

(2007) 11 GAU CK 0014
In the Gauhati High Court
Case No : Writ Petition (C) No. 410 of 2002

Sanjoy Sukla Das

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 14-11-2007

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2008) GLT 394 Supp

Hon'ble Judges : U.B. Saha, J

Bench : Single Bench

Advocate : D. Chakraborty, for the Appellant; P.K. Biswas, for the Respondent

Final Decision : Dismissed

Judgement

U.B. Saha, J.—The prayers made in the instant writ petition are for quashing/ setting aside the impugned orders dated 24.9.2002 and 31.12.2002 (Annexure-H and I to the writ petition respectively) and also for a direction to the Respondents to provide the Petitioner a job under the Indian Army on compassionate ground under the die in harness scheme.

2. The factual matrix of this case is that the Petitioner is an unfortunate, unemployed son, whose father, namely, Matilal Sukladas, died on 25.7.1999, while he was working as Conservancy Safaiwala in the Station Headquarters of 58 Wrls Exptl Unit, C/o. 99 APO, Agartala and was the only earning member, bread earner in the family. Being there was a scheme in existence for providing a job to a family member of the deceased employee of the Respondents, the mother of the Petitioner approached the authority of the station head quarter of Agartala and also to the Army Headquarter, New Delhi for providing a job to one of the members of the family under the die in harness scheme in force at the relevant time. At the time of death of his father the deceased employee, the Petitioner was a boy of 18 years. Hence he could not take up the matter with the authority. But after he became major, on 20.12.2001, the Petitioner made representation to the aforesaid authority for providing him with a job

commensurating his educational qualification under the Die in harness scheme. On 14.1.2002, the Director (VIG & PG), Ministry of Defence, vide his communication dated 14.1.2002, requested the appropriate authority to examine the grievance of the Petitioner promptly. But there being no action on the representation of the Petitioner, the Petitioner has filed this writ petition with aforesaid prayers.

3. During the pendency of the writ petition, the Petitioner received a letter dated 24.9.2002 (Annexure-H to the writ petition) written by the Dy. Director, GS/SD-7(Adm Civs) for Dy. Chief of the Army Staff (T&C) which reads as under:

Registered/SDS

Addl. Dte. Gen of Staff Duties

Sd-7(Adm Civs)

General Staff Branch

Army Headquarters

DHQPO. New Delhi

No. 92842/SD-7(Adm Civs)/32 24 Sep 2002

Sh. Sanjay Sukla Das

S/o. late Sh. Motilal Sukla Das

R/o. Vill. Barjala, P.s. Barjala

P.S. West Agartala, Distt. West Tripura

Communication of the Decision of Board of Officers of 1st Sitting-SH/SMT Sanjay Sukla Das S/o/W/o late Sh. Motilal Sukla Das, ex. C/ Safaiwala Stn. HQ Agartala.

1. Reference your application dated 26.2.02 seeking compassionate appointment.
2. As per para 12 (c) of DOP&T OM No. 14014/6/94-Estt(D) dated 09 Oct 1998 an application for compassionate appointment is to be considered by a Board of Officers in the light of Govt. instructions on the subject. The decision of the BOO is to be communicated to the applicant after every sitting. The application if not recommended in the first sitting for want of vacancy is to be considered afresh along with fresh applications by the Board of Officers on three occasions consecutively and the final decision is to be communicated to the applicant by a speaking order.
3. The Govt. has also issued the revised points system based on 100 points scale (reproduced overleaf) attributed to various parameters such as an amount of family pension, terminal benefits, No of Defendants, No of unmarried daughters, No of minor children, movable/immovable property, leftover service etc. to quantify the level of compassion in each case for making a comparatively

balanced and objective assessment vide MOD ID No. 19(4) 824-99/1998-D(Lab) dated 09 Mar 2001.

4. Total 60 applications for compassionate appointment were received till end Aug 02 by SD-7 (Adm Civs) from various offices under its Adm Control against 11 vacancies available under 5% quota. The eleventh case recommended by the Board has secured 81 points. Thus all those cases, which secured less than 81 points were not recommended by the Board due to non-availability of vacancy under 5% quota. Your application secured 69 points and consequently has not been recommended by the BOO. Your case however will be considered again by Board of Officers in the next meeting along with the fresh applications.

Sd/- (A Rajan Babu) Dy Director GS/SD-7 (Adm Civs) For Dy. Chief of the Army Staff (T&C) Copy to : (1) Stn. HQ Agartala

* * *

4. It appears from the aforesaid communication that an application for compassionate appointment is to be considered by a Board of Officers (for short BOO) in the light of Govt. instructions and the decision of the BOO is to be communicated to the applicant after every sitting. The application if not recommended in the first sitting for want of vacancy is to be considered afresh along with fresh applications by the board of officers on three occasions consecutively and the final decision is to be communicated to the applicant by a speaking order. It further reveals that the Govt. has also issued the revised points system based on 100 points scale attributed to various parameters as stated therein such as an amount of family pension, terminal benefits etc. to quantify the level of compassion in each case for making a comparatively balanced and objective assessment. It has been stated that total 60 applications for companionate appointment were received till end Aug 02 by SD-7 (Adms Civs)¹ from various offices under its Adm control against 11 vacancies available under 5% quota. The eleventh case recommended by the Board has secured 81 points. Thus all those cases which secured less than 81 points were not recommended by the Board due to non availability of vacancy under 5% quota And the Petitioner's application secured 69 points and consequently has not been recommended by the BOO. It has further been stated that the case of the Petitioner will however be considered again by board of Officers in the meeting along with the fresh applications.

5. Thereafter another communication, dated 31.12.2002, has been made by the same authority to the Petitioner informing him that his case has been considered by the Board of Officers on the third occasion along with fresh applications. Total 69 applications for compassionate appointment were considered against 03 vacancies available under 5% quota. The 3rd case recommended by the Board has secured 91 points. Thus all those case which secured less than 91 points were not recommended by the Board due to non availability of vacancy under 5% quota. As Petitioner's application has secured 69 points, his case has not

been recommended for want of vacancies under 5% quota. For better appreciation, the said communication, dated 31.12.2002, is quoted hereinbelow:

Registered/SDS Addl. Dte Gen of Staff Duties SD-7 (Adm Civs) General Staff Branch Army Headquarters DHQ PO, New Delhi-110011

No. 92842/SD-7(Adm Civs)/42 31 Dec 2002 Sh. Sanjay Sukla Das S/o. late Sh. Motilal R/o.Vill & P.O. Barjala P.S. West Agartala Bench Distt. West Tripura

Communication of the Final Decision of ADGSD for Compassionate Employment to Sh. Sanjay Sukla Das Late Sh. Moti Lai Sukla Das Ex-Consy Safaiwala of Stn. HQ. Agartala.

1. Reference your application dated 26.2.02 and this HQrs letters of even number dated 24 Sep 2002 and 26 Nov 2002.

2. Your case has been considered by the Board of Officers on the third occasion along with fresh applications. Total 69 applications for companionate appointment were considered against 03 vacancies available under 5% quota. The 3rd case recommended by the Board has secured 91 points. Thus all those cases which secured less than 91 points were not recommended by the Board due to non availability of vacancy under 5% quota. As intimated earlier, your application has secured 69 points. Your case has thus not been recommended by the BOO, for want of vacancies under 5% quota.

3. The competent authority, Addl. Director General of Staff Duties has considered your case as per Govt. Orders on the subject and turned it down for not coming up in the comparative merit even third time which is made equal to the number of vacancies available under Govt. prescribed 5% quota.

4. Your case has been decided strictly in accordance with the elaborate objective parameters laid down by the Govt. to quantify the compassion as given overleaf. No authority has any powers to take decision other than these parameters. You are therefore advised in your own interest not to waste your effort and time in making correspondence with any authority on this issue.

Sd/-(A Rajan Babu) Dy. Director, GS/SD-7(Adm Civs) For Dy Chief of the Army Staff (T&C)

Copy to : Stn. HQ Agartala The documents in respect of above individual is forwarded herewith.

MOD/D (Lab)-ID No. 1313/2002/D(Lab) dated 09.8.2002.

6. The Respondents by way of filing the counter-affidavit resisted the claim of the Petitioner. It has been stated that the simple case of the Respondents is that though the Petitioner's case was considered, due to non availability of the vacancies under the 5% quota, his case could not be recommended by the Board of Officers as the Petitioner got 69 points whereas the persons provided job against eleven vacancies recommended by the Board got 81 points and 3rd

vacancy was also filled up by the person who got 91 percent. It has further been contended in the counter-affidavit that though it was intimated to the Petitioner that his case will be considered again by the Board of Officers (BOO) in the next meeting along with the fresh applications, the Petitioner did not file any fresh application to the Station Headquarter at Agartala even after receipt of the letter dated 24.9.2002 from the Army Headquarter.

7. Heard Mr. D. Chakraborty, learned Counsel for the Petitioner and Mr. P.K. Biswas, learned Assistant SG for the Respondents.

8. Mr. Chakraborty learned Counsel for the Petitioner submits that die in harness scheme being a beneficial scheme for providing job to a family member of the deceased Govt. employee who died while in service. Therefore, restriction to 5% quota of the vacancies under the die in harness scheme is unreasonable and violative of Article 14 of the Constitution. Hence, the communication dated 24.9.2002 (Annexure-H) and dated 31.12.2002 (Annexure-I) are liable to be set aside and the Petitioner should be provided with a job under die in harness Scheme on compassionate ground there being no earning member in the family to tide over the crisis resulted due to the death of the sole bread earner, the father of the Petitioner, the deceased employee. Mr. Chakraborty further submits that though in the writ petition there is no specific contention for relaxation of the said condition of 5% quota, but the Court has the power to direct the Respondents to relax the quota system so that the applicants under the die in harness scheme like the Petitioner can get the job smoothly without facing any hurdle which has been put by the Respondents in the Scheme incorporating 5% quota of the total vacancies as well as introducing the points system. According to him, restriction/limit put by the Respondents would frustrate the object behind introduction of the die in harness scheme. Mr. Chakraborty further submits that it was the duty of the authority, however, to consider the case of the Petitioner during the pendency of the writ petition and for which no fresh application is required, but that was not done, for which itself also, this Court has the power to direct the Respondent for providing a job to the Petitioner under die in harness scheme, or otherwise to direct the authority to consider the case of the Petitioner afresh along with other fresh applications, if necessary to accommodate an applicant like Petitioner under die in harness. The Respondents are bound to create supernumerary post and if they fail to do so the same, Court can direct to create a supernumerary post for accommodation of the Petitioner he is being an applicant under die in harness scheme due to death of only bread winner of the family.

9. Per contra, Mr. Biswas, learned Assistant SG for the Respondents submits that employment under the die in harness scheme is not a right of the family members of a deceased employee, rather consideration for appointment under the said scheme is a right. He has further contended that the employer has the right to put restriction as well as ceiling limit in the scheme prepared by them for die in harness keeping in mind the facts. Thousands and thousands of employees

are in the queue for getting jobs. Though the applicants like the Petitioner lost their bread earners, but they are getting the other retiral benefits of the service of the deceased employees. If the entire vacancies are provided to the applicants like the Petitioner under the die in harness scheme, then there would be no post either for direct recruitment or for promotion even. In support of his contention, so far 5% ceiling, he relied on a judgment of the Apex Court in Union of India (UOI) Vs. Joginder Sharma, particularly, he referred to para-4 and 5, which is extracted hereinbelow:

4. Heard the learned Counsel for the Appellant and the learned Counsel for the Respondent. The compassionate appointment is intended to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the sole breadwinner, who died leaving the family in penury and without sufficient means of livelihood. If under the Scheme in force any such claim for compassionate appointment can be countenanced only as against a specified number of vacancies arising, in this case 5 percent, which ceiling it is claimed came to be imposed in view of certain observations emanating from this Court in an earlier decision. The Tribunal or the High Court cannot compel the department concerned to relax the ceiling and appoint a person. Since this method of appointment is in deviation of the normal recruitment process under the rules, where people are waiting in the queue indefinitely, the policy laid down by the Government regarding such appointment should not be departed from by the courts/tribunals by issuing directions for relaxations, merely on account of sympathetic considerations or hardships of the person concerned. This Court as early as in the decision reported in LIC of India v. Asha Ramchandra Ambedkar held that the courts cannot direct appointments on compassionate grounds dehors the provisions of the Scheme, in force governed by rules regulations/instructions. If in a given case, the department of the Government concerned declines as a matter of policy, not to deviate from the mandate of the provisions underlying the Scheme and refuses to relax the stipulation in respect of ceiling fixed therein, the courts cannot compel the authorities to exercise its jurisdiction in a particular way and that too by relaxing the essential conditions, when no grievance of violation of substantial rights of parties could be held to have been proved, otherwise.

5. So far as the case on hand is concerned both the Tribunal as well as the High Court seem to have fallen into great and same error. A mere recommendation or expression of view by an authority at the lower level that if relaxation is accorded. There is scope for appointment does not obligate the competent authority to necessarily grant relaxation or that the courts/tribunals can compel the competent authority to grant relaxation. The reasons assigned by the High Court to reject the challenge made by the Appellant. Seem to be no reason in the eye of the law apart from they being totally oblivious to the very stipulations in the Scheme and the very object underlying the Scheme of making appointments on compassionate grounds. Where the question of relaxation is in the discretion of an authority in the government and not even in the realm of any statute or

statutory rules but purely administrative and that authority as a matter of policy declines to accord relaxation, there is hardly any scope for the tribunal/court to compel the exercise to grant relaxation. The two factual instances, sought to be relied upon, on behalf of the Respondent, have been properly explained by the Appellant to be not really and in substance a deviation from the general policy not to relax so as to alter the ceiling and create more than the stipulated number of vacancies, to appoint persons on compassionate grounds.

10. Mr. Biswas has finally contended that the case of the Petitioner was considered with fresh applications on three occasions consecutively by the Board of Officers (BOO) and final decision was communicated to him. Hence, no further consideration is called for so far the present applicant is concerned. The counter-affidavit was filed by the Respondents-authorities before amendment of the writ petition incorporating the fact that the case of the Petitioner will be considered if he files a fresh application. But from Annexure-H and I, it is clear that as per policy, the case of the Petitioner under die in harness scheme can only be considered for three occasions, not more than that, and it was done in this case, and as such, the writ petition is liable to be dismissed straightway.

11. This Court has given an anxious thought to the submissions of the learned Counsel of both the parties as well as contentions made in the writ petition and the counter-affidavit and the law report cited by the learned Counsel for the parties. It is an admitted position that the father of the Petitioner was an employee of the Respondents and the Petitioner applied for a job under die in harness scheme to tide over the crisis faced by them after the death of his father, the lone bread earner of the family and the Respondents also considered the prayer of the Petitioner for providing a job under the die in harness Scheme as was in force not only on one occasion but also on three occasions as required by the Scheme and the result of the consideration was communicated to the Petitioner stating, inter alia, that due to non availability of the vacancies within the 5% quota, the case of the Petitioner could not be recommended by the Board of Officers, authorized for such recommendation and the persons who were recommended they got higher points than the Petitioner.

12. Only dispute between the parties that remains for consideration is firstly whether the Respondents employers have the power to frame the Scheme incorporating ceiling limit particularly five percent of the vacancy for filling up the post/vacancy from amongst the applicants who preferred applications for getting job under the die in harness scheme considering the points system i.e. the elaborate objective parameters to qualify compassion to the family members of the deceased employees and whether the said ceiling limit and the qualification of the compassion byway of point system are required to be interfered with and secondly whether the Respondents can be directed for providing job to the Petitioner even after considering his prayer by the authority under the scheme by way of creating a supernumerary post as there is no bread earner in his family. According to this Court, mere death of an employee does not entitle any of the

family members to claim compassionate appointment under the die in harness scheme as a matter of right. There is difference between "rights" and "compensation". For a right, one can ask for fulfillment of that right since it is an interest, the violation of which would be a legal wrong and the competent authority is bound to respect such interest being it is a legal duty. But for "compassion" one has to wait for the mercy, grace or sympathy of the competent authority to act in that behalf as the compassion is nothing but an exception to the normal rule. Right to appointment being a normal route of public employment which requires open invitation of applications and the applicants have to face competition, but in compassionate appointment the said open invitation is not required and no competition is called for, rather being an exception to the normal route prescribed to give succor to the destitute family which has plunged into penury due to untimely death of the sole bread winner and cast no legal duty to the authority.

13. When a person applies for a job following procedure and succeeds in the interview and gets selected by the authority, then only a right is accrued for claiming a job to the said post, the same being a legal right, but in die in harness, prescription in the scheme rule is a condition precedent for getting a job. The scheme being prepared for compassionate appointment, it is the authority who only can decide whether they will provide job to a family member of a deceased employee or not on such compassionate ground and that too whether they would frame scheme for that purpose or not. In the instant case, keeping in mind that the family members of the deceased employee faced sudden crisis just after his death he being the lone bread earner, the Respondents-employers framed a scheme for providing job to one of the family members of the deceased employee to tide over such crisis also considers that all the vacancies should not go to the family members of the deceased employees who are otherwise compensated to tide over their crisis from the property of the deceased employee left over by him including person and other retiral benefits and the movable and immovable properties. Only five percent of the vacancies should go to them so that the general provisions/route of the employment should not be hampered and the unemployed youth waiting in queue for getting job after following the prescribed procedure should not be deprived of. According to this Court, such restriction/ceiling limit is not unreasonable, rather a reasonable restriction which is permissible, and if the entire vacancies are filled up only by the legal heirs/dependant family members of the deceased employee, then unemployed waiting for in general route would face serious problem which may disturb the society. Now the question remains to be answered is whether Court can direct the employer to appoint a family member after creating supernumerary post. Creation or abolition of post is within the domain of the employer. Normally Court cannot direct or recommend for creating a supernumerary post to make available the vacancy in order to accommodate a given person in the die in harness scheme, since it is the sole province of employer and not the writ Court. But that does not mean that a genuine claim of

the family members of the deceased employee shall not be entertained and considered by the authority for providing a job under the Scheme in force to tide over the sudden crisis. In a given case, it is the duty of the employer to provide job to one of the family members of the deceased employee for which the scheme is framed specially to the person fulfilling the conditions laid down in the scheme and the Court cannot at all give a direction to create a supernumerary post for providing benefit of die in harness scheme, if the authority considered the case in accordance with the scheme and due observance of law See *State Bank of India and Another Vs. Somvir Singh*, Yet the Court has the power, which can only be exercised in a particular case where the employer fails to discharge its duty and the family members of the deceased employee has established violation of Article 14 of Constitution. In the instant case, as it appears from the letter dated 24.9.2002 and 31.12.2002 (Annexure-H and I respectively to the writ petition) that the case of the Petitioner was considered not only on one occasion but also on three consecutive occasions and due to non availability of the vacancies his case could not be recommended by the Board of Officers (BOO) and he has also secured lesser point than the persons recommended for the job under the die in harness scheme, hence it cannot be said by this Court that the right for consideration of the Petitioner for getting the job was denied by the authority. The aforesaid observation of this Court is supported by the decision of the Apex Court in *Umesh Kumar Nagpal Vs. State of Haryana and Others*, ; *Managing Director, MMTC Ltd., New Delhi v. Pramoda Dei alias Nayak*, (1997) 11 SCC 390; *State of Jammu & Kashmir and Others Vs. Sajad Ahmed Mir*,

14. The Court cannot resume the power of the employer while deciding a writ petition, particularly on prayer for providing a job under the die in harness scheme, as that will encroach the power of the administrative authority. The Court can only see whether any right of the family members of the deceased employee is affected either by action or by inaction of the Respondents employer while they consider the case of the family members of the deceased employee. It is also settled by this time that the Court cannot decide the matter on sympathetic consideration contrary to law See *State of Tamil Nadu and Others Vs. St. Joseph Teachers Training Institute and Another*, The Court should endeavour to find out whether the case in hand is to be weighed within the parameter of the law and it should not be disregarded to the law, whatever, the grave situation is faced by the Petitioner. In the instant case, no case is made out by the Petitioner for interference with the decision of the Respondents. In the result, the writ petition stands dismissed. No order as to costs.

15. This Court is constrained to note here that it is painful that the Court cannot provide proper justice unless the proper assistance comes from the parties. In the instant case, though the Petitioner prayed for providing job under a particular die in harness scheme, but he did not annexe the same to the writ petition for consideration and perusal of the Court. On the other side, the Respondents also while denied the claim of the Petitioner failed to place the said scheme under which they considered the case of the Petitioner. At this stage, no

other option is before this Court except to decide the matter on the records available being the writ petition filed by the Petitioner pending before this Court since 2002.

16. However, the dismissal of this writ petition will not be a bar for the Respondents-authorities to consider the case of the Petitioner, if he comes in accordance with the scheme for consideration to get a job due to the death of his father, the deceased employee.