

(2011) 08 BOM CK 0117

In the Bombay High Court

Case No : Writ Petition No. 1284 of 2011

Aparna Narendra Zambre - nee - Aparna Mohan Kulkarni and
Vaishali Mohan Kulkarni

APPELLANT

Vs

Assistant Superintendent Engineer, Krishna -Koyna Upsa
Sinchan Project Board, Sangli, Collector, Office of the
Collectorate, Sangli and The State of Maharashtra

RESPONDENT

Date of Decision : 01-08-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16, 21
Criminal Procedure Code, 1973 (CrPC) — Section 125
Maharashtra Civil Services (Pension) Rules, 1982 — Rule 72(3)

Citation : (2011) 5 ALLMR 346 : (2011) 5 BomCR 34 : (2011) 113 BOMLR
2799 : (2011) 5 MhLj 290

Hon'ble Judges : Mridula Bhatkar, J;A.M. Khanwilkar, J

Bench : Division Bench

Advocate : A.M. Kulkarni with Akshay Shinde, for the Appellant; A.B. Vagyani,
A.G.P. for Respondent Nos. 2 and 3, for the Respondent

Judgement

A.M. Khanwilkar, J.—This petition is filed by the heirs and family members of deceased Mohan Kulkarni, who was working as an Assistant Engineer in Mhaishal Pump House No. 2, who died in harness on 8th September, 2003, leaving behind Petitioner No. 2 as his widow and two daughters. Petitioner No. 1 is one of the daughters of deceased Mohan. At the relevant time, she was unmarried. The other daughter was already married in November, 2002, before the said Mohan Kulkarni died in harness. After the death of Mohan, his widow, Petitioner No. 2 made an application on 29th July, 2004 addressed to the Executive Engineer, Mhaishal Pump House No. 2 at Sangli, requesting to appoint her unmarried daughter, Petitioner No. 1, to the post of Junior Clerk or any other suitable post on compassionate ground. She further stated that she has No. objection if Petitioner No. 1, who was her unmarried daughter, were to be given such appointment. The said proposal was forwarded to the Superintending Engineer, Krishna-Koyna Upsa Sinchan Project Board at Sangli by the Executive Engineer

on 27th August, 2004. On 10th September, 2004, Respondent No. 1 forwarded the said application to the Collector, Sangli, for necessary action. The name of Petitioner No. 1 came to be included in the Wait List of candidates to be appointed on compassionate ground prepared by the Collector as well as the Department. By letter dated 10th December, 2007, Respondent No. 1 informed Petitioner No. 1 that her name was included in the Wait List prepared by the Office of the Collector and was at Serial No. 146 and at Serial No. 10 in the Wait List prepared by the Department some time in August, 2005. Petitioner No. 1 was also informed to remain present in his office on 17th December, 2007 with relevant documents. It is the case of the Petitioners that necessary documents were produced by the Petitioners. The Petitioners, once again, received a communication dated 2nd June, 2009, calling upon them to remain present in the office with the relevant documents. Accordingly, Petitioner No. 1 went to the office of the Respondents on 3rd June, 2009, and, again, on 5th June, 2009. On 8th June, 2009, the Collector called upon Respondent No. 1 to give para-wise remarks on the proposal of Petitioner No. 1 and to submit a detailed report. Respondent No. 1, once again, confirmed the position that name of Petitioner No. 1 is included in the Wait List prepared prior to 22nd August, 2005. Petitioner No. 1 was called upon to submit undertaking in the prescribed format and to furnish necessary information. Accordingly, Petitioner No. 1 submitted the undertaking / affidavit on 31st July, 2009 as per the requirements specified in the written communication received by her dated 13th July, 2009. The Petitioners were shocked and surprised to receive communication from the Executive Engineer dated 10th November, 2010. It is mentioned therein that Petitioner No. 2, being widow, was getting monthly pension, and, in the view of the Department, she was financially sound and was not dependent on Petitioner No. 1. Then, referring to Government Resolution dated 26th October, 1994, it was stated that Petitioner No. 1 was ineligible to be appointed on compassionate ground, being married daughter of the deceased employee. As per the said Government Resolution, besides the other family members mentioned therein, only an unmarried daughter is eligible to be considered for appointment on compassionate ground. This decision is challenged in the present petition.

2. The Petitioners not only pray for quashing and setting aside of the said decision, but also pray for direction against the Respondents to forthwith appoint Petitioner No. 1 to a suitable post with effect from 29th July, 2004, along with back wages and consequential benefits.

3. This petition is opposed by the Department. The learned A.G.P. has adopted the reasons stated in the impugned communication dated 10th November, 2010, and has contended that the said view is consistent with the policy of the Government notified in the Government Resolution dated 26th October, 1994. According to the learned A.G.P., so long as the said policy is in place and the validity thereof is not being challenged on permissible grounds, No. fault can be found with the conclusion reached by the Authority of rejecting the request of Petitioner No. 1 for being appointed on compassionate ground.

4. Having considered the rival submissions, we would first advert to the admitted facts of the present case. It is common ground that Mohan Kulkarni, father of Petitioner No. 1 and husband of Petitioner No. 2, was working as Assistant Engineer in Mhaishal Pump House No. 2. He died in harness on 8th September, 2003, leaving behind the Petitioners and one more daughter, who was already married in November, 2002. Admittedly, Petitioner No. 1 was unmarried at the time when her father, Mohan Kulkarni, expired on 8th September, 2003. She was unmarried even on 29th July, 2004 when application was made for considering her case for appointment in a suitable post on compassionate ground. She was unmarried even when her name was included in the Wait List on 22nd August, 2005. She, however, got married on 11th July, 2007. She was called upon to comply with formalities for being considered to be appointed on suitable post on compassionate ground in June, 2009. It is common ground that the fact that Petitioner No. 1 got married on 11th July, 2007 was disclosed to the authorities. Petitioner No. 1 filed undertaking / affidavit, inter alia, stating that her mother, Petitioner No. 2, was getting pension amount, which was not sufficient to maintain herself. Therefore, she was interested in taking up job so as to support her mother, who was entirely dependent on the income of her father. She has also stated that her husband was not opposed to assist Petitioner No. 2 financially in the event she were to get employment on compassionate ground. In substance, she claimed that it was her desire to get employment so as to support her mother, Petitioner No. 2, and to overcome her financial hardship.

5. According to the Petitioners, in spite of this stand of the Petitioners, the Respondents rejected the claim of Petitioner No. 1 for being appointed on suitable post on compassionate ground. Only two reasons are recorded in the impugned communication received by the Petitioners. Firstly, Petitioner No. 2 was getting Family Pension, which, according to the Respondents, was sufficient to maintain herself. According to the Respondents, it is not as if Petitioner No. 2 was dependent on Petitioner No. 1. The other reason mentioned in the impugned communication is that Petitioner No. 1, being married daughter, was not eligible to be considered for appointment on compassionate ground.

6. Reverting to the first reason mentioned in the impugned communication, we fail to understand as to how that ground can be said to be germane for rejecting the request of the Petitioners to appoint Petitioner No. 1 on compassionate ground. If that logic was to be upheld, it would necessarily follow that even other eligible family members (referred to in the Government Resolution) of the deceased employee, would become ineligible for appointment on compassionate ground. In that, even in the case of other family members such as son, unmarried daughter, widow, the same reason would be attracted, which would result in making the scheme of appointment on compassionate ground, such as Clause 3(a) of Government Resolution dated 26th October, 1994, being otiose. Suffice it to observe that the fact that Family Pension is being received by the widow or other eligible family members of the deceased employee can be No. basis to deny them the benefit of appointment on compassionate ground. That

concession is in addition to the relief of Family Pension, which is, essentially, intended to meet the immediate financial hardship suffered by the members of the family due to the sudden demise of the deceased employee. Indeed, after appointment on compassionate ground, whether the Family Pension should be paid is a matter to be governed by the extant Rules. The very object of appointment of dependant of deceased employee, who died in harness, is to relieve immediate hardship and distress caused to the family by sudden demise of the earning member of the family. Providing Family Pension may be lessening the financial hardship, but not completely relieving the family members of the deceased employee of financial hardship and distress caused due to his sudden demise, resulting in loss of his regular salary, on which the entire family was dependent.

7. That takes us to the second reason, which weighed with the authorities to reject the claim of Petitioner No. 1. For that, we may have to refer to Clause 3(a) in the Government Resolution dated 26th October, 1994, which reads thus:

English translation of the abovesaid extract of the said Government Resolution reads thus:

Government Resolution, General Administration Department, No. Comp. 1093/2335/ M. No. 90/ 93/ Eight Dated: 26 October, 1994.

Revised rules in respect of giving employment in government Service on Compassionate ground.

(1) These rules shall be applicable to the appointments, to be made on compassionate grounds, in all the offices of the State Government of Maharashtra.

(2) The relatives of the government employees mentioned at 3 (A) (including the employees borne on converted permanent and temporary establishments) falling in the belowmentioned categories shall be eligible, under these rules, for appointment in the government service on compassionate ground:

(a) Employees, died while in government service.

(b) Officers/ Employees, retired prematurely under certificate of the competent medical officer, on account of serious ailments like Tuberculosis, Cancer etc.

(c) Employees, declared incompetent for further service by the Competent medical officer on account of mental or physical disability, who are made to retire prematurely or who have been removed from service on the aforesaid ground.

(d) Employees, who became handicapped on account of accident while discharging their duties, in the government service, but, who did not accept an alternative post in spite of offering it under Rule 72 (3) of Maharashtra Civil Services (Pension) Rules 1982, and opted retirement.

(3) (a) Husband/ wife, son or unmarried daughter of the deceased / prematurely

retired government employee OR son/ unmarried daughter lawfully adopted, before death/ premature retirement, shall be deemed to be the relatives eligible to be appointed as per rules. Except them, No. other relative shall get the benefit under this scheme.

(b) The said appointment can be given to only one relative of government employees.

.....

8. Two broad questions would arise while answering this issue. Firstly, whether the eligibility of the candidate such as Petitioner No. 1 should be reckoned with reference to the date when she became eligible for consideration to be appointed on compassionate ground, or whether her eligibility should be reckoned with reference to the date when the suitable vacancy becomes available? Secondly, whether the expression "unmarried daughter" in Clause 3(a) of the Government Resolution can be said to be just and fair, as it excludes the married daughter for being appointed on compassionate ground?

9. So far as the first point is concerned, we agree with the Petitioners that there are authorities of the Apex Court, on Service Jurisprudence, in abundance, taking the view that the required qualification of the candidates should be examined with reference to the date of making application and not with reference to the date of selection. The Apex Court has consistently held that, in the absence of a fixed date indicated in the advertisement / notification inviting applications, with reference to which, the requisite qualification should be judged, the only certain date for the scrutiny of the applications will be the last date for making the applications. [See Mrs. Rekha Chaturvedi (Smt) Vs. University of Rajasthan and Others, , and Ashok Kumar Sonkar Vs. Union of India (UOI) and Others, .]

10. In the present case, the father of Petitioner No. 1 expired on 8th September, 2003, and the application for appointment on compassionate ground was made soon thereafter, on 29th July, 2004. On the date when Petitioner No. 1 made application, she was found to be eligible. Admittedly, she was not married until then, and possessed other qualifications. Applying the principle underlying the abovesaid decisions of the Apex Court, the required qualification of Petitioner No. 1 should and ought to be judged with reference to the date of her application made on 29th July, 2004. Indeed, Petitioner No. 1 got married on 11th July, 2007. The question is: Whether, on account of this circumstance, she became ineligible, being married daughter of the deceased employee?

11. This question has been exhaustively considered by the learned Single Judge of our High Court (Smt. Nishita Mhatre, J.), while deciding Writ Petition No. 6056 of 2010 in the case of The State of Maharashtra and Ors. v. Medha Prashant Parkhe, vide judgment dated October 26, 1020. The learned Single Judge has held that Clause 3(a) in the Government Resolution dated 26th October, 1994 is arbitrary and results in discrimination against married daughter. This decision has analysed several judgments which have questioned the nexus of exclusion of

married daughters from consideration for appointment on compassionate ground. The learned Single Judge has adverted to the exposition of the Calcutta High Court in the case of *Smt. Usha Singh v. State of West Bengal and Ors.* 2003 (2) LLN 554, questioning the nexus of leaving out married daughter from consideration. The Calcutta High Court, in paragraph 7 of the said decision, has observed that right to marry is a necessary concomitant of right to life guaranteed under Article 21 of the Constitution. Right to life includes right to lead a healthy life so as to enjoy all the faculties of the human body in their prime condition. In paragraph 10 of the same judgment, the Court proceeded to pose several questions which were unanswerable, including the nexus between the qualification of unmarried daughters and the object sought to be achieved. It went on to observe that, if anyone suggests that a son, married or unmarried, would look after the parent and his brothers and sisters, and that a married sister would not do as much, the answer would be in the negative.

12. In another decision of the Karnataka High Court relied upon by the learned Single Judge of our High Court, it is observed that the "dependency" should be the yardstick and not the "marriage" to wipe out the tears from the eyes of the suffering family on account of the loss of an earning member in the family [see *Manjula Vs. State of Karnataka and Another*,].

13. The learned Single Judge has also adverted to the decision in the case of *R. Jayamma Vs. Karnataka Electricity Board and Another*, of the Karnataka High Court, which has held that Article 14 of the Constitution assures to all citizens equality before the law and legal protection of the law. Article 15 expressly prohibits discrimination on the ground of sex. Article 16 guarantees equality of opportunity in matters of public employment. Keeping in mind those principles, the learned Single Judge of our High Court has observed that the provision such as Clause 3(a) of Government Resolution dated 26th October, 1994, which excludes married daughter from consideration, is manifestly discriminatory and arbitrary. As a consequence of this opinion, the prefix "unmarried" may have to be struck down being unconstitutional. That would make even a married daughter eligible for consideration.

14. We may usefully refer to the decision of the Division Bench of the Madras High Court in the case of *U. Arulmozhi v. the Director of School Education* in Writ Petition No. 18916 of 2004 decided on 20th February, 2006 reported in (2006) 2 LW 324 (Mad) (DB). While dealing with the identical provision in the Government Order, the Court held that exclusion of married daughter from consideration for appointment on compassionate ground is untenable. The Court reasoned that the provision in question [such as Clause 3(a) of G.R. dated 26th October, 1994] does not envisage at the time of actual employment that such unmarried daughter should continue to be unmarried nor does it provide that, after the unmarried daughter gets employment on compassionate ground, she cannot marry in future. Further, there is no column in the format of application to be submitted to indicate that the applicant at the time of her employment is

required to disclose whether she is married in the meantime. Nor there is any requirement that an unmarried daughter is required to remain as a spinster for ever. The Court then found that, if an unmarried daughter, after getting appointment, has liberty to marry, it is unfathomable as to why the married daughter be deprived of the concession.

15. We are conscious of the fact that the Petitioners have not challenged the validity of Clause 3(a) of Government Resolution dated 26th October, 1994. We may, however, rest this decision singularly on the first broad point referred to above. The question is: The eligibility for appointment should be reckoned from which date? Is it on the date of selection or with reference to the date of making application? As has been held earlier, the date of application ought to be reckoned for the purpose of eligibility of the candidate and not the date of selection. The fact that, in the present case, the application for appointment of Petitioner No. 1 on compassionate ground was made on 29th July, 2004 is indisputable. That was well within time. At the relevant time, Petitioner No. 1 was unmarried. It is also common ground that the name of Petitioner No. 1 was included in the Wait List on 22nd August, 2005. This event is also crucial to determine the eligibility of the incumbent. Even at that time she was unmarried. She got married only on 11th July, 2007. Thus, applying the legal position, the date of application and, at any rate, the date of inclusion of her name in the Wait List ought to be reckoned for considering the claim of Petitioner No. 1. As she was "unmarried" on that date, she fulfilled the requirements of Clause 3(a) of the Government Resolution. The fortuitous circumstance of her marriage on 11th July, 2007, while her name remained on the Wait List since 2005 on account of non-availability of vacancy against which she could be appointed, cannot be the basis to deny her the concession provided to the family members of deceased Government employee for being appointed on compassionate ground, which is intended to meet the immediate financial hardship suffered by the members of the family due to the sudden demise of the deceased employee.

16. On this finding, it is unnecessary for us to traverse the wider issue as to whether the provision contained in Clause 3(a) of Government Resolution dated 26th October, 1994 restricting the concession only to an unmarried daughter is ultra vires the Constitution.

17. We may now refer to the other decisions pressed into service by the Petitioners. Reliance has been placed on the exposition in the case of Savita Samvedi (Ms) and Another Vs. Union of India (UOI) and Others, . In this case, the circulars issued by the Railway Board were under challenge. The first Circular provided for allotment of railway accommodation to the retired railway employee and also to his unmarried daughter on out-of-turn basis. That was subsequently clarified by another circular so as to extend the scope of concession even to married daughters, subject to fulfilment of certain requirements. Those conditions were assailed, being contrary to Article 14 of the Constitution of India. The Court observed that such conditions in respect of married daughters were

wholly unfair, gender-biased, unreasonable and liable to be struck down under Article 14 of the Constitution. As aforesaid, it is not necessary for us to go into the larger question on the facts of the present case.

18. Reliance is then placed on the decision in the case of Dr (Mrs) Vijaya Manohar Arbat Vs. Kashirao Rajaram Sawai and Another, . In that case, the question which arose for consideration was: Whether the parents were entitled to ask for maintenance from their married daughter u/s 125 of the Code of Criminal Procedure. That question has been answered in the positive by the Apex Court. Relying on this decision, it is contended by the Petitioners that Petitioner No. 1 having submitted undertaking / affidavit to the effect that the dominant purpose of seeking employment on compassionate ground was to financially support her mother, Petitioner No. 2, who was the family member of the deceased employee, and that plea having gone unchallenged, it was not open to the authorities to reject her application for appointment on compassionate ground. We find force in this submission.

19. Considering the above, both the grounds referred to in the impugned communication dated 10th November, 2010 are untenable. In that case, the basis on which the application of Petitioner No. 1 for appointment on compassionate ground has been rejected by the Authority cannot be sustained. That does not mean that Petitioner No. 1 would be entitled for the relief of declaration that she is appointed on a suitable post with effect from 29th July, 2004, which was the date on which she made application. After that application, her name was included in the Wait List in August, 2005. That, by itself, did not give her right of appointment. That created only a right in her favour for being considered for appointment as and when suitable vacancy arose. That process was commenced in June, 2009, when her number in the Wait List matured for consideration, in anticipation of the vacancy of suitable post. Her proposal was processed at different levels until November, 2009. Thereafter, the impugned communication was sent. It is possible that, if the authorities were to accept her application for appointment on compassionate ground, she may have got employment some time in November or December, 2010. However, Petitioner No. 1 cannot be heard to claim relief of payment of back wages and other consequential benefits from the date of her application on 29th July, 2004. For, until a right to appointment was created in favour of Petitioner No. 1, she cannot claim relief of back wages as such. Accordingly, while setting aside the impugned communication, we would direct the authorities to re-consider the claim of Petitioner No. 1 for being appointed on compassionate ground against a suitable vacancy expeditiously; and appoint her if she is found eligible in all other respects, including No. other senior person to her in the concerned Wait Lists is yet waiting to be appointed against suitable vacancy. Accordingly, we partly allow the Writ Petition on the following terms:

(a) The impugned communication dated 10th November, 2010 issued by the Office of the Executive Engineer, Exhibit "A", is quashed and set aside.

(b) The Respondents are directed to forthwith re-consider the claim of Petitioner No. 1 for being appointed on compassionate ground against suitable vacancy; and if all other candidates senior to her in the concerned Wait Lists are already appointed, shall proceed to appoint Petitioner No. 1 against a suitable vacancy, if found to be eligible in all other respects.

(c) No. order as to costs.