

(2011) 07 AHC CK 0029

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 4059 of 2003

Jagdish Narain

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 14-07-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 162, 309, 311(2)

Citation : (2011) 8 ADJ 217 : (2012) 2 AWC 1526 : (2011) 3 UPLBEC 2196

Hon'ble Judges : Vineet Saran, J;Ran Vijai Singh, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Hon"ble Ran Vijai Singh, J.—The unfortunate Petitioner, who was appointed on compassionate ground after the death of his father (late Sarwan Lal), appears to be aggrieved by the judgment and order dated 21.01.2002, passed by Central Administrative Tribunal, Allahabad in Original Application No. 844 of 1995, by which the Petitioner's Original Application has been dismissed.

2. The facts giving rise to this case are that the late Sarwan Lal, who was a permanent employee, working as a Tailor with Respondent No. 2, died in harness. After his death on 13.12.1992, the Petitioner being the eldest son was appointed on compassionate ground.

3. From the perusal of the appointment letter, it transpires the Petitioner's appointment was on probation for the period of 2 years with the rider that in case Petitioner's work and conduct during the period of probation is found unsatisfactory, his services be terminated. It further transpires that the Respondents have found the Petitioner's work unsatisfactory and terminated the services of the Petitioner on 22.9.1994.

4. Aggrieved by the order dated 22.9.1994, an appeal was filed on 7.10.1994. When no decision was taken on that, the Petitioner has sent a representation/reminder on 8.12.1994 stating therein that the Petitioner's father was poisoned

and his dead body was found at the factory gate. After the death of his father, the Petitioner's mother received heavy shock and her health started deteriorating day-by-day, consequently she has fallen ill. There were two unmarried minor sisters also and considering the same, the Petitioner was offered an appointment on compassionate ground against a clear vacancy. It is also stated that as the Petitioner's mother was ailing and his family circumstance was very hard pressing, the Petitioner off and on got absented himself from duty. His absence from duty was not deliberate and it was under some compelling circumstance and that needed sympathetic consideration, but the Respondents without affording an opportunity to explain the reason for absence, has terminated the Petitioner's services. Even on his representation no decision was taken by the appellate authority, thereafter, under the compelling circumstances the Petitioner had filed the Original Application before the Central Administrative Tribunal.

5. The order of termination was challenged mainly on the ground that the appointment offered on compassionate ground is always permanent in nature, therefore, the services of the Petitioner could not be terminated except taking recourse of law as contemplated under the Civil Services (Classification Control and Appeals) Rules, 1965 for his alleged misconduct for absence on duty as the reason for termination of the Petitioner's services is unsatisfactory work due to absence from duty for few days in few spells.

6. The Tribunal, without deciding the question as to whether appointment on compassionate basis can be made on probation or on temporary basis, has proceeded to decide the case in terms of the appointment letter and came to the conclusion that during the period of probation the Petitioner's work was closely watched by the Respondents and as he got absented himself about 103 days in 36 spells, taking note of that, the Tribunal has dismissed the Original Application of the Petitioner by the impugned order and refused to grant any relief.

7. Aggrieved by that order the Petitioner has filed the present writ petition, almost taking the same ground as it was taken in the Original Application filed before the Tribunal.

8. In paragraph 9 of the writ petition the Petitioner has taken the ground that the appointments on compassionate grounds are always permanent in nature and the Respondents have arbitrarily treated the Petitioner on probation and terminated the Petitioner's services treating him as a probationer. Reply of paragraph 9 of the writ petition has been given in paragraph 8 of the counter-affidavit, which is reproduced below:

8. That the contents of paragraph 9 of the petition are incorrect. Correct facts are as follows:

(a). The Ministry of Personnel, Public Grievances and Pensions (Department of Personnel & Training) Office Memorandum No. 14014/6/86-Estt. (D) dated 30.6.1987 provides consolidated instructions with regard to compassionate

appointment of deceased Government servant. Para 4 of it with regard to eligibility provides that compassionate appointment can be made only against direct recruitment quota and compassionate appointment should be made if the applicants are eligible and suitable for the post in all respects under the provisions of the relevant recruitment rules.

(b). Para 9 of the aforementioned O.M. further provides that the department should have selective approach and appointments made on compassionate ground should be done in such a way that the persons appointed to the post do have the essential educational and technical qualifications and experience required for the post consistent with the requirements of maintenance of efficiency of administration.

(c). The Petitioner's performance during probation period was not satisfactory and the competent authority acted well, within its rights to terminate the Petitioner's services. It is incorrect that the appointment on compassionate ground is always permanent in nature from the date of appointment. The allegations that the Respondents arbitrarily and illegally treated the Petitioner as temporary employee on probation is misconceived and misleading.

9. In this paragraph, Respondents have tried to impress upon the procedure of the appointment on compassionate ground, but so far as the Petitioner's specific submission that the appointment on compassionate ground is always permanent in nature, has not been denied with concrete material in support thereof. The other grounds which have been taken in the counter-affidavit are that, it is well settled that no one can travel beyond the terms of appointment letter, as knowing it very well, the Petitioner with open eyes has accepted the appointment, therefore taking note of that, as the Petitioner's work was found unsatisfactory during the probation period, his services have been terminated. Learned Counsel for the Respondents in support of his submission has placed reliance upon few judgments of the Apex Court in *Kunwar Arun Kumar v. U.P. Hill Electronics Corporation Ltd. and others*, AIR 1997 SC 136; and *State of Punjab and others v. Sukhwinder Singh*, 2005 SCC (L&S) 705, where it is held that the probationers have no right to the post, and if their works are unsatisfactory during the probation period, their services can be terminated without notice, or without affording an opportunity of hearing.

10. Refuting the submissions of the learned Counsel for the Respondents, learned Counsel for the Petitioner has submitted that the Respondents have never denied the nature of compassionate appointment, which is always permanent in nature. He has further submitted that so far as the conditions of the appointment letter is concerned, suffice it to say, the Petitioner who was leading a hard pressed life after the death of his father, was not in a position to protest the conditions of the appointment letter. It was for the Respondents to look into the relevant rule meant for appointment and only thereafter issue a letter of appointment in consonance with the scheme/rules. He has further submitted that a needy person cannot be a chooser and cannot put any condition

except to surrender himself with a view to mitigate the hardship which has fallen on the family.

11. We have heard the learned Counsel for the parties and perused the record.

12. Here, in this case we have to first decide that what kind of appointment should be offered to a person, who is seeking appointment on compassionate ground. For deciding the same, it would be necessary to look into the provision contained in Article 309 of the Constitution of India, which talks about the framing of Rules to regulate recruitment and condition of service of persons appointed to public services and the posts in connection with the affairs of Union or any State by the appropriate legislature. Apart from the legislature, it is also provided under the proviso of the aforesaid Article that the President or such person as he may direct in the case of services and the posts in connection with the affairs of Union, and Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of State to make rules to regulate the recruitment and the conditions of services of persons" seeking appointment.

13. The word "recruitment" is a comprehensive term and includes method provided for inducting a person in public service appointment, selection, promotion, deputation are well known methods of recruitment. This is what has been held by the Apex Court in the case of K. Narayanan and others Vs. State of Karnataka and others, The condition of service is also based under the relevant rules governing the recruitment, which includes salary or wages, leave, provident fund, gratuity, promotion, seniority, tenure, or termination of service, superannuation, pension, transfer, deputation and disciplinary proceedings.

14. In absence of any law or rule, framed under Article 309, it is competent for the Government to regulate its public services in exercise of its executive power under Article 162. This executive power of the State is co-extensive with its legislative power and it is also open to the executive as to the legislature, to provide for particular person, from a single case, but neither can violate constitutional limitation as those contained in Articles 14 and 16. Article 162 enables the Government to make orders but not Rules to prescribe conditions of service as are referred to in the proviso to Article 309.

15. For inducting a person in service as transpires from perusal of preceding paragraphs, there must be a statutory rule/ order and without that there can be no entry in the service, and even if entry is there, that will not create any right in favour of an employee. An employee can be treated as a member of the service only after his appointment becomes confirmed/permanent. The ad hoc/temporary or appointment on probation basis confers no right to post.

16. Here in the present case, no specific rule has been placed before us for making an appointment on compassionate ground and the Respondents have only referred in paragraph 9 of the counter-affidavit a Circular which talks about the appointment on the compassionate ground. In brief, as it would appear from

the perusal of paragraph 9 (a) and (b), there happens to be an Office Memorandum No. 14014/6/86-Estt. (D) dated 30.6.1987 issued by Ministry of Personnel Public Grievances and Pensions (Department of Personnel & Training), paragraph 4 of which talks about the eligibility, according to which, the compassionate appointment can be made only against the direct recruitment quota and the compassionate appointment should be made if the applicants are eligible and suitable for the post in all respects under the provisions of relevant recruitment rules.

17. Paragraph 9 of the aforesaid Office Memorandum provides that the department should have selective approach and appointment made on compassionate ground should be done in such a way that the persons appointed to the post do have the essential education and training qualifications and experience required for the post consistent with the requirement of the maintenance of efficiency of administration.

18. As would appear from the perusal of above paras, this Memorandum does not talk about the nature of the appointment, whether it is temporary or on probation basis.

19. Learned Counsel for the Petitioner has placed before us Scheme for Compassionate Appointment, 1998. Although the said Scheme is not very much relevant for the present case as the Petitioner's appointment was made in the year 1992, but certainly it reflects light on the intention of the employer for making an appointment on compassionate ground.

20. Paragraph 7 of the aforesaid Scheme talks about the determination and availability of the vacancies which runs as under:

7. DETERMINATION / AVAILABILITY OF VACANCIES.

(a) Appointment on compassionate grounds should be made only on regular basis and that too only if regular vacancies meant for that purpose are available.

(b) Compassionate appointments can be made upto a maximum of 5% of vacancies falling under direct recruitment quota in any Group "C or "D" post. The appointing authority may hold back upto 5% of vacancies in the aforesaid categories to be filled by direct recruitment through Staff Selection Commission or otherwise so as to fill such vacancies by appointment on compassionate grounds. A person selected for appointment on compassionate grounds should be adjusted in the recruitment roster against the appropriate category viz. SC/ST/OBC/General depending upon the category to which he belongs. For example, if he belongs to SC category he will be adjusted against the SC reservation point, if he is ST/OBC he will be adjusted against ST/OBC point and if he belongs to General category he will be adjusted against the vacancy point meant for General category.

(c) While the ceiling of 5% for making compassionate appointment against regular vacancies should not be circumvented by making appointment of

dependent family member of Government servant on casual/daily wage/ad hoc/ contract basis against regular vacancies, there is no bar to considering him for such appointment if he is eligible as per the normal rules/orders governing such appointments.

(d) The ceiling of 5% of direct recruitment vacancies for making compassionate appointment should not be exceeded by utilizing any other vacancy e.g. sports quota vacancy.

(e) Employment under the scheme is not confined to the Ministry/ Department/ Office in which deceased/medically retired Government servant had been working. Such an appointment can be given anywhere under the Government of India depending upon availability of a suitable vacancy meant for the purpose of compassionate appointment.

(f) If sufficient vacancies are not available in any particular office to accommodate the persons in the waiting list for compassionate appointment, it is open to the administrative Ministry/Department/Office to take up the matter with other Ministries/Departments/Offices of the Government of India to provide at an early date appointment on compassionate grounds to those in the waiting list.

21. Para 12 of the aforesaid Scheme talks about the procedure. For appreciation that is reproduced below:

12. PROCEDURE

(a) The proforma as in Annexure may be used by Ministries/Departments/ Offices for ascertaining necessary information and processing the cases of compassionate appointment.

(b) The Welfare Officer in each Ministry/Department/Office should meet the members of the family of the Government servant in question immediately after his death to advise and assist them in getting appointment on compassionate grounds. The applicant should be called in person at the very first stage and advised in person about the requirements and formalities to be completed by him.

(c) An application for appointment on compassionate grounds should be considered in the light of the instructions issued from time to time by the Department of Personnel and Training (Establishment Division) on the subject by a committee of officers consisting of three officers- one Chairman and two Members- of the rank of Deputy Secretary/Director in the Ministry/Department and officers of equivalent rank in the case of attached and subordinate offices. The Welfare Officer may also be made one of the Members/Chairman of the committee depending upon his rank. The committee may meet during the second week of every month to consider cases received during the previous month. The applicant may also be granted personal hearing by the committee, if necessary, for better appreciation of the facts of the case.

(d) Recommendation of the committee should be placed before the competent

authority for a decision. If the competent authority disagrees with the committee's recommendation, the case may be referred to the next higher authority for a decision.

22. Para 15 talks about the seniority which runs as under: "15. SENIORITY

(a) The inter se seniority of persons appointed on compassionate grounds may be fixed with reference to their date of appointment. Their interpolation with the direct recruits/promotees may also be made with reference to their dates of appointment without disturbing the inter se seniority of direct recruits/promotees.

(b) Date of joining by a person appointed on compassionate grounds shall be treated as the date of his/her regular appointment.

23. From the perusal of the above Scheme, particularly, Paras 7 and 15 (a) and (b) it transpires that the appointments on compassionate grounds should be made only on regular basis and that too only if regular vacancies meant for that purpose are available and the candidate seeking appointment is fully qualified having required academic qualification and training as required under the relevant rule in the general selection. So far as seniority is concerned, para 15 (a) provides that inter se seniority of persons appointed on compassionate grounds be fixed with reference to their dates of appointment. Further, para 15 (b) provides that the date of joining by a person appointed on compassionate ground shall be treated as the date of his/her regular appointment.

24. Here in the present case, as we have noticed the Respondents have not come with the case, with concrete material to establish before the Court that the appointment made on compassionate ground is not permanent in nature, although there is a bald denial. The Tribunal has also not considered this aspect of the matter. It appears that the nature of the Petitioner's appointment on probation is an outcome of the appointment made under the relevant service rules, meant for general selection containing recruitment and conditions of service, where the person after adopting the procedure of selection is appointed on probation basis. The appointment on probation basis is the quite known feature of service rules meant for the purposes of selection and appointments on various posts. In some rules there are provisions that after expiry of the fixed term of probation if nothing adverse is communicated, the service of such employees shall be deemed to be confirmed. There are also conditions in the relevant service rules that the probation period can be extended and in case the work of the employee appointed on probation basis is not satisfactory, his services can be terminated also.

25. It is also quite well known feature and settled principle that the appointment on compassionate ground is not made under the relevant service rules governing the general selection, including recruitment and conditions of service. This is a special kind of legislation unknown to the general procedure of recruitment contained in various service rules. Here, the intention of the legislature is, to

save out the family from financial crunch which falls upon the family after the death of the employee who dies in harness.

26. From the perusal of 1987 Circular, on which reliance has been placed in the counter-affidavit, it transpires that there is a consistent approach of the employer that in no case qualification can be relaxed, and it is also provided that appointment be made against the regular vacancy, but there is no rider as such that the appointment be made on probation or on temporary basis. Here, we find as there is no mention about the appointment on probation basis in the Circular of 1987, therefore, the appointment can only be permanent in nature, which may be inferred from the later Scheme framed by the Respondents in the year 1998, particularly, para 7 (a) of the Scheme which provides that the appointment on compassionate grounds should be made only on regular basis and that too only when the regular vacancies meant for that purpose are available and para 15 which deals with the seniority and provides that inter se seniority of persons appointed on compassionate grounds need be fixed with reference to their dates of appointment. Further, the date of joining of a person appointed on compassionate ground shall be treated as the date of his/her regular appointment.

27. Otherwise also, the very purpose of the appointment on compassionate ground relaxing the relevant rules of recruitment of a particular service is to provide a special kind of treatment to the dependents of a deceased employee who has given his blood and flesh for smooth working of the system, of which, he was a unit and that is why in other rules governing the appointment on compassionate grounds there is no mention of the nature of appointment, either on temporary or probation basis, like the U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974, or even in the present Scheme governing the compassionate appointment. Therefore, it must travel beyond the realm of uncertainty by providing the employee a permanent status in service. Otherwise, if the sword of uncertainty is allowed to linger on the head of an employee who has been appointed on compassionate ground, he will not be able to discharge his duty with full devotion in the service as well as towards the family, and the intention of the legislator in extending such benefit gets defeated. Dealing such aspect, a Division Bench of this Court in the case of Ravi Karan Singh v. State of U.P. and others (1999) 3 UPLBEC 2263, has observed as under:

In our opinion, an appointment under the Dying in Harness Rules has to be treated as a permanent appointment otherwise if such appointment is treated to be a temporary appointment then it will follow that soon after the appointment the service can be terminated and this will nullify the very purpose of the Dying in Harness Rule because such appointment is intended to provide immediate relief to the family on the sudden death of the bread-earner. We, therefore, hold that the appointment under Dying in Harness Rule is a permanent appointment and not a temporary appointment and hence the provisions of U.P. Temporary Government Servant (Termination of Services) Rules, 1975 will not apply to such

appointments.

28. Following this, other Division Benches of this Court, in *Sanjai Kumar v. Deputy Director General (NCE), Directorate U.P., Lucknow and others* (2002) 3 UPLBEC 2748; and *Ram Chandra v. State of U.P. and others*, 2008 (2) ESC 1053, have held that the appointment on compassionate ground is always permanent in nature.

29. Another question would arise that if an appointment made on compassionate ground is permanent in nature, can his service be terminated treating it to be on probation in terms of the appointment letter. For deciding this question, another question would arise whether the Respondents were justified in appointing the Petitioner on probation basis on compassionate grounds, and even if it is so, whether this condition can be binding upon the employee/Petitioner and that cannot be challenged treating it as it was accepted by the appointee with open eyes without any protest.

30. As would reveal from the foregoing discussions and the Circular relied upon by the Respondents, meant for appointment on compassionate grounds, there is no provision for appointment on probation/temporary basis and in absence of any such provision under the relevant circular/rule under which Petitioner's appointment was made, the Respondents' stand cannot be justified in putting the condition of appointment on probation basis. It is settled law that if a statute provides to do a thing in a particular manner then that thing has to be performed in that very manner and in not doing so it leads towards futility having no avail and void. Therefore, we are of the considered opinion that in absence of any such provision under the relevant Circular governing the appointment on compassionate grounds, for making appointment on probation basis, the Respondent's putting a rider on probation basis in appointment letter is totally misplaced, arbitrary and unsustainable in the eye of law.

31. The Tribunal's finding while dismissing the Original Application of the Petitioner observing that the Petitioner's appointment was on probation basis and he has accepted the same with open eyes, therefore he could not challenge the same, to our mind is not correct as the estoppel does not operate against law and if any condition has been put in contrary to the law governing the field, or in absence of any provision, the law of estoppel will not come into play and that can always be challenged. Otherwise also, any contract contrary to the legal provision cannot be enforced in the Court of law.

32. In view of the foregoing discussions, we are of the view that the Respondents were not justified in terminating the services of the Petitioner treating him as a probationer as his appointment on compassionate ground should have been made on permanent basis. The Tribunal has failed to consider this aspect of the matter and illegally held that it was not open for the Petitioner to challenge the conditions of appointment letter and in terms of the appointment letter, the termination of the Petitioner was justified. We are of the opinion that once the

Petitioner's appointment was found permanent in nature, the putting of conditions on probation basis in appointment letter is unjustified. The Respondents could not have terminated the Petitioner's services treating him as a probationer and only course open to the Respondents was to take recourse of law as contemplated under the Civil Services (Classification Control and Appeals) Rules, 1965 for his absence from duty which may amount misconduct. The Respondent's act is also hit by Article 311(2) of the Constitution of India.

33. In the result, writ petition succeeds and is allowed. The impugned judgment and order dated 21.1.2002, passed by Central Administrative Tribunal, Allahabad in Original Application No. 844 of 1995 is hereby quashed. Normally, we would have remanded the matter to the Tribunal after quashing the same to consider the nature of Petitioner's appointment as the Tribunal has not considered that aspect of the matter, but looking into the pendency of the matter for about 16 years from the date of the termination order and nature of the urgency in compassionate appointment, we also quash the termination order dated 22.9.1994, passed by the Respondents with a direction to the Respondents to reinstate the Petitioner forthwith in his services. We also provide as the Petitioner has not worked during this period, therefore he will not be entitled to full salary. The Respondents are directed to pay only 50% of the salary to the Petitioner with all other consequential benefits, like treating the Petitioner in service during this period. However, this judgment will not preclude the Respondents to proceed in accordance with law for the Petitioner's absence from duty.