

(2014) 09 GUJ CK 0032

In the Gujarat High Court

Case No : Letters Patent Appeal No. 2309 of 2009 in Special Civil Application No. 12546 of 2008 with Civil Application No. 12446 of 2009 in Letters Patent Appeal No. 2309 of 2009

Executive Engineer

APPELLANT

Vs

Gitaben

RESPONDENT

Date of Decision : 29-09-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 142, 16, 226

Citation : (2014) 143 FLR 1102 : (2014) 4 LLJ 352 : (2014) 4 LLN 135

Hon'ble Judges : Jayant M. Patel, J;C.L. Soni, J

Bench : Division Bench

Advocate : Rutviz Oza, Asstt. Govt. Pleader, Advocate for the Appellant; Sunil C. Patel, Advocate for the Respondent

Judgement

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C.L. Soni, J.—This appeal under Clause 15 of the Letters Patent is at the instance of the original respondents against whom the respondent herein-original petitioner preferred the petition under Article 226 of the Constitution of India seeking to quash and set aside the communication dated 12.7.2007 at Annexure-F whereby the application of the petitioner for compassionate appointment was rejected by respondent No. 1 on the ground that the petitioner was not holding requisite qualification of SSC for Class-IV post as per the notification dated 16.3.2005 notifying the Recruitment Rules for such Class-IV post.

2. Learned Single Judge, however, quashed and set aside the said order of the respondent No. 1 and held that the respondent herein shall be entitled for appointment on Class-IV post as per the policy prevailing at the time of making application for compassionate appointment and directed the appellants to pass appropriate order appointing the respondent on compassionate ground within the time stipulated in the order.

3. We have heard learned advocates for the parties.

4. Learned Assistant Government Pleader Mr. Rutvij Oza for the appellants submitted that the learned Judge committed an error in directing to appoint the respondent on compassionate ground though the respondent was not possessing required qualification for Class-IV post when decision on the application of the respondent was taken. Mr. Oza submitted that on account of later decision of the Hon"ble Supreme Court, the respondent cannot be made entitled for compassionate appointment. Mr. Oza submitted that as per the law settled by the Hon"ble Supreme Court in the case of State of Gujarat and Others Vs. Arvindkumar T. Tiwari and Another, and in subsequent decision in the case of MGB Gramin Bank Vs. Chakrawarti Singh, , the qualification and the policy as on the date of consideration of the application for compassionate appointment is to be considered. Mr. Oza submitted that in any case, now, since there is a change in the policy under the Government Resolution dated 5.7.2011 for not granting compassionate appointment to anybody, the impugned order passed by the learned Single Judge is required to be quashed and set aside. He thus urged to allow the appeal.

5. Learned advocate Mr. Sunil Patel appearing for the respondent submitted that the impugned order of the learned Single Judge is not required to be interfered with as the learned Judge has rightly held that the application of the respondent for compassionate appointment was required to be considered as per the policy prevailing at the time of her application. Mr. Patel submitted that in fact, after the judgment of the learned Single Judge, Division Bench of this Court as also the Hon"ble Supreme Court have taken the same view that application for compassionate appointment is to be decided as per the policy prevailing at the time when such application is made. Delay in deciding such application should not dis-entitle the applicant of compassionate appointment under the policy prevailing at the relevant time. Mr. Patel also submitted that even as per the prevailing policy for payment of ex-gratia compensation under the Government Resolution dated 5.7.2011, the respondent shall be entitled for compensation as held by the learned Single Judge in the case of Vishal Keshubhai Chudasama Vs. State of Gujarat and Others, . Mr. Patel thus urged to dismiss the appeal.

6. Having heard learned advocates for the parties, it appears that before the application dated 18.6.2004 made by the respondent for compassionate appointment was dealt with in the year 2006, the Government had made the rules providing qualification of SSC pass for Class-IV post under the Government Resolution dated 16.3.2005. When the application of the respondent was decided, it was found that the respondent was not meeting the qualification required for Class-IV post and her application was thus rejected.

7. The question is whether the respondent could have been offered compassionate appointment on Class-IV post contrary to the Recruitment Rules which had only come into force when her application was decided.

8. We have in group of appeals, being Letters Patent Appeal No. 2385 of 2009 and other allied matters, considered such issue and set aside the similar impugned order of learned Single Judge on the basis of the subsequent declaration of law by the Hon''ble Supreme Court on the issue of grant of compassionate appointment and have held and observed in para 11 to 20 of our judgment dated 9.9.2014 as under:-

11. Having heard learned advocates for the parties, it appears that when the applications made by the respondents for compassionate appointment were decided by the appellants, the requisite qualification for Class-IV post was minimum 10th Std. (SSC) which undisputedly the respondents were not possessing when their applications were decided. However, the learned Judge took the view that the applications for compassionate appointment made by the respondents were required to be decided as per the policy prevailing as on the date of the applications.

12. In the case of State Bank of India and Another Vs. Raj Kumar, , the Hon''ble Supreme Court has held and observed in para 11 and 12 as under:-

11. Normal schemes contemplate compassionate appointment on an application by a dependent family member, subject to the applicant fulfilling the prescribed eligibility requirements, and subject to availability of a vacancy for making the appointment. Under many schemes, the applicant has only a right to be considered for appointment against a specified quota, even if he fulfils all the eligibility criteria; and the selection is made of the most deserving among the several competing applicants, to the limited quota of posts available. In all these schemes there is a need to verify the eligibility and antecedents of the applicant or the financial capacity of the family. There is also a need for the applicant to wait in a queue for a vacancy to arise, or for a selection committee to assess the comparative need of a large number of applicants so as to fill a limited number of earmarked vacancies.

12. Obviously, therefore, there can be no immediate or automatic appointment merely on an application. Several circumstances having a bearing on eligibility, and financial condition, upto the date of consideration may have to be taken into account. As none of the applicants under the scheme has a vested right, the scheme that is in force when the application is actually considered, and not the scheme that was in force earlier when the application was made, will be applicable.

13. Learned counsel for the petitioners however relied on the decision of the Hon''ble Supreme Court dated 19.10.2010 in Special Leave to Appeal (Civil) (CC) No. 15498 of 2010, in the case of State of Gujarat and Others Vs. Jagdish Savjibhai Padaya and Another, wherein the Hon''ble Supreme Court agreed with the view taken by the Division Bench of this Court in the group of Letters Patent Appeals that the applications for compassionate appointment were to be decided as per the policy prevailing at the time of application and directed the concerned

competent authority of the State Government to decide the applications for compassionate appointment within reasonable time.

14. The Division Bench of this Court in Letters Patent Appeal No. 22 of 2010 and allied matters after considering the judgment of the Hon''ble supreme Court in the case of State Bank of India (supra), held that not to take decision for long time on the applications for compassionate appointment and to rely on the subsequent Government Resolutions to deal with such applications would defeat the claims for compassionate appointment. The Division Bench, therefore, directed the concerned authorities to examine the case of each of the applicant in terms of the policy prevailing at the time of submitting applications for compassionate appointment.

15. However, there is further development in the law. In the case of State of Gujarat and Others Vs. Arvindkumar T. Tiwari and Another, , the Hon''ble Supreme Court examined the issue of eligibility criteria while considering the applications for appointment on compassionate ground. The Hon''ble Supreme Court held and observed in para 8 to 10 and 12 as under:-

8. It is a settled legal proposition that compassionate appointment cannot be claimed as a matter of right. It is not simply another method of recruitment. A claim to be appointed on such a ground, has to be considered in accordance with the rules, regulations or administrative instructions governing the subject, taking into consideration the financial condition of the family of the deceased. Such a category of employment itself, is an exception to the constitutional provisions contained in Articles 14 and 16, which provide that there can be no discrimination in public employment. The object of compassionate employment is to enable the family of the deceased to overcome the sudden financial crisis it finds itself facing, and not to confer any status upon it.

9. The eligibility for the post may at times be misunderstood to mean qualification. In fact, eligibility connotes the minimum criteria for selection, that may be laid down by the executive authority/legislature by way of any statute or rules, while the term qualification, may connote any additional norms laid down by the authorities. However, before a candidate is considered for a post or even for admission to the institution, he must fulfill the eligibility criteria.

10. The appointing authority is competent to fix a higher score for selection, than the one required to be attained for mere eligibility, but by way of its natural corollary, it cannot be taken to mean that eligibility/norms fixed by the statute or rules can be relaxed for this purpose to the extent that, the same may be lower than the ones fixed by the statute. In a particular case, where it is so required, relaxation of even educational qualification(s) may be permissible, provided that the rules empower the authority to relax such eligibility in general, or with regard to an individual case or class of cases of undue hardship. However, the said power should be exercised for justifiable reasons and it must not be exercised arbitrarily, only to favour an individual. The power to relax the recruitment rules

or any other rule made by the State Government/Authority is conferred upon the Government/Authority to meet any emergent situation where injustice might have been caused or, is likely to be caused to any person or class of persons or, where the working of the said rules might have become impossible.

12. Fixing eligibility for a particular post or even for admission to a course falls within the exclusive domain of the legislature/executive and cannot be the subject-matter of judicial review, unless found to be arbitrary, unreasonable or has been fixed without keeping in mind the nature of service, for which appointments are to be made, or has no rational nexus with the object(s) sought to be achieved by the statute. Such eligibility can be changed even for the purpose of promotion, unilaterally and the person seeking such promotion cannot raise the grievance that he should be governed only by the rules existing, when he joined service. In the matter of appointments, the authority concerned has unfettered powers so far as the procedural aspects are concerned, but it must meet the requirement of eligibility etc. The court should therefore, refrain from interfering, unless the appointments so made, or the rejection of a candidature is found to have been done at the cost of "fair play", "good conscious" and "equity".

(Emphasis Supplied)

However, since in the facts of the case, Hon"ble Supreme Court found that as on the date of the applications for compassionate appointment, the eligibility criteria was 10th Std. and the applicant was unable to pass 8th Std., he was certainly not eligible to apply for the post and it was not desirable nor even permissible to issue direction to relax the said eligibility criteria and to appoint him on merely humanitarian ground. In such facts of the case, the Hon"ble Supreme Court further observed that the question framed as to whether application for compassionate appointment was to be considered as per the existing rules or under the rules as existing on the date of death of the employee was not required to be considered.

16. Hon"ble Supreme Court has further considered the issue about the applicability of the Scheme for compassionate appointment in the recent decision in the case of MGB Gramin Bank (supra). In this judgment, Hon"ble Supreme Court has considered its earlier judgment in the case of State Bank of India (supra) and has held and observed in para 8 to 15 as under:-

8. The Courts and the Tribunals cannot confer benediction impelled by sympathetic considerations to make appointments on compassionate grounds when the regulation framed in respect thereof did not cover and contemplate such appointments.

9. In A. Umarani Vs. Registrar, Cooperative Societies and Others, , while dealing with the issue, this Court held that even the Supreme Court should not exercise the extraordinary jurisdiction under Article 142 issuing a direction to give compassionate appointment in contravention of the provisions of the Scheme/

Rules etc., as the provisions have to be complied with mandatorily and any appointment given or ordered to be given in violation of the scheme would be illegal.

10. The word "vested" is defined in Black's Law Dictionary (6th Edition) at page 1563, as "vested", Fixed; accrued; settled; absolute; complete. Having the character or given in the rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent. Rights are "vested" when right to enjoyment, present or prospective, has become property of some particular person or persons as present interest; mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not constitute vested rights

11. In Webster's Comprehensive Dictionary (International Edition) at page 1397, "vested" is defined as Law held by a tenure subject to no contingency; complete; established by law as a permanent right; vested interest. (Vide: Masammatt Bibi Sayeeda and Others etc. Vs. State of Bihar and Others, ; and J.S. Yadav Vs. State of U.P. and Another, .

Thus, vested right is a right independent of any contingency and it cannot be taken away without consent of the person concerned. Vested right can arise from contract, statute or by operation of law. Unless an accrued or vested right has been derived by a party, the policy decision/scheme could be changed. (Vide: Kuldeep Singh Vs. Govt. of NCT of Delhi, .

12. A scheme containing an in pari materia clause, as is involved in this case was considered by this Court in State Bank of India and Another Vs. Raj Kumar, . Clause 14 of the said Scheme is verbatim to clause 14 of the scheme involved herein, which reads as under:

"14. Date of effect of the scheme and disposal of pending applications:

The Scheme will come into force with effect from the date it is approved by the Board of Directors. Applications pending under the Compassionate Appointment Scheme as on the date on which this new Scheme is approved by the Board will be dealt with in accordance with Scheme for payment of ex-gratia lump sum amount provided they fulfill all the terms and conditions of this scheme."

13. The Court considered various aspects of service jurisprudence and came to the conclusion that as the appointment on compassionate ground may not be claimed as a matter of right nor an applicant becomes entitled automatically for appointment, rather it depends on various other circumstances i.e. eligibility and financial conditions of the family, etc., the application has to be considered in accordance with the scheme. In case the Scheme does not create any legal right, a candidate cannot claim that his case is to be considered as per the Scheme existing on the date the cause of action had arisen i.e. death of the incumbent on the post. In State Bank of India & Anr. (supra), this Court held that in such a situation, the case under the new Scheme has to be considered.

14. In view of the above position, the reasoning given by the learned Single Judge as well as by the Division Bench is not sustainable in the eyes of law. The appeal is allowed and the impugned judgments of the High Court are set aside.

15. The respondent may apply for consideration of his case under the new Scheme and the appellant shall consider his case strictly in accordance with clause 14 of the said new Scheme within a period of three months from the date of receiving of application.

With these observations, appeal stands disposed of.

17. The Government has now introduced the policy dated 5.7.2011 which provides for payment of ex-gratia amount of compensation in lieu of compassionate appointment. We had an occasion to go through the said policy, copy of which was produced in another appeal which was also heard on the same day when these appeals were heard by us.

18. Thus, considering the observations made in para 8 to 10 and 12 by the Hon''ble Supreme Court in the case of Arvindkumar T. Tiwari (supra) and in light of recent decision of Hon''ble Supreme Court in the case of MGB Gramin Bank (supra) and also on account of change in the policy for compassionate appointment, the view expressed by the Hon''ble Division Bench in the above group of appeals cannot be now followed.

19. In light of such development and as held by the Hon''ble Supreme Court in the case of Raj Kumar (supra) and MGB Gramin Bank (supra), the compassionate appointment cannot be claimed as a matter of right but it should be strictly in accordance with the rules, regulations and administrative instructions governing the subject.

20. In view of above, even while considering that delay in deciding the application would defeat the purpose of compassionate appointment, as observed by the Division Bench of this Court in the above-referred group of Letters Patent Appeals, the impugned orders cannot be now allowed to be operated. If it is permissible to the original petitioners, they may apply under the new scheme and the appellants may take decision thereon in accordance with law.

9. In the case of Vishal Keshubhai Chudasama (supra) relied on by Mr. Patel, the application was made by the petitioner of the said case in the year 2010 and the decision was taken by the concerned authority after the new policy dated 5.7.2011 came into force. In such facts, learned Single Judge relying on the judgment of the Hon''ble Supreme Court in the case of MGB Gramin Bank (supra) directed to consider the application of that petitioner under the new policy. Since the facts are not similar in the present case, the said judgment of the learned Single Judge will have no application to the facts of the case.

10. For the reasons stated above, the appeal is allowed. The impugned order passed by the learned Single Judge is quashed and set aside. The respondent-original petitioner may, however, apply under the new policy, if permissible, and

when the respondent applies, the appellants may take decision in accordance with law. The appeal is disposed of accordingly with no order as to costs.

11. In view of the order passed in the Letters Patent Appeal, Civil Application would not survive and same shall stand disposed of accordingly.