

(2015) 08 AHC CK 0003

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 43622 of 2015

Senior General Manager, Ordnance Factory Kalpi Road

APPELLANT

Vs

Central Administrative Tribunal, Allahabad and Others

RESPONDENT

Date of Decision : 05-08-2015

Acts Referred:

Constitution of India, 1950 — Article 311(2)

Citation : (2015) 8 ADJ 62 : (2016) 1 ESC 90 : (2015) 3 UPLBEC 2460

Hon'ble Judges : Arun Tandon, J; Ashwani Kumar Mishra, J

Bench : Division Bench

Advocate : Mahendra Bahadur Singh, for the Appellant; Namwar Singh and Sanjiv Singh, Advocates for the Respondent

Judgement

1. This writ petition has been filed by the General Manager, Ordnance Factory, Kanpur against the judgment and order of the Central Administrative Tribunal (herein after referred to as the "Tribunal") dated 29.5.2015 passed in Original Application No. 1006 of 2011, Amit Verma v. Union of India and others. The Original Application No. 1006 of 2011 was filed by Amit Verma, respondent No. 2 challenging the order dated 25.1.2011 passed by the General Manager, Ordnance Factory, the petitioner before us as well as against the appellate order dated 21.3.2012.

2. Under the orders impugned before the Tribunal, the services of Amit Verma, who was offered compassionate appointment, had been put to an end after recording that his work and performance during the period of probation was not satisfactory.

3. The Tribunal relying upon the Division Bench judgment of this Court in the case of Jagdish Narain Vs. Union of India (UOI) and Others, (2011) 8 ADJ 217 : (2012) 2 AWC 1526 : (2011) 3 UPLBEC 2196 as well as after following the judgment in the case Sanjai Kumar v. Deputy Director General (NCE), Directorate U.P., Lucknow and others, 2002 (3) ESC 454 (All) and in the case of Ram Chandra v. State of U.P. and others, 2008 (2) ESC 1053, has recorded a finding

that so far as the compassionate appointees are concerned, they cannot be treated to be on probation as their appointment has to be regular/permanent. Therefore, before terminating the services of such an compassionate appointee, there has to be an enquiry preceding the punishment. The order of termination has accordingly been set aside.

4. Counsel for the petitioner before us submitted that the judgment of the Division Bench in the case of Jagdish Narain (Supra) does not lay down the correct law inasmuch as the said judgment has failed to take into consideration that under the provision relating to compassionate appointment, as notified under the Government of India notification dated 9.10.1998, only relaxation in some matters has been provided to such appointees namely:

- (a) Exemption from following the recruitment process.
- (b) Non applicability of ban, if any, on appointment.
- (c) Relaxation in the outer age limit.
- (d) Such other relaxation in the matter of typing test etc.

5. It is, therefore, explained that other provision pertaining to direct recruitment would continue to apply. Meaning thereby that a compassionate appointee has necessarily to be placed on probation at the first instance. It is only when he completes the period of probation satisfactorily that he is to be confirmed on the said post. It is also explained that there is no magic in the word "regular appointment". All appointments made as per the rules applicable are regular appointments including compassionate appointment.

6. It is settled law that compassionate appointees have been held to be appointees covered by direct recruitment vis-a-vis the appointees who are promoted. It is explained that the aforesaid aspect of the matter has not been examined by the Division Benches in the case of Jagdish Narain (supra) while holding that compassionate appointees need not be appointed on probation.

7. We have examined the judgment of the Division Bench of this" Court in the case of Jagdish Narain (supra) as well as the statutory provisions as applicable. Relevant portion of the judgment reads as follows:

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

As would reveal from the foregoing discussions and the Circular relied upon by the respondents" meant for appointment on compassionate grounds, there is no

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

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

In view of the foregoing discussions, we are of the view that the respondents were not justified in terminating the services of the petitioner treating him as a probationer as his appointment on compassionate ground should have been made on permanent basis. The Tribunal has failed to consider this aspect of the matter and illegally held that it was not open for the petitioner to challenge the conditions of appointment letter and in terms of the appointment letter the termination of the petitioner was justified. We are of the opinion that once the petitioner's appointment was found permanent in nature the putting of conditions on probation basis in appointment letter is unjustified. The respondents could not have terminated the petitioner's services treating him as a probationer and only course open to the respondents was to take recourse of law as contemplated under the Civil Services (Classification Control and Appeals) Rules, 1965 for his absence from duty which may amount misconduct. The respondent's act is also hit by Article 311(2) of the Constitution of India."

8. We find it difficult to agree with the general proposition of law as has been laid down in the case of Jagdish Narain (*supra*).

9. There has been non-consideration of the impact of the provision pertaining to grant of relaxation in the matter of compassionate appointees, in the facts of the case, Clause 6 of the Government Order dated 9.10.1998. Compassionate appointees like any other direct recruit has necessarily to be placed under probation at the first instance as per the service rules after he is exempted from undergoing the process of selection etc. Therefore, what logically follows is that if the compassionate appointee does not complete the period of probation successfully, his services are liable to be terminated like any other direct recruit.

10. The Court may record that the distinction between a temporary appointee and a person appointed on probation is well known under Service Jurisprudence and has repeatedly been explained by the Supreme Court.

11. It is true that the provisions of Temporary Government Servant Rules may not be applicable to a compassionate appointee but such non application of the said rules cannot lead to a conclusion that a compassionate appointee is not to be appointed on probation.

12. The Division Bench, in our opinion, was not correct in recording that under the circulars there is no provision for a compassionate appointee to be placed on probation at the first instance. We, therefore, feel that the following questions of law need to be examined by a Larger Bench of this Court:

(a) Whether in view of relaxation granted in some matters only qua compassionate appointment, is it not necessary that even a compassionate appointee be placed on probation at the first instance like any other direct recruit employee, in view of the fact that the provision pertaining to appointment on probation, at the first instance, has not been excluded or exempted in favour of compassionate appointees.

(b) Appointment on compassionate ground on probation at the first instance is also a regular appointment, therefore, it does not mean that he has been offered temporary appointment.

(c) Whether in Service Jurisprudence the distinction between temporary appointee and a regular appointee who is appointed on probation in accordance with the rules applicable is more than clear or not.

13. In view of the what has been recorded above, petitioner has made out a case for grant of interim order.

14. Till the next date of listing, operation of the order dated 29.5.2015 passed by the Tribunal shall remain stayed. Let this order be placed before Hon"ble The Chief Justice for constituting a Larger Bench for answering the questions, referred to above.