
(2003) 12 UK CK 0023

In the Uttarakhand High Court

Case No : Writ Petition No. 2726 (S/S) of 2001

Mst. Mangali Devi

APPELLANT

Vs

State of Uttaranchal and others

RESPONDENT

Date of Decision : 06-12-2003

Acts Referred:

Citation : (2005) 1 UC 449

Hon'ble Judges : Rajesh Tandon, J

Bench : Single Bench

Advocate : Sri C.D. Bahuguna, for the Appellant;

Final Decision : Allowed

Judgement

1. Rule Respondents waive service. Both the parties agreed that the matter may be decided finally.

2. By the present writ petition, the Petitioner has prayed for the following reliefs:

(1) Issue a writ, order or direction in the nature of mandamus commanding Respondents to appoint the son of the Petitioner under Dying in Harness Rules and to pay the Petitioner back salary due pension and gratuity with interest within the time allowed by this Hon''ble Court.

(2) Issue any other suitable writ order or direction which this Hon''ble Court may deem fit and proper.

(3) Award cost of the petition to the Petitioner.

3. Brief facts giving rise to the present writ petition are that the husband of the Petitioner was working under the Executive Engineer, Construction Division, Public Works Department Narendra Nagar, Tehri Garhwal, Respondent No. 3 on the post of Beldar on daily wage basis since 1977 and he worked as daily wage employee up to the year 1979.

4. Thereafter the husband of the Petitioner was taken as workcharge employee

on the post of Beldar since 1980 and he worked as such upto the year 1993 i.e. upto 5.6.1993. Thus the husband of the Petitioner worked for about a period of 16 years.

5. Petitioner has submitted that her husband died on 5.6.1993 leaving behind the following heirs and legal representatives.

(1)

Mst. MangalaDevi

Widow

(2)

Gabar Singh

Son

(3)

Jaspal Singh

Son

(4)

Shishpal Singh

Son

(5)

Digpal Singh

Son

6. The Petitioner has submitted that the Respondent No. 3 has prepared a seniority list of work charge employees in the year 1992 in which the name of the husband of the Petitioner finds place at serial No. 10 which has fully established that the husband of the Petitioner had worked on daily wage since 21.10.1976 up to 20.11.1980 and thereafter from 21.11.80 he worked as a work charge employee.

7. By way of the amendment dated 12.12.2001 the Petitioner has made the following averments in paragraph 6 of the writ petition. The same are quoted below:

Paragraph 6- That it is relevant to mention it here that one Trilok Singh was engaged in Muster roll within construction division P.W.D. Narendra Nagar, Tehri Garhwal in the year 1984 and was then engaged on work charged basis in the year 1989 and then after 7 years of service he was made regular but the husband of the Petitioner even after putting in 16 years of service as a work charged employee was not made regular by the department arbitrarily. The said

Mr. Trilok Singh died in the year 1997 and after his death, his son was given employment under dying in harness rules.

Amendment carried out in compliance of the order of this Hon''ble Court dt. 12.12.2001.

8. The Petitioner has further submitted that Harsh Mani was also appointed on daily wage employee in the year 1973 and he was taken on work charge in the year 1989 and died in the year 1993. His son was given the appointment under Dying in Harness Rules.

9. The Petitioner has stated that he has applied soon after the death of the husband of the Petitioner. She has filed an application for the appointment of the elder son of the Petitioner under the dying in harness Rules.

10. The Petitioner has submitted that according to the government order dated 18.6.1991 he was entitled for the benefits of dying in harness rules which are quoted below:

11. The Petitioner has stated that by virtue of another govt. order dated 16.3.1996, the Chief Engineer again directed that the work charge employees who died in service and had completed more than 10 years of service are entitled for the benefit of the rule. The said notification is quoted below:

12. According to the Petitioner his case is fully covered by the aforesaid govt. orders. He has moved an application before the Superintending Engineer on 16.7.1994 and reminder were sent on the following dates:

1) 16.7.1994

2) 28.1.1995

3) 7.5.1996

13. Counsel for the Petitioner Sri C.D. Bahuguna has submitted that nothing was done then he has filed a complaint before the consumer forum. The same was allowed on 23.5.1995. Against the said order, appeal was preferred.

14. The appeal was allowed on 21.7.2000. The observations of the state government are quoted below:

Learned Counsel for the Appellant has argued that the District Forum has no jurisdiction to decide this case as the deceased, husband of the complaint, was not a regular Government employee and the cases of government employees cannot be tried before the District Forum. It is well known fact that U.P. Public Service Tribunal Act. All the cases pertaining to the service matters are tried by that Tribunal Exclusively. The jurisdiction of other courts is barred and no court can entertain in any claim for pension, gratuity or anything which in any way connected with the pensionary benefits. In the present case the complaint has prayed for payment of gratuity and fixation of pension. These matters arise out of service which the complainants husband was doing. Therefore these matters

will be tried by U.P. Public Service Tribunal and not by the District Consumer Forum. The learned District forum has committed a manifest error by invoking jurisdiction in the present case. The order passed by the learned District Forum is without jurisdiction and is liable to be dismissed.

The appeal is therefore liable to be allowed.

15. As will appear from the aforesaid order that the appeal was allowed only on the ground that the Consumer Forum has no jurisdiction to decide the case of recruitment of services of Dying in Harness rules. He has not adjudicated the application on merits.

16. A counter affidavit has been filed by the State where it was admitted that the Petitioner was a government servant being serving in the work charge establishment so far as other facts with regard to the disparity in the employment is concerned, the same was also admitted.

Paragraph 4- That late husband of the Petitioner Sri Govind Singh was engaged as a daily wager in the year 1976 and he worked as such till 1979. Thereafter in the year 1980 he was taken on the work charge establishment worked as such till 5.6.1993 when he died. The Petitioner is claiming for giving employment to one of his family under the Dying in harness Rules 1974 and also for pension/gratuity etc. as service benefits payable to other regular employees of the department. As the husband of the Petitioner was working as a work charged establishment employee to which the Dying in Harness Rules 1974 are not applicable, as such her claim and representation were rejected accordingly. Aggrieved by the aforesaid rejection, the Petitioner also moved a claim petition before the District Consumer Protection Forum, Tehri, District-Tehri Garhwal which are allowed in contravention to specific government orders of service rules made in this behalf time to time. As such, aggrieved by the aforesaid order of the District Consumer Protection forum, the Respondent No. 3 filed an appeal before the State Consumer Forum, which was allowed in favour of the Respondents vide its order dated 21.7.2000, as such the writ petition of the Petitioner is not maintainable as per Government Order dated 11.3.93 and 30.10.96 the benefits of Dying In Harness Rules 1974 are not permissible in the case of the Petitioner. The copy of the aforesaid Government Order dated 11.3.93 and 30.10.1996 are annexed herewith and marked as Annexure No. C.A.1 and C.A.2 to this counter affidavit respectively.

Paragraph 10- That the contents of para No. 4B, which has been wrongly typed as para No. 4 again are not admitted as stated, because Sri Trilok Singh was an employee of a regular establishment on the post of Chaukidar, who died on 23.9.97. Being the son of a regular employee Sri Kama; Singh was provided employment in the department under Dying in Harness Rules 1974 and not otherwise. In this connection the copy of the order dated 18.12.97 issued by the Executive Engineer, Temporary Division, P.W.D. Sri Nagar is annexed herewith and marked as Annexure No. C.A.3 to this counter affidavit.

Paragraph 11- That the contents of para No. 5 of the writ petition, as stated is incorrect and denied. The Petitioner has stated that Sri Harshmani has died and his son was given employment under the Dying in Harness Rules - 1974 in the department is rather misleading. Sri Harshmani is alive and is still working in the department. In this connection the information has furnished by the Executive Engineer, Temporary Division, P.W.D. Thatuer, Tehri Garhwal dated 14.9.2001 addressed to the Executive Engineer, Construction Division, P.W.D. Narendra Nagar, Tehri Garhwal is relevant, copy of which is annexed herewith and marked as Annexure No. C.A. 4 to this counter affidavit.

17. Rule 5 of the U.P. Recruitment of Dependents of Government Servants Dying In Harness Rules, provides as under:

5. (Recruitment of a member of the family of the deceased) (Subs. By Noti. 6/XII/73-Ka-2-99 dated 20th January, 1999, published in U.P. Gazette (Extra.) Part-4 section (Ka) dated 20th January 1999).

(1) In case a Government servant dies in harness after the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall on making an application for the purposes, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules if such person-

(i) fulfils the educational qualification prescribed for the post,

(ii) is otherwise qualified for Government service, and

(iii) makes the application for employment within five years from the date of the death of the Government servant:

Provided that where the State Government is satisfied that the time limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner.

(2) As far as possible, such an employment should be given in the same department in which the deceased Government Servant was employed prior to his death.

(3) (Ins. by Noti. 6/12-73-Ka-2-2001, dated 12th October, 2001 [vide U.P. Recruitment of Dependents of Government Servants Dying in Harness (Sixth Amendment) Rules. 2001 (w.e.f. 12.10.2001) Each appointment under Sub-rule (1) should be under the condition that the person appointed under Sub-rule (1) shall upkeep those other family members of the deceased Government Servant

who are incapable for their own maintenance and were dependent of the abovesaid deceased Government servant immediately before his death.

18. It has been held by the Apex Court in *Smt. Sushma Gosain and Others Vs. Union of India (UOI) and Others*, that the appointment on compassionate ground is made to enable the family to tide over the sudden crises. It reads as under:

We consider that it must be stated unequivocally that in all claims for appointment on compassionate grounds there should not be any delay in appointment. The purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread earner in the family. Such appointment should, therefore, be provided immediately to redeem the family in distress. It is improper to keep such case pending for years. If there is no suitable post for appointment supernumerary post should be created to accommodate the applicant.

19. Relying upon the judgment of *Smt. Sushma Gosain and Others Vs. Union of India (UOI) and Others*, it has been held in *Manish Mishra v. State of U.P.* 1998(3) ESC 1877 (All) the court has directed to create supernumerary post. The observation are quoted below:

The core question is whether mandamus can be issued commanding the Respondents to create supernumerary Class III post. The appointment on compassionate ground is made to enable the family to tide over the sudden crisis on the death of the deceased employee who was a bread earner in the family. If the post is not available a supernumerary post is to be created. In *Smt. Sushma Gosain and Others Vs. Union of India (UOI) and Others*, , wherein the widow of the deceased employee made application for appointment on the death of her husband in the year 1982 but she was not given appointment for many years, the court directed that if there is no suitable post for appointment, supernumerary post be created to accommodate the applicant with the following observation:

Paragraph 3- We consider that it must be stated unequivocally that in all claims for appointment on compassionate grounds, there should not be any delay in appointment. The purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread earner in the family. Such appointment should, therefore, be provided immediately to redeem the family in distress. It is improper to keep such case pending for years. If there is no suitable post for appointment supernumerary post should be created to accommodate the applicant.

Paragraph 4- In *Smt. Phoolwati Vs. Union of India and Others*, , the direction was given by the Apex Court relying upon the decision of *Smt. Sushma Gosain's* case (supra) for employing the applicant in that case on a suitable post commensurate with her educational qualification. The test, when class III or Class IV post or such other supernumerary post has to be created, was considered in *Umesh Kumar Nagpal v. State of Haryana and Ors.* Judgment Today 1994(3) SC 525,

wherein it was held that if the object of granting compassionate employment is to enable the family to tide over the sudden crisis, as a rule, appointments in public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any consideration is permissible. There are certain exceptions and one such exception is in favour of dependent of an employee dying in harness and leaving his family in penury and without any means of life. The posts in Classes III and IV are the lowest posts in non manual and manual categories and hence they alone can be offered on compassionate grounds:

In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency.

Paragraph 5- "The Government has decided to create supernumerary Class IV post. The direction given by the Government Order dated 16.8.96 is not in contravention of the principle laid down by the Apex Court referred to in Umesh Kumar Nagpal's case (Supra).

20. In the case of Smt. Pushp Lata Dixit v. Madhyamic Shiksha Parishad and Ors. following observations having made. Reliance was placed on the judgment of the case of Smt. Sushma Gosain and Ors. reported in 1991 (18) ALR 509:

2. Hon'ble Supreme Court in a case Smt. Sushma Gosain and Ors. v. Union of India and Ors. held that:

It can be stated unequivocally that in all claims for appointment on compassionate grounds, there should be any delay in appointment. The purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread earner in the family. Such appointment should, therefore, be provided immediately to redeem the family in distress. It is improper to keep such case pending for years. If there is not suitable post for appointment supernumerary post should be created to accommodate the applicant.

3. Keeping in mind that fact that the Petitioner was appointed in 1973 and continuously worked in the department up to the date of his death, in my opinion it would be proper to direct the opposite parties to accommodate the Petitioner in the Department. The Petitioner is a widow of the deceased who died in harness, therefore, I quash the impugned order dated 20.9.1989 contained in Annexure No. 11 and direct the opposite parties to consider the question of appointment of the Petitioner in accordance with her qualification and pass an order within one month from the date of receipt of this order and provide employment in accordance with her qualification.

21. In 2002 (1) UPLBEC 237 Santosh Kumar Mishra v. State of U.P., it has been held that though the deceased may be a daily wager still the appointment can be made under Dying In Harness Rules. Relevant paragraphs to that effect is quoted below:

Paragraph 7- Learned Counsel for the Petitioner has placed reliance upon the case of Raj Narain Prasad (supra), for stressing his submission that the Petitioner's father would be deemed to have been a regular Government servant in view of the fact that his appointment has been converted into workcharge employee in pursuance of the scheme approved by the Apex Court. He further submitted that in view of the decision rendered in the case of Smt. Pushp Lata Dixit v. Madhyamik Shiksha Parishad and Ors. reported in 1991 (18) ALR 509, the Petitioner is entitled for getting the appointment. In this case, the husband of Smt. Pushp Lata was working as a Paid Apprentice. The plea that he was not a regular employee although he had been working in the department for the last 17 years was not entitled for appointment under Dying in Harness Rule was rejected by the Court and the directions were issued to accommodate the Petitioner (Smt. Pushp Lata according to her qualifications relying upon this case, the writ petition filed by Smt. Maya Devi v. State of U.P. and Ors. reported in 1998 (79) FLR 608, was also allowed in which the High Court found that the Petitioner's husband in that case has satisfactorily worked for about 10 years until his death and though he may be a daily wager, the Petitioner can be accommodated on compassionate grounds under Dying in Harness Rules. In the case of Smt. Saroj Devi v. State of U.P. and Ors. reported in 1999 (3) ECC 2187 (All), the benefit was given to the temporary appointee as he was working against a substantive vacancy.

Paragraph 8- The learned State Counsel relying upon the phraseology used, submitted that the scope of Dying in Harness Rules, can neither be broadened nor enlarged. Emphasis has been laid upon the definition given of Government Servant in Rule 2 (a) of the aforesaid Rules, which means a Governments servant employed in connection with the affairs of Uttar Pradesh who (i) was permanent in such employment or (ii) though temporary had been regularly appointed in such employment or (iii) though not regularly appointed, had put in three years continuous service in regular vacancy in accordance with the procedure laid down for recruitment to the post or service, as the case may be.

Paragraph 9- According to the submission of the Learned Counsel for the State, a daily wager or workcharge employee who is engaged by the State Government or any department of the State Government cannot be treated as a Government servant within the definition of Rule 2 of the aforesaid rules. Qualifying the above argument, the Learned Counsel for the State further submitted that though an employee who is not regularly appointed is covered by the definition in view of Sub-clause (iii) of Rule 2(a) but in that case such employee must have put in three years continuous service, that too in regular vacancy in such employment. Since the Petitioner's father was earlier a daily wager or muster roll employee and later on worked as work charge employee, therefore, it cannot be said that he was appointed regularly or had worked in regular vacancy.

Paragraph 10- The case of State of Manipur Vs. Thingujam Brojen Meetei, , has been relied upon the Learned Counsel for the state for fortifying his argument. The Apex Court in the above referred case was dealing with a scheme which was issued by means of an office memorandum dated 2.5.1984 by giving appointments to the dependents of the person who died in harness. Para 3 of the scheme as initially framed provided as follows:

The concession under the above scheme shall also be applicable to those dependents mentioned in (2) in respect of those work charged employees who died in harness.

By means of corrigendum dated 8.5.1984 office memorandum dated 2.5.1984 was modified and paragraph (3) was substituted by the following provision:

The scheme shall be applicable only to regular Government employees in a vacancy available in the department in which the deceased employee worked

A note was also taken by the Apex Court that for work charged employees the Government of Manipur has framed the Terminal Benefits for work charged staff of PWD/Indian Penal Code/PHE/MI/Electricity, Manipur Rules, 1978 (for short, "the terminal Benefits Rules"). Under the Terminal Benefits Rules Permanent work-charged employee are allowed certain benefits in the pattern of CPWD in the matter of pension, gratuity, retirement, leave, holidays, etc.

Paragraph 11- The Apex Court found that even though a workcharge employee is confirmed, his status does not change from that of a work charge employee and that he would be entitled to the benefits which are available to him under the aforesaid Rules of 1978 but in view of the scheme, no appointment can be given to him under the said scheme.

Paragraph 12- The Apex Court was considering the scheme and the status of a work charge employee even after being confirmed it has been held that a workcharge employee after confirmation does not cease to be a work charge employee and he continues to be a workcharge employee. The question of regularization against a regular vacancy was not in issue before the Apex Court. NO rule, law of any Government Order has been brought to the notice of this

Court by the State to indicate that any terminal benefits have been provided to the workcharge employee who have to their credit a considerable period of service and even in cases after very longer period of service, they retire as such. Even no provision for confirmation of a work charge employee as a work charge employee is available in the State of Uttar Pradesh nor any such provision has been shown by the learned State Counsel despite being specifically asked for.

Paragraph 13- From the facts of the case of Thingujan Borjen Meetal (supra) it is clear that the scheme framed by the Government confine the benefits to the regular Government employees as per provisions of para 3 and the work charge employees are covered by another set of Rules of 1978. It is also obvious that their Lordships of the Supreme Court did not have an occasion to consider the question of daily wager or a work charge employee who has been allowed to continue for considerable length of service and has legitimate expectation of being regularized against a vacancy if the regular vacancy is not available at the time when he was engaged on daily wager or was converted into a work charge employee in the work charge establishment.

Paragraph 14- The practice of appointing daily wagers or work charge employees in very much prevailing in the State of Uttar Pradesh and instances are no less in number where the daily wagers or workcharge employees in the Government department have been allowed to continue for years together, namely, 15 years, 20 years and 25 years or till they actually reach the age of superannuation to which they may not be entitled, not being a Government servant but they are disposed with their engagement on attaining the age of superannuation. The practice of appointing such daily wagers and work charge employees has constantly been a matter of great concern for the judiciary and for that matter, the Apex Court has many a times issued directions for framing schemes so as to accommodate all daily wagers of long standing duration and work charge employees as a regular employees, it would be needless to mention that such a scheme has been ordered to be framed by the Court in the department of Rural Engineering Services in the Forest Department and many other departments.

Paragraph 15- In the instant case, it reflects that the Supreme Court being alive of the hanging fate of the daily wagers and workcharge employees who have put in considerable length of service approved a scheme for giving regular appointment to such workcharge employees, in the case of Raj Narain Prasad (supra) the Supreme Court was not oblivious of the fact that these daily wagers and workcharge employees are said to have been engaged for particular requirements but their continuous length of service and engagement entitles them to claim regularisation against existing or future vacancy. The Supreme Court specifically directed them that there should be regular review of cadre strength so that work charge employees may be accommodated against the available existing vacancies and to create the vacancies against which they can be accommodated and likewise muster roll employees can stand next to work charge employees. It, therefore, cannot be but rightly said that dependent of

every work charge employee irrespective of his length of service and irrespective of the fact whether he was, entitled for regularization or not can be deprived of the benefit of appointment on compassionate grounds

Paragraph 16- It may also be taken of that if daily wager or a work charge employee is engaged against a particular duty or post, and that work is of perennial nature, the presumption would be that such an employee would be entitled for being treated to have been continuing against a regular vacancy.

Paragraph 17- In the instant case, one more redeeming feature in favour of the Petitioner is that persons junior to the Petitioner's father who were similarly appointed and were taken on the work charge establishment were regularized against regular vacancies by means of order dated 2.11.98 but the case of the Petitioner's father was not considered and thus he was deprived the benefit of regularization. In case, the Petitioner's father had been considered at that time, he would have been regularized before he died on 1.4.99. Since the Petitioner's father was entitled for regularization after putting in such a long service and his case has not been considered for regularization, the Petitioner cannot be deprived of giving the appointment on compassionate ground because the opposite parties themselves did not consider the case of the Petitioner's father for regularization.

Paragraph 18- It is also not disputed that appointments of such nature have already been given by the department earlier and the Respondents State has not been able to indicate as to why the same benefit has not been given to the Petitioner.

22. In Jagdish Prasad Vs. State of Bihar and Another, , it has been held as under:

The very object of appointment of a dependant of the deceased employees who die in harness is to relieve unexpected immediate hardship and distress caused to the family by sudden demise of the earning member of the family.

23. In view of the aforesaid facts and circumstances, a writ of mandamus is issued directing the Respondents to consider the appointment of the Petitioner under Dying-in-Harness Rules.

24. Further a writ of mandamus is issued directing the Respondents to pay the pension, gratuity and the salary due to the deceased as well as the arrears of salary; pension and gratuity with interest at the rate of 10% per annum.

25. Respondents are directed to comply the aforesaid directions within a period of one month from the issue of the certified copy of the order.

26. Consequently, the writ petition is allowed. There will be no order as to costs.