
(2008) 12 P&H CK 0171
In the Punjab And Haryana At Chandigarh

Jitesh Kumar Dembla

APPELLANT

Vs

State of Haryana and Others

RESPONDENT

Date of Decision : 12-12-2008

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2009) 2 ILR (P&H) 58 : (2009) 153 PLR 486

Hon'ble Judges : M.M. Kumar, J;Augustine George Masih, J

Bench : Division Bench

Final Decision : Allowed

Judgement

M.M. Kumar, J.—The petitioner is a helpless orphan and is subjected to litigation by the respondent State. He has filed the instant petition under Article 226 of the Constitution for issuance of appropriate direction to the respondents to employ him on a suitable post in accordance with the ex gratia employment scheme or the rules. The writ petition was allowed on 1.8.2006 by a Division Bench of which one of us (M.M. Kumar, J.) was a member by striking off the defence of the respondent State for having not paid the cost of Rs. 10,000/- for filing of written statement. Against the judgment dated 1.8.2006, the respondent State approached Hon'ble the Supreme Court. On 10.3.2008, the following order has been passed by Hon'ble the Supreme Court in SLP (Civil) No. 12517 of 2007.

In this case the Department has obtained instructions to deposit the cost of Rs. 10,000/- for not filing the written statement. Hence, the matter came to be decided against the Department.

Since the Department is ready and willing to pay the cost of Rs. 10,000/- the following order is being passed:

Department is directed to file its written statement within eight weeks from today. Cost of Rs. 10,000/- shall be paid to the employee as cost condition precedent. The High Court is requested to hear and dispose of the matter as expeditiously as possible and preferably within six months from the date of the

filing of the written statement.

The SLP is disposed of accordingly.

2. The cost of Rs. 10,000/- has now been paid and the written statement of respondent Nos. 1 to 3 has already been taken on record.

3. The petitioner has asserted that his mother was working as a JBT Teacher, who died along with his father on 6.9.1993 in an unfortunate accident. At the time of their death the petitioner was less than nine years nine months old having been born on 11.11.1983. He attained majority on 11.11.2001 and filed an application on 6.5.2003 (P-5) for ex-gratia employment under the Exgratia Employment Scheme as prevailing at that time. It has been claimed that he has a younger brother with the name of Himansu Dembla, who was 5 years old at the time of death of their parents, and sells vegetables as a street hawker as there is no source of income. The father of the petitioner was an employee in a private firm at Faridabad and no benefit from his service has been paid to the petitioner. The petitioner has acquired the qualification of 10 + 2 in the year 2004. The Director, Primary Education, Haryana, on a representation made, had addressed a communication on 22.1.1994 to the Chief Secretary to reserve one post for him as the petitioner was below 17 years of age. The aforementioned communication reads as under:

Deceased Santosh Devi JBT Teacher was posted at Primary School Dakola district Faridabad. She died on 6.9.1993 during service. The father in law of deceased employee has requested because he do not want service and their children are minor and one out of them Jitesh Demble studying in 4th Class and his date of birth is 11.11.1983. The resolution for service can not be submitted according the Exgratia Scheme of the Government because his age is below 17 years. Please reserve the post for him, so that at the age of 17 years after sending the resolution of service he may get facility of service. The relevant documents are attached in this regard. The deceased employee was a permanent employee of the Government.

Sd/- Joint Director, Primary Education, For Director, Primary Education, Haryana, Chandigarh Dated 22.1.1994.

4. In the written statement filed by respondent Nos. 1 to 3 the stand taken is that on 6.9.1993 when the mother and father of the petitioner died, he was 9 years 9 months and 25 days old and could not have been offered any employment. However, in that year he approached the respondent department with a request to reserve a post for him. It has been asserted that an application for appointment on compassionate ground could be made within three years from the date of death of an employee and such an appointment cannot be claimed as a vested right, which could be asserted at any time. The trite and oft quoted defence has also been taken in this case that the object of compassionate appointment is to enable the family to get over a financial crisis which confronts the family on the death of a sole bread earner and the same cannot be claimed

after a lapse of time or after the crisis is over. The object of such scheme is to relieve the family of the financial destitution and to help it to get over the emergency. The cause of the petitioner has been opposed by asserting that the instant petition suffers from delay and laches as the petition has been filed in the year 2004 after a lapse of 11 years. The respondents have also asserted that the pensionary benefits granted to his mother who was a JBT Teacher would be sufficient to look after his day to day needs. Reliance has also been placed on the policy instructions dated 8.S.199S concerning ex-gratia scheme by asserting that there is no provisions to reserve any post under the policy instructions (R-1).

5. We have heard learned Counsel for the parties at a considerable length and have perused the paper book with their able assistance. The compassionate appointments in the respondent State are regulated by the statutory Rules known as the Haryana Compassionate Assistance to Dependents of the Deceased Government Employees Rules, 2003 (for brevity, "the Rules"). Rule 3(k) of the Rules defines the expression "Orphan" and Rule 18 prohibits relaxation of any provision of the Rules by carving out a special exception in the case of "orphans". Both the aforementioned Rules are necessary for deciding the controversy, which reads as under:

3(k) Orphan means a child who has previously lost one parent and has become an orphan upon the demise of the Government employee.

18. There shall be no relaxation of any provision of these rules. However, as a special case, these rules shall be relaxed only in the cases of children who have - become orphans upon the demise of the Government employee. The claim of appointment of such orphans, shall remain alive till one child has attained majority/ minimum eligible age for entry into government service.

6. The aforementioned rules came up for interpretation before this Court in the case of Kumar Bandana Sharma v. State of Haryana 2006(4) S.L.R. 37. The Division Bench of which one of us (M.M. Kumar, J.) was a member has interpreted expression "orphan" and Rule 18. The Division Bench had also noticed the facts of that case in para 6, which reads thus:

6. A perusal of the definition of expression "orphan" would show that if a child lost one of his parents at the earlier stage then he become orphan upon the demise of Government employee. In other words, if both the parents have expired, the children would be considered to be orphans. Rule 18 carves out an exception in the case of orphan by providing that there has to be relaxation of Rules in the cases of children who have become orphan. The use of word "shall" before the word "relaxed" in the Rule would point out that the Rule is mandatory and it must remain alive till one child attain majority/minimum eligible age for entry into Government Service. Again the expression "shall" has been used before the expression "remain alive". It is, thus, obvious, that the petitioner who has lost both her parents in 1988 and 1993 has to be regarded as an orphan and her case is required to be considered by relaxing the rules. It has come on record

that the date of birth of the petitioner is 9.7.1980. She has acquired the qualification of B.A. B.Ed. and then applied for compassionate appointment to the respondents on July 28,2004. Her claim has been rejected without examining her case in the light of Rule 3(k) read with Rule 18 of the Rules by applying the principle that the petitioner should have applied for compassionate appointment within three years of the death of her mother. In other words she was required to apply for compassionate appointment in the year 1996 when she was 15-16 years old. At that stage she was not qualified to enter government service nor she had requisite qualification. The case of the petitioner is required to be considered by relaxing the Rules and without insisting upon the period within which she was required to apply. According to Rule 18 of the Rules, she could have applied on attaining the age of majority or minimum eligible age for entry into Government service and her claim for appointment was to continue to remain alive. Therefore, we are of the view that the petitioner deserves to be given appointment on compassionate basis.

7. Mr. S.P. Khatri, learned Counsel for the petitioner has submitted that Special Leave to Appeal (Civil) No. 2492 of 2007, filed against the judgment rendered in the case of Kumari Bandana Sharma (supra), has been dismissed on 28.9.2007. The facts of the present case are akin to those of Kumari Bandana Sharma's case (supra) because in this case also the petitioner has also applied after a delay of many years. However, the petitioner has qualification of 10 + 2 and he is more than 24 years now. He fulfills the qualification for appointment to a class III post.

8. Ms. Palika Monga, learned State Counsel has however, argued that the petitioner would not be entitled to appointment on compassionate basis because he has survived the onslaught of orphanage for a considerable period of 11 years, which itself would show that there is no financial crisis. According to the learned Counsel the principles laid in the case of Umesh Kumar Nagpal Vs. State of Haryana and Others, would be fully applicable to the case of the petitioner and the petition is liable to be dismissed.

9. We have thoughtfully considered the rival contentions and are of the view that the matter is covered by the judgment of this Court rendered in Kumari Bandana Sharma's case (supra). The petitioner has lost both his parents in a tragic accident on 11.11.1983 when he was about nine years nine months old. He is covered by the definition of "orphan" given in Section 3(k) of the Rules. A special exception for relaxing the "Rules" has also been carved out by Rule 18 which postulates in unmistakable terms that relaxation of Rules must be given in cases of children who have become orphan because the word "shall" has been used. A further perusal of the "Rules" shows that claim of such orphans "shall" remain alive till one child has attained majority or minimum eligible age for entry into Government service. In Kumari Bandana Sharma's case (supra) a similar situation prevailed and the Division Bench allowed the petition. In the present case also the petitioner has acquired qualification of 10 + 2 in the year 2004

when he attained the age of about 21 years (now 25+) and he is clamouring for a suitable appointment. It is also pertinent to mention that his younger brother who is about 20 years old now sells vegetable as a street hawker. Therefore, it cannot be concluded that the petitioner has overcome his penury. It is keeping in view such a ground reality that Rule 18 provides for relaxation and the claim of orphan has been kept alive till such time he attains the age of majority for entry into Government service. This petition, therefore, deserves to be allowed.

10. The submission made by the learned State counsel based on the judgment of Hon"ble the Supreme Court in Umesh Kumar Nagpal's case (supra) does not require a detailed examination because in that case their Lordships" were considering the instructions issued by the respondent State of Haryana which were adversely commented upon by this Court to the extent that no compassionate employment was to be given against a Class II or higher posts. Hon"ble the Supreme Court, however, noticed that the only ground which could justify compassionate employment is the penurious condition of the deceased family. However, in the present case the statutory rules of 2003 are applicable and once the rules occupy the field and are fully applicable then there is no escape from the conclusion that the petitioner deserves to be given appointment. In Umesh Kumar Nagpal's case (supra) the claim was not made by an orphan, which constitutes a distinct category, by virtue of definition given under Rule 3(k) read with Rule 18 of the Rules. Moreover, the petitioner and his brother are continuing to live in penury which bring this case even closer the observations made in Umesh Kumar Nagpal's case. Therefore, we do not feel persuaded to accept the argument of the learned State counsel that the law laid down in Umesh Kumar Nagpal's case would in all four apply to the facts of the present case.

11. As a sequel to the above discussion, the writ petition succeeds. The respondents are directed to appoint the petitioner on any class III post within a period of two months from today.

12. The writ petition stands disposed of in the above terms.