulting in delay in disposal of such claims. This is precisely why the Court had felt it necessary that the principles and modalities must be restated so that the principles governing this branch of the law do not get clouded any further and appointments are made in accordance with law.

7. Having understood the principles governing compassionate appointment as deducible from the pronouncements of the Apex Court and in the light of what has been discussed above, this Court is of the view that it will only be just and appropriate to lay down the under noted principles on the basis of which, henceforth, claims relating to compassionate appointment will have to be considered:

I. All pending applications against existing and available vacancies as per the quota earmarked including the cases of the Petitioners in the present cases and all others, who may not be before the Court, shall be decided in accordance with the proposed directions to be laid down in the present order and also in accordance with the principles noted in the preceding paragraphs of this order. This will be done within a period of 4 (four) months from today. The present direction naturally has to be considered as a one-time measure in view of the subsequent direction as laid down in the succeeding paragraphs.

II. The District Head of each Department will intimate the vacancies as and when such vacancies occur, to the Court Appointed District Level Committees for its scrutiny. There will be no delay in such intimation.

III. The District Level Committee will be constituted by the Deputy Commissioner of the District and the Superintendent of Police. The Deputy Commissioner himself will sit in the Committee. The District Head(s) of such departments in which vacancies are available shall be co-opted as the Additional Members of the

Committee.

IV. The District Level Committee will meet once every 2 (two) months on the last Saturday of the second month.

V. The District Level Committee will decide as to who amongst the eligible candidates is entitled to compassionate appointment. To the extent possible such appointments will be recommended to be made within the District. In making the recommendations for appointments, the District Level Committee will take into account the financial condition of the family of the deceased and on a relative consideration of the cases will make its recommendation. There will be no selection and "seniority of the claim" will not be resorted to unless two or more eligible candidates are at par.

VI. To decide on the question of financial status of the family of a claimant regard will be had to the following factors as laid down in G.M. v. Kunti Tiwari (supra)

- (a) Gratuity amount received/receivable.
- (b) Family pension payable.
- (c) Provident Fund Amount received/receivable.
- (d) Any ex-gratia payment made or payable.
- (e) Proceeds of LIC Policy and other investments of the deceased.
- (f) Income of the family from other sources.
- (g) Employment of other family members.
- (h) Size of the family and liabilities, if any.

VII. The recommendations of the District Level Committee will be considered by a State Level Committee consisting of the Chief Secretary and the Senior Financial Commissioner of the State. The Commissioner and Secretary of the Department(s) in which vacancies are available will be co-opted as Additional Members of the State Level Committee.

VIII. The State Level Committee will meet once every 3 (three) months.

IX. All vacancies available against the quota of compassionate appointment must be filled up within a period of 6 (six) months from the date of occurrence of the vacancy in accordance with the present directions.

X. If the applications of eligible candidates remain pending and cannot be considered due to want of vacancies for a period of 2 (two) years from the date of making such applications, all such applications will require no further consideration and must be understood to have spent their force.

8. Before parting with the record, this Court would like to observe that in the present group of cases the bulk of the claims pertains to non-consideration of

claims made/applications filed for compassionate appointment. All such cases will naturally be governed by the directions contained in the present order. Few of the cases under consideration pertain to complaints with regard to rejection of the claims made or appointment of persons, who, the Petitioners/claimants contend do not have a better for appointment. There are also some claimants whose appointment have been approved by the State Government but appointment orders have not been forthcoming.

Who has a better right for appointment and whether a particular claim has been rightly rejected can be gone into by the Court only if there is a reasoned order setting out the relevant facts, a practice that seems to have become a thing of the past. However, as appointment of one person in preference to another will not have the effect of abrogating the claim of the candidate passed over in view of the present Direction No. 1 which would now require the State to consider all pending claims afresh all the contentious questions raised need not be gone into. In so far as claims which have been approved by the State Government but appointment orders have not been forthcoming, the direction to reexamine all such claims and, thereafter, issue appointments orders in accordance with the laid down principles, will adequately take care of all such grievances.

9. Shri A.K. Goswami, learned Standing Counsel, Karbi Anglong and North Cachar Hills Authonomous District Councils has pointed out that in the matter of appointment in Grade III and IV posts within the jurisdiction of the Autonomous councils, it is the Autonomous Councils who would be competent to make the appointment. Undoubtedly, if the above mentioned Autonomous Councils are vested with the power to make appointments, all appointment orders, even on compassionate ground, will necessarily have to be issued by the said authorities after scrutiny of the claims and the recommendations are made in accordance with the present directions.

All the Writ Petitions shall stand closed and answered in the light of the directions above.