

(2018) 12 P&H CK 0141

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 29242 Of 2018

Jagdeep Mittal

APPELLANT

Vs

Punjab & Haryana High Court, Chandigarh

RESPONDENT

Date of Decision : 17-12-2018

Acts Referred:

High Court Establishment (Appointment and Conditions of Service) Rules, 1973 — Rule 33

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

Citation : (2018) 12 P&H CK 0141

Hon'ble Judges : Rajiv Narain Raina, J

Bench : Single Bench

Advocate : Rakesh Sobti

Final Decision : Dismissed

Judgement

1. Claims for compassionate appointment are a troublesome and recurring issue before this Court. Whether State policy at the time of death is applicable or at the time of consideration of application/s for ex-gratia appointment? Judicial precedents are a plenty on either side of the fence and much will depend on the structure of the policy as no offer can be made without. If they provide for automatic appointment merely on an application without reference to fulfillment of eligibility criteria prescribed under the scheme for compassionate appointments and availability of posts for making such appointment, and there must be an application by a dependent family member of the deceased employee. Difficulties arise when the schemes are modified or withdrawn to be replaced by a new scheme providing either for ex-gratia appointment or financial benefits, or both.

2. In State Bank of India & another Vs. Raj Kumar, (2010) 11 SCC 661, the Supreme Court addressed this issue directly. The case was that the respondent's father employed as a Messenger in the bank died on 01.10.2004. The respondent's mother made two applications in June, 2005 requesting for

appointment on compassionate grounds. When the applications were being processed and verified, the Compassionate Appointment Scheme was substituted by the "SBI Scheme for payment of ex gratia lump sum amount" coming into force w.e.f. 04.08.2005. The new scheme abolished the old scheme for compassionate appointments and instead provided for payment of an ex gratia lump sum amount as per its terms. The learned Single Judge of the Allahabad High Court by order dated 08.05.2008 directed the Bank to reconsider the case of the respondent for appointment on compassionate grounds holding that the old scheme applied and the new scheme was only prospective in operation. The order was affirmed by the Division Bench by judgment and order dated 01.09.2008 against which the Bank came in appeal to the Supreme Court. The Bank submitted that even though the respondent's father died on 01.10.2004, the application for compassionate appointment was made only in June, 2005, but before the application could be processed, the old scheme was abolished and replaced by a new scheme on 04.08.2005 and, therefore, the Bank was justified in calling upon the respondent to apply under the new ex gratia scheme.

3. On the other hand, the respondent urged in that case that on the date of death of his father and on the date of making the application, the old scheme was in force and, therefore, he was entitled to be considered for compassionate appointment under that scheme. The Supreme Court responded as follows:

"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.

10. On the other hand if a scheme provides that on the death of an employee, if a dependent family member is entitled to appointment merely on making of an application, whether any vacancy exists or not, and without the need to fulfill any eligibility criteria, then the scheme creates a right in favour of the applicant, on making the application and the scheme that was in force at the time when the application for compassionate appointment was filed, will apply. But such schemes are rare and in fact, virtually nil.

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. Further where the earlier scheme is abolished and the new scheme which replaces it specifically provides that all pending applications will be considered only in terms of the new scheme, then the new scheme alone will apply. As compassionate appointment is a concession and not a right, the employer may wind up the scheme or modify the scheme at any time depending upon its policies, financial capacity and availability of posts."

4. Reiterating the rule in Raj Kumar's case, the Supreme Court in MGB Gramin Bank Vs. Chakrawarti Singh, (2014) 13 SCC 583 professed the judgment by re-affirming that every appointment to public office must be made by strictly adhering to the mandatory requirements of Articles 14 & 16 of the Constitution. An exception for providing employment on compassionate grounds has been carved out in order to remove the financial constraints suddenly befallen on the bereaved family, which has lost its bread-earner. The Supreme Court held that

mere death of a government employee in harness does not entitle the family to claim compassionate employment. The competent authority has to examine the financial condition of the family of the deceased employee and it is only if it is satisfied that without providing employment, the family will not be able to meet the crisis, that a job can be offered to the eligible member of the family. The person claiming appointment must possess required eligibility for the post. The consistent view that has been taken by the Supreme Court is that compassionate employment cannot be claimed as a matter of right, as it is not a vested right. The Supreme Court observed that the Court should not stretch the provision by liberal interpretation beyond permissible limits on humanitarian grounds. Such appointment should, therefore, be provided immediately to redeem the family in distress. It is improper to keep such a case pending for years.

5. The facts giving rise to the appeal before the Supreme Court in MGB Gramin Bank case were that the father of the respondent, who was working on a Class III post with the Bank, died on 19.04.2006 while in harness. The respondent applied for compassionate appointment on 12.05.2006. During the pendency of the application, a new scheme dated 12.06.2006 came into force w.e.f. 06.10.2006. Clause 14 thereof provided that all applications pending on the date of commencement of the scheme shall be considered for grant of ex gratia payment to the family instead of compassionate appointment. As the appointment was denied, writ was preferred before the High Court, which was decided with a direction to the Bank not only to consider the case, but directed the Bank to appoint him. The appeal of the Bank was dismissed and that is how parties were before the Supreme Court. While setting aside the order of the High Court, the Supreme Court concluded that 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 during service. Following the ratio in Raj Kumar's case, the Supreme Court held that in such a situation, the case under the new scheme has to be considered. Judgments which presented a different view need to be noticed in the facts of those cases to try to cull out the binding ratio.

6. One of these judgments is in case Canara Bank & another Vs. M. Mahesh Kumar, (2015) 7 SCC 412, where the compassionate appointment in the appellant Canara Bank were regulated by "Dying in Harness Scheme" contained in Circular No.154 of 1993 w.e.f. 08.05.1993. The claimant's father died in harness on 10.10.1998 while serving as Clerk in Canara Bank. The claimant made an application for compassionate appointment under the 1993 scheme. The claim was rejected in June, 1999 on the ground that the respondents' family's financial position does not show any indigent circumstances warranting providing employment on a compassionate ground. He applied for reconsideration, but nothing fruitful happened in consideration, which brought the claimant to present the petition in the High Court of Kerala at Ernakulam. The learned Single Judge allowed the claim and quashed the impugned Ext.P-4 and directed the Bank to reconsider the claim of the respondent for appointment

in accordance with law. The Bank went in intra-Court appeal, but it was dismissed, which brought the Bank to the Supreme Court. The Bank contended that the benefit was in the nature of a concession, which did not create a vested right in favour of the claimant. The scheme was a non-statutory scheme, which did not create a vested right in favour of the claimant to be enforced through a writ of mandamus. Compassionate appointment is justified when it is granted to provide immediate succor to the deceased employee's dependants and cannot be granted on the passage of time. The High Court was not justified in directing the Bank to reconsider the claim for compassionate appointment. The Bank relied on precedents in *Umesh Kumar Nagpal Vs. State of Haryana*, (1994) 4 SCC 138; *SAIL Vs. Madhusudan Das*, (2008) 15 SCC 560; *Union of India Vs. B. Kishore*, (2011) 13 SCC 131; *State of Haryana Vs. Naresh Kumar Bali*, (1994) 4 SCC 448; *SBI Vs. Jaspal Kaur*, (2007) 9 SCC 571 and *Raj Kumar's case* (supra).

7. On a consideration of the case law available in precedents including in *Sushma Gosain Vs. Union of India*, (1989) 4 SCC 468 and *MGB Gramin Bank case* (supra) as well as other cases noticed in the judgment the Supreme Court in the special facts of that case found that the Bank had replaced the 1993 Scheme by a new Scheme of 2005 which applied to all pending applications for appointment on compassionate grounds, the respondent's case could not be considered because as per the new Scheme they are entitled to ex gratia payment in lieu of compassionate appointment.

8. The question which fell for consideration as noticed in para.12 of the judgment was; whether the Scheme passed in 2005 providing for ex gratia payment by way of financial assistance or the Scheme then in vogue in 1993 providing for compassionate appointment is applicable to the respondent. The Bank relied on *Jaspal Kaur's case* (supra). In *Jaspal Kaur's case*, the Supreme Court directed that dispute arising in the year 2000 cannot be decided on the basis of a scheme that was put in place much after the dispute relying on the observations that a claim for compassionate appointment under a scheme of a particular year cannot be decided in the light of the subsequent scheme that came into force much after the claim. This principle was reiterated by the Supreme Court in *Bhawani Prasad Sonkar Vs. Union of India*, (2011) 4 SCC 209. Thus, it was held that as per judgment in *Jaspal Kaur's case*, the claim cannot be decided as per 2005 Scheme providing for ex gratia payment. The circular dated 14.02.2005 being an administrative or executive order cannot have retrospective effect so as to take away the right accrued to the respondent as per Circular of 1993. The Supreme Court noticed that 2005 Scheme providing only for ex gratia payment in lieu of compassionate appointment stands superseded by the Bank by the 2014 Scheme promulgated by it which had revived the scheme providing for compassionate appointment. The Supreme Court noticed that as on date, the scheme in force is to provide compassionate appointment. It was under these peculiar circumstances the Supreme Court held that the Bank is not justified in contending that the application for compassionate appointment cannot be considered in view of passage of time.

9. On the issue, whether the respondent's family is in receipt of family pension and also has obtained the terminal benefits of the deceased employee, this in view of the Supreme Court in the aforesaid case had no consequence in considering the application for compassionate appointment.

The Supreme Court referred to Clause 3.2 of the 1993 Scheme, which stipulated that in case the dependant of the deceased employee to be offered appointment is a minor, the Bank may keep the offer of appointment open till the minor attains the age of majority. Accordingly, grant of family pension or payment of terminal benefits cannot be treated to be a substitute for providing employment assistance. It was under these circumstances the Bank's appeal was dismissed with a direction to consider the case of the respondents for compassionate appointment as per scheme which was in vogue at the time of death of the employee concerned.

10. One may now refer to the Full Bench decision of this Court relied upon by the petitioner in Krishna Kumari Vs. State of Haryana & others, 2012 (2) RSJ 473. The same issue fell for consideration before the Full Bench and it was of the opinion that the scheme or policy on the date of death is relevant. The Full Bench observed that this would be the principle recognized by the Supreme Court in Bhawani Prasad Sonkar's case. In appeal to the Supreme Court, the issue was left open, but the appeal was dismissed. The area covered, therefore, still remains grey but res judicata between the parties to the lis.

11. It may be mentioned that the decision in Raj Kumar's case was available to the Full Bench, but MGB Gramin Bank case was not available.

M. Mahesh Kumar's case (supra) though subsequent to the decision in MGB Gramin Bank and Krishna Kumari cases, but contains distinguishing features inasmuch as the policy of compassionate appointment was revived by the Bank in 2014 which altered the very aspect of the case, thereby, creating a medium through which the right could pass from 1993 to 2014. But in the present case, the policy relied upon of the Punjab Government dated 27.12.2016 was altogether withdrawn by the Punjab Government by subsequent instructions dated 29.03.2017. It is well settled that instructions can operate only prospectively and to that proposition there can be no cavil. Therefore, in my respectful view the Canara Bank case is distinguishable on facts.

12. The facts of the case in hand may be briefly noticed to understand what sort of relief can be given or denied. The late father of the petitioner retired as a Special Secretary on the establishment of the Punjab & Haryana High Court, Chandigarh on 30.04.2016 at the age of 58 years. Prior to retirement, he had applied for extension in service as per Punjab Government notification dated 30.10.2015, which was adopted by the High Court for its employees and he was granted extension in service beyond 58 years for a period of one year i.e. until 30.04.2017 under Rule 33 of the High Court Establishment (Appointment and Conditions of Service) Rules, 1973. The Government of Punjab, Department of

Finance decided in its circular-instructions dated 27.12.2016 that in case an officer/official who is on extension period i.e. from 58 to 60 years (Group A, B, C) and 60 to 62 years (Group D) dies during the period of extension, then appointment of his dependent on compassionate basis will be made as per the existing appointment policy. The petitioner's father was given another extension beyond the age of 59 years until 30.04.2018. The Punjab Government instructions dated 27.12.2016 adopted by the High Court on 07.03.2017 made available the benefit of compassionate appointment in case of death to a dependent family member. Unfortunately, the petitioner's father died during his first extension on 07.03.2017 after serving for 32 years leaving behind his wife and two children. There was no other legal heir left by the deceased. By an irony of fate, the father died on 07.03.2017 the date when the Punjab Government instructions dated 27.12.2016 were adopted by the High Court.

13. On the death of his father, the petitioner applied for compassionate appointment on 16.03.2017 for the post of Senior Assistant stating that the entire family was facing great hardship and financial crisis as his father was the only bread winner and during his life time had taken a home loan of `30 lakhs from a Bank which had to be repaid. When no decision was taken on the application, the petitioner submitted another application on 01.09.2017 for grant of appointment on any suitable post on compassionate grounds. Hon'ble the Chief Justice marked the representation to the Registrar (Administration) on 12.09.2017. The Registrar (Administration) after considering both the representations submitted by the petitioner, prepared a Meeting Note and put up the matter before the Hon'ble Departmental Promotion & Recruitment Committee for consideration. The matter was taken up by the Committee on 29.11.2017 and on consideration of the case of the petitioner, it recommended that the petitioner cannot be given appointment on compassionate basis because the deceased employee was on extension and the instructions dated 27.12.2016 had been withdrawn on 29.03.2017. On receipt of Minutes of the Meeting, the petitioner again represented to Hon'ble the Chief Justice by an application dated 09.01.2018 with the same request. When no response was received, the mother of the petitioner submitted a representation on 28.03.2018, which was again marked by Hon'ble the Chief Justice to the Departmental Promotion Committee for reconsideration. Accordingly, the matter was put up before the Registrar (Administration) for preparing a Meeting Note, which on completion of papers was put up before the Hon'ble Committee on 03.08.2018. The Committee examined the case and recommended that the petitioner cannot be given appointment on compassionate basis as the family has been paid Rs.29 lakhs on account of Gratuity, GPF, GIS and Leave Encashment and the family owns a house in the periphery of Chandigarh.

14. Calling in question these decisions, the petitioner has approached this Court by way of present petition filed under Article 226 of the Constitution of India. He relies on the Full Bench decision in Krishna Kumari's case to assert that the date of death is to be taken into consideration and the policy prevailing at that time.

The death occurred on 07.03.2016, the date when Hon'ble the Chief Justice adopted the policy dated 27.12.2016 for High Court employees and therefore, the petitioner's case was covered by that policy irrespective of the fact whether it was later withdrawn by the Punjab Government and thereafter that decision was adopted by the High Court.

15. I have heard Mr. Rakesh Sobti, learned counsel appearing for the petitioner at length but do not feel persuaded by his contentions to upset the view taken by the High Court twice on its administrative side reaching the same conclusion. In my view too, this was not a case within the ambit of financial distress at the time of death or thereafter. Moreover, the petitioner is a highly qualified person holding the B.A. LL.B. degree from Punjabi University; Diploma in Cyber Law from Government Law College, Mumbai & Asian School of Cyber Laws, Pune and an LL.M. degree from Kurukshetra University. He has a good academic record. The petitioner has stated that he is one of the two siblings of the deceased. His sister is married and settled in her matrimonial home. The financial position does not reflect undue financial crisis or any undue hardship. Compassionate appointments are not designed to make a career outside open merit in recruitment to public service, be it the High Court establishment.

16. The Departmental Promotion & Recruitment Committee did not fall in any error in declining the request for compassionate appointment on the ground that the instructions were withdrawn in its consideration or reconsideration. Compassionate appointment is not available during the period of extension on the death of employee in harness. Thus, no relief by way of certiorari or mandamus is available to the petitioner and interference is not called for in the present petition.

17. Consequently, the petition is ordered to stand dismissed.

18. However, the question, whether the policy on the date of death or the one on the date of consideration is applicable, in the present case, is rendered academic for want of eligibility.