

(2014) 09 GUJ CK 0090

In the Gujarat High Court

Case No : Special Civil Application No. 16816 of 2012

Ashokbhai Mohanbhai Vankar

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 12-09-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Motor Vehicles Act, 1988 — Section 42, 59

Citation : (2015) LabIC 206

Hon'ble Judges : Abhilasha Kumari, J

Bench : Single Bench

Advocate : Bhargavi G. Thakar and Pinakin M. Raval, Advocate for the Appellant; D.M. Devnani, Assistant Government Pleader, Advocate for the Respondent

Judgement

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Abhilasha Kumari, J.—Rule. Mr. D.M. Devnani, learned advocate, waives service of notice of Rule for the respondents. On the facts and in the circumstances of the case and with the consent of learned counsel for the respective parties, the petition is being heard and decided, finally.

2. By filing this petition under Article 226 of the Constitution of India, the petitioner has prayed that the communication dated 26.11.2010, issued by respondent No. 3, the Regional Transport Officer, rejecting the application of the petitioner for grant of appointment on compassionate grounds, be quashed and set aside. The petitioner has further challenged the communication dated 23.02.2012, issued by the office of respondent No. 2, Commissioner of Transport, whereby, the application of the petitioner for the grant of lumpsum financial aid, has been rejected.

3. Briefly stated, the facts of the case are that the father of the petitioner, who was working as a Peon under respondent No. 2, died while in service on

16.12.1993. At that point of time, the petitioner was a minor, being only three years" old. According to the petitioner, his mother approached the respondents for appointment on compassionate grounds. However, she was told that as she is illiterate and her son was then a minor, she should make an application when the petitioner attains majority. Even before attaining the age of majority, the petitioner made an application for compassionate appointment which was returned to him on the ground that it should be made in the prescribed format. Thereafter, the petitioner made another application dated 01.08.2008, after attaining majority. According to the petitioner, his date of birth is 17.07.1990, and he attained majority on 17.07.2008. By a communication dated 12.05.2009, respondent No. 3 informed the petitioner that his application has been filed as it ought to have been made within the prescribed time limit by any family member who was a major at the time of the death of the employee, as per Clauses 8(a) and (b) of the Government Resolutions dated 10.03.2000 and 07.09.2002. It was also stated in the said communication that there was no provision to wait till a minor family member attains majority. The petitioner was asked to furnish certain details by respondent No. 3 as per the communication dated 02.07.2010, which he did. By the impugned communication dated 26.11.2010, issued by respondent No. 3, the request of the petitioner for compassionate appointment was rejected on the ground that as per the policy of 1997, if the widow is illiterate, the son or daughter has to make an application within two years of attaining majority. The sister of the petitioner, who had attained majority prior to the petitioner, had not made an application.

4. The petitioner made another application, requesting that he may be given lumpsum financial assistance in lieu of compassionate appointment, on 03.11.2011. This application was also rejected by the impugned order dated 23.02.2012, on the ground that as per the Government Resolution dated 05.07.2011, an application for lumpsum financial aid cannot be considered if the request for compassionate appointment has been turned down before the coming into force of the said Government Resolution. Aggrieved by the above actions of the respondents in rejecting his applications, the petitioner has approached this Court.

5. Ms. Bhargavi G. Thakar, learned advocate for Mr. Pinakin M. Raval, learned advocate for the petitioner has submitted that, as the petitioner was only three years" old when his father died, he applied for the grant of appointment on compassionate grounds after attaining majority. Thereafter, he made several representations to the concerned authorities. It is submitted that the application of the petitioner ought to have been considered as per the policy prevalent at that time. The mother of the petitioner had approached the respondents for compassionate appointment but, being illiterate, was told to wait till the petitioner attains majority. It is further submitted that though the elder sister of the petitioner attained majority before him, no application was made by her within the prescribed period of time. However, she has made an affidavit stating she has no objection if the petitioner is given appointment, instead of herself.

That, as per social custom, a daughter would get married and leave the house, therefore, appointment ought to be given to the son, that is the petitioner. However, the explanations and clarifications of the petitioner were not accepted by the respondents.

6. It is contended that the petitioner is eligible and qualified for appointment as per the policy. In spite of this, the respondents have wrongly refused appointment on compassionate grounds to him, on unsustainable grounds. Further, the application of the petitioner for lumpsum financial assistance has also been rejected in an illegal and arbitrary manner, against the spirit of Government Resolution dated 05.07.2011.

7. It is, therefore, prayed that the impugned orders be quashed and set aside and the respondents be directed to reconsider the case of the petitioner.

8. The petition has been opposed by Mr. D.M. Devnani, learned Assistant Government Pleader, appearing for the respondents.

9. It is submitted by the learned Assistant Government Pleader that the very aim and object of the policy for appointment on compassionate grounds is to provide immediate succour to the bereaved family. However, the application for compassionate appointment has to be made within the prescribed period of time as per the policy, that is, within two years of the death of the employee, if the widow is illiterate. In the present case, though it is submitted that the widow approached the respondents after the death of the employee, there is no proof that she made an application for her daughter or son, as none has been produced on record. If the petitioner claims a benefit on the basis of the policy, then the provisions of the said policy would have to be followed.

10. It is further submitted that the petitioner has himself stated, vide communication dated 12.07.2010, addressed to respondent No. 3, that though his elder sister had attained the age of majority prior to him, she did not make an application for appointment as, being a daughter, she would be married and go to her matrimonial home and the family of the petitioner would not derive any financial benefit. It is stated in the said letter that as the petitioner would be staying with his widowed mother, appointment on compassionate grounds ought to be granted to him. It is submitted by the learned Assistant Government Pleader that the petitioner has admitted in the said letter that his mother, who is illiterate, had never made any application.

11. Learned Assistant Government Pleader has further submitted that at the relevant point of time, the petitioner did not challenge the communication dated 26.11.2010. Instead, he opted to make another application for the grant of lumpsum financial assistance, as per the Government Resolution dated 05.07.2011. It is stipulated in the said Government Resolution that once an application for appointment on compassionate grounds has been rejected, it cannot be considered under this Government Resolution.

12. The sum and substance of the submissions advanced by the learned Assistant Government Pleader are that both the impugned orders, dated 26.11.2010, under the old policy and dated 23.02.2012, under the new policy, have been passed in accordance with the requirements and provisions of the respective policies, therefore, the petition may be rejected.

13. In support of his submissions, learned Assistant Government Pleader has placed reliance upon the following judgments:

(1) Life Insurance Corporation of India Vs. Mrs. Asha Ramachandra Ambekar and another, .

(2) C. Jacob Vs. Director of Geology and Mining Indus. Est. and Another, .

(3) State Bank of India and Another Vs. Raj Kumar, .

14. This Court has heard the learned counsel for the respective parties and perused the documents produced on record.

15. The main thrust of the submissions advanced by the learned advocate for the petitioner is that the case of the petitioner for grant of appointment on compassionate grounds ought to have been dealt with under the policy prevailing when the employee died. It may be noted that the employee passed away on 16.12.1993, when the petitioner was a minor. There is no record that at the relevant point of time, the mother of the petitioner had made any application for compassionate appointment either on her own behalf, or on behalf of the petitioner. For the first time, the petitioner made an application on 01.08.2008, after attaining the age of majority on 17.07.2008. This application has been rejected by the impugned order dated 26.11.2010, on the ground that the eldest child of the deceased employee (a daughter) ought to have applied within two years of attaining majority. If no such application is made, then compassionate appointment cannot be given to the other children of the deceased employee.

16. It is an admitted position, emerging from the perusal of the communication dated 12.07.2010, of the petitioner, himself, that he is not the eldest child of the deceased. After the death of his father, no application was made by his mother. This is stated in the said communication, though averments in the petition suggest that the mother of the petitioner approached the respondents and was told to apply when the petitioner attains majority. Such averments are not supported by any material on record. On the contrary, in the letter dated 12.07.2010, addressed by the petitioner to respondent No. 3, it is clearly stated that the petitioner has an elder sister who had attained the age of majority before him. However, no application was made by her thereafter. The reason for this is also reflected in the said letter and is indicative of the social mindset which discriminates subtly but insidiously, against a daughter, even in the parental home. The petitioner states that his elder sister would get married and go to her matrimonial home and it is only the son who would stay with the parents and look after them, therefore he should be given compassionate appointment. This

letter clearly reveals that the petitioner is asking for appointment dehors the policy prevailing at the relevant point of time that envisaged that the eldest child, whether son or daughter ought to apply within two years from attaining majority. Admittedly, this was not done as the petitioner's elder sister did not make any application. As stated in the impugned communication dated 26.11.2010, as per the prevailing policy, there was no provision that applications of other members of the family would be entertained if the child who attains majority first, does not apply within the stipulated period of time. The impugned decision dated 26.11.2010 is as per the policy in vogue at the relevant period of time when the father of the petitioner died.

17. It may be noted that the petitioner did not challenge the communication dated 26.11.2010, at that stage. Instead, he made another application dated 03.11.2011, for the grant of financial aid, as per the Government Resolution dated 05.07.2011. This Government Resolution contains the new policy of the State Government and has been passed in supersession of the old policy. In the said Government Resolution, there is no provision for granting appointment on compassionate grounds. However, it contemplates the grant of financial aid to the family of the deceased employer, in the manner stipulated therein. There is a clause in the Government Resolution dated 05.07.2011, which states that the application of a dependent of deceased employee would not be entertained if such dependent had made an application prior thereto, which has been rejected. It is for this reason that the second application of the petitioner also came to be rejected, by the impugned order dated 23.02.2012. This order has also been passed on the basis of the prevalent policy.

18. The Court may now examine the legality and validity of both the impugned orders passed on the basis of the erstwhile and the prevalent policy, respectively.

19. As already indicated hereinabove, as per the erstwhile policy dated 24.02.1997, if the widow of the deceased employee is illiterate and the children are minor at the time of the death of the employee, in such circumstances, the first child to attain the age of majority is to apply for compassionate appointment within a period of two years from attaining majority. It is an admitted fact that the mother of the petitioner did not make any application as she was illiterate. It is also undisputed that the elder sister of the petitioner, who attained the age of majority before the petitioner, did not make any application. The requirements of the policy prevailing at the relevant period were, therefore, not fulfilled by the family of the petitioner. The petitioner has tried to explain why no application was made by his sister in his letter dated 12.07.2010. The explanation of the petitioner is that his sister would be married and would leave the house, and it is only a son (the petitioner) who could look after his mother. Apart from being fallacious, this explanation cannot have the effect of changing, overriding or modifying the policy prevailing at that time. If the family of the petitioner did not make an application as per the policy, solely due to the fact that the eldest child was a daughter, no fault can be found with the respondents. The petitioner is not

entitled for appointment on compassionate ground de hors the policy, only on account of the fact that he is the son of the deceased.

20. It is a settled position of law that appointment on compassionate grounds cannot be claimed as a matter of right. The very purpose of such appointment is to provide succour to the bereaved family within the bounds of the prevailing policy. There can be no deviation from such policy. If the dependent who has applied does not fulfil the requirements of the policy, he/she cannot claim such appointment. In the present case, it is clear that the petitioner did not fulfil the requirement of the policy prevailing at the relevant point of time. The policy required that if the widow was illiterate, the eldest child may apply within two years from attaining majority. The petitioner is not the eldest child and his elder sister did not apply at all. The case of the petitioner has been rejected, as he did not fulfil the requirements of the policy. This aspect is clearly borne out from the material on record. Having perused the same, this Court is satisfied that no illegality has been committed by respondent No. 3 in passing the impugned order dated 26.11.2010.

21. The view of this Court is fortified by the dictum of the Supreme Court in *State Bank of India And Another v. Raj Kumar* (supra) (cited by the learned Assistant Government Pleader for the respondents). The relevant extract of the said judgment is reproduced hereinbelow:

"8 It is now well settled that appointment on compassionate grounds is not a source of recruitment. On the other hand it is an exception to the general rule that recruitment to public services should be on the basis of merit, by an open invitation providing equal opportunity to all eligible persons to participate in the selection process. The dependants of employees, who die in harness, do not have any special claim or right to employment, except by way of the concession that may be extended by the employer under the Rules or by a separate scheme, to enable the family of the deceased to get over the sudden financial crisis. The claim for compassionate appointment is therefore traceable only to the scheme framed by the employer for such employment and there is no right whatsoever outside such scheme. An appointment under the scheme can be made only if the scheme is in force and not after it is abolished/withdrawn. It follows therefore that when a scheme is abolished, any pending application seeking appointment under the scheme will also cease to exist, unless saved. The mere fact that an application was made when the scheme was in force, will not by itself create a right in favour of the applicant.

9. Normally the three basic requirements to claim appointment under any scheme for compassionate appointment are: (i) an application by a dependent family member of the deceased employee; (ii) fulfillment of the eligibility criteria prescribed under the scheme, for compassionate appointment; and (iii) availability of posts, for making such appointment. If a scheme provides for automatic appointment to a specified family member, on the death of any employee, without any of the aforesaid requirements, it can be said that the

scheme creates a right in favour of the family member for appointment on the date of death of the employee. In such an event the scheme in force at the time of death would apply."

(emphasis supplied)

22. After the rejection of first application of the petitioner by the order dated 26.11.2010, the petitioner did not challenge the said order at that point of time. He has only done so in the present petition. In the meanwhile, there has been a change in policy on the coming into force of the Government Resolution dated 05.07.2011, vide which the scheme for granting appointment on compassionate grounds has been done away with. Instead, lumpsum financial aid is contemplated. However, Clause (b) of the said Government Resolution lays down that an application for financial aid by a dependent of a deceased employee will not be entertained if an application made by him under the erstwhile policy/scheme, has been rejected. This is the reason for the rejection of the second application made by the petitioner, vide the impugned order dated 23.02.2012. This order is in accordance with the provisions of the Government Resolution dated 05.07.2011, and, therefore, cannot be said to be either arbitrary or illegal.

23. The learned Assistant Government Pleader has relied upon a judgment of the Supreme Court in *C. Jacob v. Director of Geology and Mining And Another* (supra), on the point of consideration of a stale claim. In the said decision, the Supreme Court has cautioned the Courts to be circumspect in issuing directions for consideration of stale claims. This judgment would not be directly applicable to the facts of the present case, as in the case in hand, the case of the petitioner has been rejected by two orders passed on the basis of the policy in regard to compassionate appointment/lumpsum financial assistance, under the old and new policies, respectively.

24. It may be noted that the very object of granting appointment on compassionate grounds is to rehabilitate the family in distress after the death of the employee who died in harness. In the present case, the father of the petitioner died on 16.12.1993, whereas the petitioner has made the application on 01.08.2008, and that too, dehors the prevailing policy, as already observed hereinabove. The family has been able to pull on for all these years and the need for immediate succour has now been obviated. The petitioner has no vested right to claim either compassionate appointment or lumpsum financial assistance after such a long delay, especially when his case does not fulfil the requirements of either the erstwhile or the prevalent policy.

25. In *Life Insurance Corporation of India v. Asha Ramchandra Ambekar (Mrs.) And Another* (supra), relied upon by the learned Assistant Government Pleader, the Supreme Court was dealing with a case where the Life Insurance Corporation, the appellant before the Apex Court, had challenged the order of the High Court directing it to give appointment to the widow of the deceased employee, dehors the regulations and instructions governing the appointment on

compassionate grounds. In an extremely erudite manner, the Supreme Court held that:

"10. Of late, this Court is coming across many cases in which appointment on compassionate ground is directed by judicial authorities. Hence, we would like to lay down the law in this regard. The High Courts and the Administrative Tribunals cannot confer benediction impelled by sympathetic consideration. No doubt Shakespeare said in "Merchant of Venice":

"The quality of mercy is not strained ; It dropped , as the gentle rain from heaven Upon the place beneath it is twice blessed ; It blessed him that gives, and him that takes;"

These words will not apply to all situations. Yielding to instinct will tend to ignore the cold logic of law. It should be remembered that "law is the embodiment of all Wisdom". Justice according to law is a principle as old as the hills. The courts are to administer law as they find it, however, inconvenient it may be.

11. At this juncture we may usefully refer to *Martin Burn Ltd. Vs. The Corporation of Calcutta*, . At page 535 of the Report the following observations are found:

"A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. A statute must of course be given effect to whether a Court likes the result or not."

The courts should endeavor to find out whether a particular case in which sympathetic considerations are to be weighed falls within the scope of law. Disregardful of law, however, hard the case may be, it should never be done. In the very case itself, there are regulations and instructions which we have extracted above. The court below has not even examined whether a case falls within the scope of these statutory provisions. Clause 2 of sub-clause (iii) of Instructions makes it clear that relaxation could be given only when none of the members of the family is gainfully employed. Clause 4 of the circular dated January 20, 1987 interdicts such an appointment on compassionate grounds. The appellant Corporation being a statutory Corporation is bound by the Life Insurance Corporation Act as well as the Statutory Regulations and Instructions. They cannot be put aside and compassionate appointment be ordered.

12. Further it is well-settled in law that no mandamus will be issued directing to do a thing forbidden by law. In *Brij Mohan Parihar Vs. M.P. State Road Transport Corporation and Others*, it is stated as under:

"The provisions of the Motor Vehicles Act and in particular Sections 42 and 59 clearly debar all holders of permits including the State Road Transport Corporation from indulging in unauthorised trafficking in permits. Therefore the agreement entered into by the petitioner, unemployed graduate, with the State Road Transport Corporation to ply his bus as nominee of the Corporation on the

route in respect of which the permit was issued in favour of the Corporation for a period of five years, was clearly contrary to the Act and cannot, therefore, be enforced. In the circumstances, the petitioner would not be entitled to the issue of a writ in the nature of mandamus to the Corporation to allow him to operate his motor vehicle as a stage carriage under the permit obtained by the Corporation as its nominee."

13. It is true that there may be pitiable situations but on that score, the statutory provisions cannot be put aside."

(emphasis supplied)

26. The above observations of the Supreme Court would apply squarely to the present case, where the petitioner does not fulfil the requirements of either the erstwhile or the prevailing policy.

27. Considered from all angles, the petition must fail. For the aforesaid reasons, this Court cannot but hold that the impugned orders dated 26.11.2010 and 23.02.2012, passed by the respondent-authorities, do not suffer from any arbitrariness or illegality, so as to warrant the interference of this Court.

28. The petition is, therefore, rejected. Rule is discharged. There shall be no orders as to costs.