

(1995) 07 AP CK 0009

In the Andhra Pradesh High Court

Case No : Writ Petition No. 12896 of 1991

Radhika Thirumalai A.

APPELLANT

Vs

Hindustan Aeronautics Limited

RESPONDENT

Date of Decision : 21-07-1995

Acts Referred:

Constitution of India, 1950 — Article 14, 141, 142(1), 144, 226
Recruitment and Promotion Rules, 1964 — Rule 78.3

Citation : (1995) 2 ALT 699

Hon'ble Judges : S.R. Nayak, J

Bench : Single Bench

Judgement

1. Common law does not oblige an employer to provide appointment to the dependents of a deceased employee. Even the Constitution of India does not specifically oblige any employer to provide compassionate appointments to the legal heirs or the dependents of the deceased employees. In other words, no dependent of an employee who dies in harness can claim compassionate appointment as a matter of right unless a scheme is framed by the concerned employer either under a Statute or in exercise of its executive or administrative power providing such appointments. However, in consonance with the concept of Welfare State, in recent times, the employers both in private and public sectors have evolved schemes providing for compassionate appointments to the legal heirs and the dependents on account of the untimely death of an employee in harness. Accordingly, in the present case the management of the respondent company had evolved a scheme by way of an executive act providing for compassionate appointments to the dependents of the employees who died in harness.

2. The petitioner is one Smt. A. Radhika Tirumalai @ Ratheka. The petition averments disclose that the husband of the petitioner was serving the respondent company as Senior Supervisor at the time of his death who is said to have died in harness on October 9, 1987. Thereafterwards, in pursuance of the scheme evolved by the respondent company, the petitioner claims to have made

an application on October 23, 1987; again on December 2, 1987 to the management of the respondent company requesting the latter to consider her case for appointment to the appropriate post under the scheme. It is claimed that the petitioner passed S.S.C. Since the respondent company refused to consider her candidature so far, she filed this writ petition in this Court in the year 1991 seeking a writ of Mandamus to the respondent company to provide her any suitable appointment under the scheme. During the pendency of the writ petition, the petitioner filed W.P.M.P. No. 22217 of 1994 for amendment of the prayer so as to question the validity of Rule 78.3 of the Recruitment and Promotion Rules, of 1964 for short the "Rules", framed by the Board of Directors of the respondent company insofar as the said Rule prescribes test and interview to the dependents of the deceased employees and insofar as it provides appointment only depending upon the availability of vacancies. That W.P.M.P. was ordered by this Court by a separate order and permission was accorded to amend the prayer.

3. On service of notice, the respondent company had filed its counter to the main writ petition as well as to the W.P.M.P. No. 22217 of 1994.

4. Heard the learned Counsel for the parties.

5. Sri P. B. Vijay Kumar, the learned Counsel appearing for the petitioner would submit that the husband of the petitioner died as far back as on October 9, 1987 and even after a lapse of nearly eight years, the case of the petitioner was not considered by the respondent company and this inaction on the part of the company is quite contrary to the law laid down by the Apex Court in the case of Life Insurance Corporation of India Vs. Mrs. Asha Ramachandra Ambekar and another, The learned Counsel would therefore contend that the inaction is totally arbitrary, illegal and violative of Article 14 of the Constitution. Further, the learned Counsel referring to the stand now taken by the respondent company that there is a ban on recruitment, would submit that the ban imposed on recruitment is not complete in terms and the so-called ban is exempted from operation in medical and critical areas and he would contend that the appointment of the petitioner on compassionate grounds under the scheme would fall under the concept of "Critical Area". Therefore, even assuming that the ban is valid and enforceable, that will not apply to the case of the petitioner. On the other hand, Sri K. Srinivasa Murthy, the learned Standing Counsel for the respondent company would at the outset submit that there is no vested right in the petitioner to seek compassionate appointment either in Common Law or in Constitution of India or in any Statute Law and but for the scheme framed by the Board of Directors of the Company, the petitioner would not have laid any claim for compassionate appointment. Elaborating this submission, Sri Murthy would further contend that the source of the right of the petitioner therefore should necessarily flow from the scheme itself and if that is so, the petitioner is bound and governed by the terms of the scheme and she is not entitled to seek a writ of Mandamus from this Court to the respondent company, to appoint her in

violation of any of the terms of the said scheme. Sri Murthy next contended that the law laid down by the Supreme Court in Sushma's Case should be understood in its right perspective and in the context of the fact situation of that case. The learned Counsel after referring to the facts of that case submitted that the Supreme Court made certain general observations in paragraph 9 of the judgment in the context of that case and therefore those observations cannot be applied literally to each and every case of compassionate appointment ignoring the facts and circumstances of individual cases. Sri Murthy placing reliance on the decisions of the Supreme Court in the case of Smt. Sushma Gosain and Others Vs. Union of India (UOI) and Others, and Umesh Kumar Nagpal v. State of Haryana (1995 I LLJ 798) and State of Haryana Vs. Naresh Kumar Bali, would submit that what is stated in para 9 of Sushma's case (supra) should be understood in the light of the subsequent decisions of the Supreme Court and no mandamus could be issued to the respondent company to appoint the petitioner on compassionate grounds in violation of the Rules governing such appointments. Referring to the averments made in the counter filed by the respondent company, Sri Murthy would submit that after the ban on recruitment was imposed, no appointments were made to Class IV services and there are 48 claimants as on to day who seek appointments in the services of the company on compassionate grounds and the company has made a list of those claimants strictly in accordance with the date of death of the concerned employees and in that list the name of the petitioner finds at serial No. 23. Even if any vacancy accrues or arises in future, the seniors to the petitioner are required to be considered for appointment and the claim of the petitioner cannot be considered overlooking the claims of the seniors. For all these reasons, the learned Counsel would submit that no case is made out for interference by this Court in exercise of its discretionary power under Article 226 of the Constitution of India.

6. As the Court pointed out at the thresh - hold it is true but for the scheme evolved by the respondent company, the petitioner would not have any vested right to claim compassionate appointment in the services of the company. The company in its discretion has framed the scheme providing for compassionate appointments. It is a fact that the husband of the petitioner died nearly eight years back. In that context and in the light of the terms of the scheme as well as decisions of the Apex Court on the issue, it has to be seen whether the petitioner has made out any case for issuance of a writ of Mandamus either to consider her case for appointment or to appoint her in any appropriate post.

7. In the case of Smt. Sushma (supra), the husband of Smt. Sushma by name Ramkumar, was working as Store Keeper in the Department of Director General, Border Road. He died in harness in the month of October, 1982. In November, 1982 the widow Smt. Sushma sought appointment in DGBR as Lower Division Clerk on compassionate grounds under the scheme and in the month of January, 1983 she was called for the written test and later on for interview. She passed the trade test. However, no appointment order was issued to her. In September, 1985 Smt. Sushma filed a writ petition in the High Court of Delhi seeking a

direction to the DGBR to appoint her in a suitable post. The said writ petition was dismissed by the Delhi High Court and consequently the matter was carried before the Apex Court. The contention put forth by the management in that case to deny the appointment to the petitioner was that there was a ban on recruitment of ladies in the year 1985 and therefore the petitioner could not be appointed. In that context, while granting the relief to the petitioner therein, the Apex Court in Paragraph 7 held thus :

"We consider that it must be stated unequivocally that 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."

What is stated in paragraph 9 of the judgment to my mind is a "judgment in rem" and not a "judgment in personam" applicable only to the facts of the case or to the petitioner before the Court. The Supreme Court has laid down the law in clear terms and it does not admit any other meaning than the meaning that in all claims for appointment on compassionate grounds there should not be any delay in appointment and if there is no suitable post, for appointment, supernumerary post should be created to accommodate the applicant. At this juncture the submission advanced by Sri Murthy is required to be noted. According to Sri Murthy, the learned Counsel, if these observations are literally taken into account, it would mean that a dependent is entitled to be appointed on compassionate ground irrespective of the fact whether the dependent possesses the requisite prescribed qualification or not for the post. I do not find any warrant to read such expansion in the observation of the Apex Court in paragraph 9. Their Lordships were not dealing with the question whether an applicant who seeks compassionate appointment should satisfy the prescribed qualification or not. The precise question before the Court in that case was whether the inordinate delay was justified or not and whether the defence put forth by the management that there was no vacancy is justified or not. Meeting these two precise questions, the Apex Court observed that there shall not be any delay in such appointments and if there is no vacancy, supernumerary posts are required to be created in order to accommodate the applicants for compassionate appointments.

8. The law laid down by the Supreme Court in Sushma's Case (supra) in my considered opinion is not diluted or in any way circumscribed by the subsequent pronouncements of the Apex Court. The three-Judge Bench of the Supreme Court in the case of Smt. Phoolwati Vs. Union of India and Others, considered the case of Smt. Sushma (supra) and affirmed and reiterated the same ratio. Therefore, it should be held that the view taken by the two Judge Bench of the

Supreme Court in Smt. Sushma's case (supra) has the affirmation and approval of the three Judge Bench.

9. The next case in the series is *The Life Insurance Corporation of India v. Asha Ramchandra Ambekar* (supra). In that case one Sri Ramchandra Ambekar was employed as higher grade Assistant in the Sanda Vbranch under the Nasik Divisional Officer of the Corporation and he died in harness on September 11, 1987. Upon his demise, his widow viz., Asha Ramchandra Ambekar, the first respondent before the Supreme Court, submitted an application seeking employment on compassionate grounds in the services of the Corporation on December 12, 1987. The management of the Corporation rejected the request of the widow on the ground that she had exceeded the upper age limit of 45 years and therefore her request could not be complied with. Thereafterwards, the son of the deceased employee made various representations seeking employment on compassionate grounds. The Corporation rejected his claim by issuing an endorsement on January 21, 1987. Thereupon, a writ petition was filed in the Bombay High Court seeking a direction to the Corporation to appoint him on compassionate grounds and the Bombay High Court by its order dt. October 19, 1993 directed the Corporation to appoint the son i.e., the second respondent on compassionate grounds. The Corporation went in appeal to the Supreme Court. The question before the Supreme Court was whether the Bombay High Court was justified in issuing a direction to the Corporation to appoint the son of the deceased employee contrary to the Statutory Regulations. The Apex Court also found fault with the High Court in issuing the Mandamus without examining whether one of the members of the family is gainfully employed or not. It is relevant to note that the compassionate appointment in the Corporation was provided by virtue of the provisions made under the Statutory Regulations. Full facts of the case are not forthcoming from this decision. However, what emerges from the observation of the Apex Court is that the Courts cannot issue a writ of Mandamus to the employer to provide appointments on compassionate grounds in violation of the Statutory Regulations. This ratio laid down by the Apex Court in no way dilutes the law laid down by the Supreme Court in Sushma's case (supra). It is relevant to note that in this case the Supreme Court has not at all referred to or considered the decision of the earlier Bench in Sushma's case (supra).

10. This next case to be considered is *Umesh Kumar Nagpal v. State of Haryana* (supra). In this case the Supreme Court has referred to the earlier decision in the case of Smt. Sushma (supra) in paragraph 4 of the decision. The only question considered by the Supreme Court in this case is whether while offering compassionate appointments to the dependents of the deceased employees it is permissible for the employer to appoint such dependents to any class of services other than Class III and Class IV services. The Supreme Court after referring to Sushma's case (supra) opined that compassionate appointment cannot be offered in Class II posts and it should be confined to Class III or Class IV posts only. Although the Supreme Court referred to Sushma's case (supra), it had to

differ from the law laid down by the Supreme Court in Sushma's case (supra) in paragraph 9 of that decision.

11. The last case in the series is State of Haryana v. Naresh Kumar Bali (supra). In this case also, the decision in Sushma's case (supra) was neither referred to nor considered. In that case, the father of the respondent was employed as Constable in the office of the Superintendent of Police at Ambala and he died in harness on March 14, 1977. There were instructions issued by the State of Haryana containing a scheme under which the widow of the deceased employee could sponsor the name of any one member of the family for service to any post in any department of the Government, and this provision was subject to the qualifications held by the persons whose names were forwarded for appointment. In accordance with this scheme, the widow of the deceased employee was issued an intimation that she could sponsor a name. Accordingly, the widow forwarded the name of her son by name Naresh Kumar Bali who was the respondent before the Apex Court. On August 3, 1988 the mother of the respondent i.e., the widow wrote a letter to the authority of the State Government stating that her son was willing to do the job of a clerk and therefore should he be appointed to the said post. That resulted in the appointment of her son to the post of Clerk. Thereafterwards, the son informed the employer that since he had applied for appointment to the post of a teacher to the Subordinate Service Selection Board prior to his appointment by the department as a clerk on compassionate ground, he should be appointed as a teacher and be transferred to Education Department. That request was not acceded to by the State Government. When the matter stood thus, the mother of the employee by her representation dated March 17, 1990 requested the authorities to appoint her son to the post of Sub-Inspector of Police claiming that he possessed the requisite prescribed qualifications. Recruitment to the post of Sub-Inspector in that case was only by way of promotion and not by direct recruitments as per the relevant Police Rules of 1934 and therefore the request of the mother was rejected by the department vide its order dated April 18, 1990. The subsequent representation of the mother to transfer her son to the Excise Department was also rejected. That led the mother to file a writ petition in the Punjab and Haryana High Court and the High Court allowed the writ Petition directing the State to appoint the son of the petitioner as Inspector of Police within a period of three months. The said judgment was called in question before the Supreme Court by the State of Haryana. In that factual background the Apex Court observed as under in paras 15 and 16 :

"15. We have set out the factual background in full. The letter of the respondent's mother dated August 3, 1988 categorically states that her son (respondent) was willing to be appointed as a clerk. It was on that the appointment letter, extracted above, came to be issued. Though the respondent claimed that he had applied for the post of a teacher the Subordinate Service Selection Board had not chosen him for the post of a teacher because he did not have the requisite qualification. In fact, the respondent did not object to his

appointment as a clerk and his claim for consideration for the post of teacher was one year after his appointment. Thus, the appointment on compassionate ground as per the scheme had been completed. The claim for appointment as Inspector was never made earlier. The High Court without even analyzing the circumstances under which the seven persons mentioned in its judgment came to be appointed as Police Officers (ASI or Inspector), straight away has chosen to conclude that there was discrimination. We are not in a position to appreciate this line of reasoning. The positive finding ought to have been given whether the case of the respondent was comparable with those of the seven and then a finding of discrimination ought to have been rendered.

16. With regard to appointment on compassionate ground we have set out the law in *Life Insurance Corporation of India v. Asha Ramchandra Ambekar* (supra). The same principle will clearly apply here. What the High Court failed to note is the post of an Inspector is a promotional post. The issuing a direction to appoint the respondent within three months when direct recruitment is not available, is unsupportable. The High Court could have merely directed consideration of the claim of the respondent in accordance with the Rules. It cannot direct appointment. Such a direction does not fall within the scope of mandamus. Judicial review, it has been repeatedly emphasised, is directed against the decision-making process and not against the decision itself; and it is no part of the Court's duty to exercise the power of the authorities itself. There is widespread misconception on the scope of interference in judicial review. The exercise of the extraordinary jurisdiction constitutionally conferred on the Apex Court under Article 142(1) of the Constitution can be of no guidance on the scope of Article 226. For these reasons we set aside the judgment under appeal and remit the matter to the High Court for a fresh consideration in the light of what we have indicated above. Accordingly, the appeal is allowed. No costs."

12. As could be seen from the observations of the Apex Court, the Court found fault with the High Court in not noticing that when the son of the deceased was appointed as a clerk, the appointment on compassionate ground as per the scheme had been completed and therefore the High Court ought not to have issued a writ of Mandamus to the State to appoint him again as Inspector of Police. The Apex Court also observed that the High Court ought not to have issued a direct Mandamus to appoint the son of the deceased to the post of Inspector of Police and instead the direction to consider his candidature for the post ought to have been issued. In this case also there is no reference to the case of *Smt. Sushma* (supra). Therefore, I hold that none of the cases delivered by the Supreme Court subsequent to the case of *Smt. Sushma* (supra) has diluted the ratio contained in paragraph 9 of that decision. Therefore, the case of the petitioner is required to be considered in the light of the law laid down by the Apex Court in paragraph 9 of the decision in *Sushma's* case (supra).

13. Referring to the facts of this case it should be noticed that the petitioner made applications as far back as on October 23, 1987. It is admitted fact that

her candidature is not considered till today. The defence put forth by the respondent company is two fold viz., there is a ban on recruitment after May 18, 1987 and secondly there are twenty two others who are also seeking appointment on compassionate grounds and unless their candidatures are considered and they are appointed, there is no scope for considering the case of the petitioner and appointing her to any suitable post. In my considered opinion these contentions put forth by the management are not tenable in view of the law laid down by the Supreme Court in Sushma's case (supra). As already pointed out the ratio contained in paragraph 9 of the decision in Sushma's case (supra) is a judgment in rem and it is applicable universally. As pointed out by the Supreme Court, the purpose of providing appointment on compassionate ground is to mitigate the hardship caused to the defendant due to the death of the bread earner in the family. In this case, the petitioner has pleaded that after the death of her husband she was in dire need of appointment to sustain herself. The Apex Court has again reiterated the object behind the giving of appointment on compassionate grounds in paragraph 2 of the Judgment in Umesh Kumar & Nagpal's case (supra) which reads thus :

"The question relates to the considerations which should guide while giving appointment in public services on compassionate ground. It appears that there has been good deal of obfuscation on the issue. As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interest of justice and to meet certain contingencies. One such exception is in favour of the dependents of an employee dying in harness and leaving his family in penury and without any means of livelihood. 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 dependents of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family tide over the sudden crisis. The object is not to give a member of such family a post much less a 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 111 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. The

provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependent of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz., relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned".

The combined reading of the observations of the Supreme Court in Sushma's case (supra) as well as Umesh Kumar & Nagpal's case (supra) makes it imperative on the part of the employer to consider the claims of the dependents of the deceased employees within a reasonable time and then to make appointment if they possess the prescribed qualifications. Since in this case, the claim of the petitioner is not yet considered on merit, the inaction on the part of the management should be held to be arbitrary, unreasonable, violative of Article 14 of the Constitution as well as the authoritative pronouncement of the Supreme Court in Smt. Sushma Gosain's case (supra). Therefore, the petitioner is entitled to a writ of Mandamus directing the respondent company to consider her case within a specified time and if she is found to be fit and eligible then to appoint her to any appropriate post.

14. The first defence put-forth by the respondent company that there is a ban on recruitment is not tenable for more than one reason. Ban on recruitment is imposed by an executive act, not by law or under any statutory regulations. The law laid down in para 9 of the judgment of the Apex Court in Smt. Sushma Gosain's case (supra) is a "judgment in rem" and therefore the respondent company is bound by it by virtue of cumulative effect of provisions of Articles 141 and 144 of the Constitution of India. Article 141 provides that law declared by the Supreme Court shall be binding on all Courts within the territory of India whereas Article 144 ordains that all authorities, civil and judicial. In the territory of India shall act in aid of the Supreme Court. These two Articles are complimentary to each other. While Article 141 says that the law declared by the Supreme Court shall be binding on all Courts in India, Article 144 enjoins such Courts to aid in the enforcement of such law. Article 144 is, however, wider inasmuch as it includes not only Courts. But also other civil authorities, and it relates not only to the enforcement of the law declared by the Supreme Court, but all its orders, decrees or directions. The respondent company is an "authority" within the meaning of Article 144. In carrying out a legal obligation if an authority has to violate its own executive/administrative instructions, it should do so and if it does so, no one can take any exception to such action. However, in this case the Court finds that there is no need for the respondent company to violate its policy decision imposing ban on recruitment. Ban on recruitment is not

complete. Ban is exempted from operation in "medical" and "critical areas". "Sushma" (supra) ordains that there should not be any undue delay in providing appointments to the dependents of the deceased employees on compassionate ground, and even in a case where there is no vacancy, the employer is obliged to create supernumerary posts in order to accommodate the dependents of the deceased employees. If that is so, obedience to the obligation flowing from the dictum of the Apex Court in "Sushma" (supra) should be considered to be a "critical area" and therefore it is permissible for the respondent-company to make appointment on compassionate ground invoking this exemption and without violating the policy banning recruitment.

15. There is also no merit in the second contention put forth by the learned Standing Counsel for the respondent company that there are 22 other persons who are also dependents of the other employees of the company who died in harness and who laid claims for appointment earlier to the petitioner and in the list prepared by the Management of the company, the petitioner's name finds at S. No. 23 and therefore unless all those 22 persons above the petitioner are appointed on compassionate ground, appointment to the petitioner cannot be offered and if it is offered it would amount to invidious discrimination. It is not known whether those 22 persons - dependents of the deceased employees have also approached this Court for the relief or not. Be that as it may, it is needless to state that the respondent-company is under an obligation to offer appointment on compassionate ground to the said 22 persons as well as others if they claim appointment on compassionate ground under the rules, provided they fulfill the conditions of appointment stipulated under the rules without any undue delay. There is a ban on recruitment or there are no vacancies cannot be valid and good ground to defer consideration of the claims of the dependents for appointment on compassionate grounds as held by "Sushma" (supra).

16. Before concluding, it should be noted that the petitioner has also challenged the vires of Rule 78.3 of the Rules. In my considered opinion this need not be gone into at this stage, as the respondent has not yet considered the case of the petitioner and has (not) taken any decision on merit. It is settled position in law that the Constitutional question should not be decided or entertained by the Constitutional Courts unless it becomes absolutely necessary to resolve an issue arising in a case. The Constitutional Courts shall not decide Constitutionality of a law or regulation or rule as matters of academic importance as held by the Apex Court in State of Bihar v. Rai Bahadur AIR 1960 SC 878. I do not find any necessity to decide that question at this stage and accordingly the Constitutional question raised by the petitioner regarding vires of Rule 78.3 is kept open to be agitated at an appropriate stage and accordingly W.P.M.P. No. 2217 of 1994 stands disposed of.

17. In the result and for the foregoing reasons, I make the following :

ORDER

I. The writ petition is allowed with costs. Advocate's fee Rs. 1,000/-

II. A Writ of Mandamus shall issue to the Respondent company to consider the candidature of the petitioner for appointment on compassionate ground to any suitable post in Class III or Class IV services only and if she is found suitable and eligible, then to appoint her to such post within a period of two months from the date of receipt of a copy of this order.