

(2019) 03 CAT CK 0159

In the Central Administrative Tribunal

Case No : Original Application No. 4339 Of 2017

Sh. Barham Prakash

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 25-03-2019

Acts Referred:

Constitution Of India, 1950 — Article 14, 16

Citation : (2019) 03 CAT CK 0159

Hon'ble Judges : Pradeep Kumar, J

Bench : Single Bench

Advocate : Mohit Prasad, Shailendra Tiwary

Final Decision : Dismissed

Judgement

1. The applicant was appointed as Khalasi on 27.07.1982.

He suffered from arthritis and diabetes on 02.08.2013. The respondent - Railway has a system of Authorised Medical Attendants (AMA) who are the doctors posted in the field and provide the initial treatment and if there is need they refer the patient to Specialist. The applicant was diagnosed as a case of osteoarthritis below left knee on 11.09.2013 and he was referred to Orthopaedic Specialist doctor. The treatment was given.

The applicant remained under sick certificate, i.e., unfit for duty during 17.02.2016 to 15.01.2017 and was referred back to AMA. The Authorised Medical Attendant referred the case of applicant for examination by a Medical Board on 04.01.2017 to assess his fitness for duty. For this purpose, the Chief Medical Superintendent of Delhi Division referred the applicant on 20.04.2017 to the Specialist (Orthopaedic) who examined the possibility of knee replacement. Thereafter, the Medical Board examined the patient on 05.06.2017 and prepared a report.

The recommendations of Medical Board in relation to medical de-categorisation and for consideration of compassionate ground appointment in lieu thereof, were

put up to the competent authority, namely, General Manager for acceptance. These recommendations were not accepted by the General Manager on 27.09.2017 and this was in turn advised by CHS Headquarter office to CMS Delhi and the CMS Delhi advised the same on 04.10.2017 to the Controlling Officer, namely, Dy. Chief Engineer (G) under whom the applicant worked. The applicant was kept on rolls of department till he attained superannuation.

2. The applicant is aggrieved that his case being of medical de-categorisation, was required to have been dealt with under PS No.10194 dated 27.06.1990 issued by Railways. This PS specified certain conditions under which compassionate ground appointment can be considered in lieu of medical de-categorisation. Feeling aggrieved, the OA has been preferred.

3. The applicant relies upon two judgments:

(i) V.Sivamurthy vs. State of Andhra Pradesh and others, (2008) 13 SCC 730 wherein the judgment was delivered on 12.08.2008. The relevant parts of this judgment are reproduced below:

"These appeals by special leave challenge the judgment dated 12.10.2001 of a Full Bench of Andhra Pradesh High Court holding that there can be no appointment on compassionate grounds in cases other than death of a government servant in harness, and that any scheme for compassionate appointment on medical invalidation of a government servant, is unconstitutional, being violative of Article 16 of the Constitution of India.

2. By GO dated 30.7.1980, the government of Andhra Pradesh formulated a scheme for providing compassionate appointment to the dependents (spouse/ son/daughter) of Government servants who retired on medical invalidation. By a further GO dated 4.7.1985, the benefit of the scheme was restricted to cases where the Government servants retired on medical invalidation, at least five years before attaining the age of superannuation. To prevent misuse of the scheme, the State Government issued GO dated 9.6.1998, prescribing suitable safeguards and procedures by constituting Medical Boards, District/State Level Committees to examine and recommend the applications for compassionate appointment on ground of medical invalidation. It provided that as and when a government servant sought retirement on medical grounds, the concerned appointing authority should refer the case to the Medical Board; that on receiving the medical opinion, he should refer the matter to the District Level Committee (or the State Level Committee in respect of employees in the Secretariat); and that the said Committee would scrutinize the proposals for compassionate appointment in accordance with the guidelines and make its recommendations to the State Government which would take the final decision.

3. The following clarification was issued by Government Memo ('GM' for short) dated 25.6.1999, as to the date with reference to which the five year period prior to superannuation should be reckoned:

"It is hereby clarified that the benefit of compassionate appointment will be applicable only to those government employees who retire on Medical Invalidation Five (5) years before they attain the age of superannuation. Therefore, the required period of five (5) years of left over service is to be reckoned from the date of issue of orders of retirement on medical invalidation. It is further clarified that in cases where the Government employees do not have five (5) years of service before the employees attain the age of superannuation at the time of considering such cases by the State Level Committee or District Level Committees, the respective Committees after scrutiny of Medical invalidation certificates in those cases may recommend only for retirement of such government employees on medical invalidation as per the certificate issued by the Medical Board."

The said clarification led to considerable grievance. The government servants felt that the clarification was not just. They contended that even when a government servant made an application for medical invalidation when the 'left over period' was more than five years, if there was delay on the part of Medical Board and/or the District Level or State Level Committee in processing and making the recommendations, the 'left over period' may get reduced to less than five years thereby making his dependant ineligible for the benefit of compassionate appointment. For example, if an application for medical invalidation was made six years prior to the due date of superannuation, but the process of verification by the Medical Board, the process of recommendation by the District/State Level Committee and the process of sanctioning of retirement, took more than one year, and as a consequence the sanction for retirement is given on a date when the 'left over period of service' is less than five years, for no fault of the government servant, the benefit of compassionate appointment to his dependant family member will be denied.

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18. The principles relating to compassionate appointments may be summarized thus :

(a) Compassionate appointment based only on descent is impermissible. Appointments in public service should be made strictly on the basis of open invitation of applications and comparative merit, having regard to Articles 14 and 16 of the Constitution of India. Though no other mode of appointment is permissible, appointments on compassionate grounds are well recognised exception to the said general rule, carved out in the interest of justice to meet certain contingencies.

(b) Two well recognized contingencies which are carved out as exceptions to the general rule are :

(i) appointment on compassionate grounds to meet the sudden crisis occurring in a family on account of the death of the bread-winner while in service.

(ii) appointment on compassionate ground to meet the crisis in a family on account of medical invalidation of the bread winner.

Another contingency, though less recognized, is where land holders lose their entire land for a public project, the scheme provides for compassionate appointment to members of the families of project affected persons. (Particularly where the law under which the acquisition is made does provide for market value and solatium, as compensation).

(c) Compassionate appointment can neither be claimed, nor be granted, unless the rules governing the service permit such appointments. Such appointments shall be strictly in accordance with the scheme governing such appointments and against existing vacancies.

(d) Compassionate appointments are permissible only in the case of a dependant member of family of the employee concerned, that is spouse, son or daughter and not other relatives. Such appointments should be only to posts in the lower category, that is, class III and IV posts and the crises cannot be permitted to be converted into a boon by seeking employment in Class I or II posts.

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30. There are of course safeguards to be taken to ensure the scheme is not misused. One is to ensure that mere medical unfitness to continue in a post is not treated as medical invalidation for purposes of compassionate appointment. A government servant should totally cease to be employable and become a burden on his family, to warrant compassionate appointment to a member of his family. Another is barring compassionate appointments to dependants of an employee who seeks voluntary retirement on medical grounds on the verge of superannuation. This Court observed in Ram Kesh Yadav (supra) as follows :

"But for such a condition, there will be a tendency on the part of employees nearing the age of superannuation to take advantage of the scheme and seek voluntary retirement at the fag end of their service on medical grounds and thereby virtually creating employment by "succession". It is not permissible for the court to relax the said condition relating to age of the employee. Whenever a cut-off date or age is prescribed, it is bound to cause hardship in marginal cases, but that is no ground to hold the provision as directory and not mandatory."

We find that in this case stringent safeguards were in fact built into the scheme on both counts by GMs dated 4.7.1985 and 9.6.1998.

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34. The contention of the appellants is that once an application is made by a government servant at a point of time when the left over period of service is more than five years, the medical examination by the Medical Board, recommending process by the District/State Level Committees and consideration and decision by the state government, are not in the hands of the Government

servant and therefore neither he nor his dependant should be punished by denying compassionate appointment on account of delays on the part of the authorities. The appellants therefore contend that the eligibility should be determined with reference to date of application and not with reference to date of sanction. But the terms of the scheme are clear. The benefit of compassionate appointment is available to a son/daughter/spouse of a government servant who retires from service on medical invalidation five years before attaining the age of superannuation. Under the scheme therefore, the five year cut off period commences from the date of retirement from service on medical invalidation and not from the date of application by the government servant for retirement on medical invalidation. This was also clarified in the G.M dated 25.6.1999 which forms part of the scheme.

35. The issue is not what is most advantageous to the government servant, but what is the actual term of the scheme. The question is not whether an interpretation which is more advantageous or beneficial to the Government servant should be adopted. The question is whether the policy as it stands which is clear and unambiguous, is so unreasonable or arbitrary or absurd as to invite an interpretation other than the normal and usual meaning. Matters of policy are within the domain of the executive. A policy is not open to interference merely because the court feels that it is not practical or less advantageous for government servants for whose benefit the policy is made or because it considers that a more fairer alternative is possible. Compassionate appointment being an exception to the general rule of appointment, can only be claimed strictly in accordance with the terms of scheme and not by seeking relaxation of the terms of the scheme. The fact that on account of certain delays in processing the application, a government servant may lose the benefit of the scheme, is no ground to relax the terms of the scheme. If in a particular case the processing of an application is deliberately delayed to deny the benefit to the government servant, the inaction may be challenged on the ground of want of bona fides or ulterior motives. But where the time taken to process the application (through medical Board, local/State level Committee and the government) is reasonable, the government servant cannot contend that relief should be extended, even if the left over period is less than five years. Let us give an example. If an application for compassionate appointment on the ground of medical invalidation is given five years and one week before the date of superannuation, obviously the Government servant cannot expect the entire process of scrutiny, medication examination, recommendation and consideration at three levels should be completed in one week. He cannot contend that when he had made the application the left over period was more than five years and therefore his dependant is entitled to appointment. As stated above these are matters of policy and courts will not interfere with the terms of a policy, unless it is opposed to any constitutional or statutory provision or suffers from manifest arbitrariness and unreasonableness. Conclusion

36. We therefore allow these appeals, set aside the judgment of the High Court.

We also set aside the orders of the Tribunal though on different grounds. We uphold the validity of the compassionate appointment scheme (contained in the GO dated 30.7.1980, 4.7.1985 and 9.6.1998 as clarified by Memo dated 25.6.1999) providing that the period of five years of 'left over service' should be reckoned from the date of issue of the order of retirement on medical invalidation and not from the date of application for retirement on medical invalidation."

In this case the request of the petitioner for compassionate ground appointment was rejected as the balance period of service left was less than five years. The matter reached Hon?ble Apex Court and in the judgment Hon?ble Apex Court had laid down certain principles which are to be kept in view while offering compassionate ground appointment in medical invalidation cases. The Hon?ble Apex Court has laid down that laid down scheme is to be followed in letter and spirit and in this regard the important point, as to when an employee is to be treated as unemployable, is when the relevant Medical Board declares the employee as medically invalidated and not from the date when the employee might have requested for such invalidation.

(ii) Bhawani Prasad Sonkar vs. Union of India and others, (2011) 4 SCC 209 - This case was decided on 11.03.2011. This is the case of an employee who was serving the Railway and was prematurely retired on 30.08.1999 on medical grounds. He was not offered any alternate employment for the medical category in which he was still fit. The respondents had a policy dated 22.09.1995 in place to deal such cases. The petitioner had made a request dated 01.09.1999 for compassionate ground appointment of his son to a Class IV post. This was not agreed as it was pleaded that only those cases of voluntary retirement are to be considered where there was total invalidation. In the referred case, the applicant was found fit in medical category B-1, however, he still preferred to go on voluntary retirement and hence his request for compassionate ground appointment was rejected.

The petitioner felt aggrieved and approached the Tribunal in which OA was dismissed. The Revision Application was also dismissed and thereafter the petitioner approached Hon?ble High Court in a writ which also was dismissed and thereafter the petitioner preferred a SLP in Hon?ble Apex Court. The observations and the decision by the Hon?ble Apex Court in this SLP are reproduced below:

"13. Mr. D.P. Chaturvedi, learned counsel appearing on behalf of the appellant, while assailing the impugned judgment, strenuously urged that having retired appellant's father without offering him a suitable alternative job, despite the fact that he was found medically fit in category B1, the respondents were obliged to appoint the appellant in terms of instructions dated 7th April, 1983 and 3rd September, 1983, which were reiterated in Circular dated 22nd September, 1995.

14. Per contra, Mr. Ashok Bhan, learned counsel appearing on behalf of the respondents, contended that appellant's father, having opted for voluntary

retirement in terms of the Railway Board's letter dated 18th January, 2000, could not seek appointment of his son on compassionate ground.

Learned counsel urged that the appellant has not brought any material on record to substantiate his plea that his father was forced to retire.

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20. Thus, while considering a claim for employment on compassionate ground, the following factors have to be borne in mind:

(i) Compassionate employment cannot be made in the absence of rules or regulations issued by the Government or a public authority. The request is to be considered strictly in accordance with the governing scheme, and no discretion as such is left with any authority to make compassionate appointment dehors the scheme.

(ii) An application for compassionate employment must be preferred without undue delay and has to be considered within a reasonable period of time.

(iii) An appointment on compassionate ground is to meet the sudden crisis occurring in the family on account of the death or medical invalidation of the bread winner while in service. Therefore, compassionate employment cannot be granted as a matter of course by way of largesse irrespective of the financial condition of the deceased/incapacitated employee's family at the time of his death or incapacity, as the case may be.

(iv) Compassionate employment is permissible only to one of the dependants of the deceased/incapacitated employee, viz. parents, spouse, son or daughter and not to all relatives, and such appointments should be only to the lowest category that is Class III and IV posts.

21. Tested on the touchstone of these broad guidelines governing appointment on compassionate ground, we are of the opinion that the appellant has made out a case for such appointment. It is manifest that in terms of circular dated 29th November, 2001 only those employees, who have been totally incapacitated from performing any service after 29th April, 1999 were entitled to seek compassionate employment for their wards. In the instant case, appellant's father retired on 30th August, 1999 i.e. after 29th April, 1999, but was not offered alternative employment in terms of the Circular dated 29th April, 1999.

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23. In light of the fact that Circular dated 29th November, 2001 was not applicable in the case of appellant's father, inasmuch as the benefit of the 29th April, 1999 Circular was not extended to him, and he was made to retire from service, we are of the opinion that the earlier circular dated 22nd September, 1995 is applicable in the instant case. Consequently, the appellant would be entitled to employment on compassionate ground as the said Circular contemplates compassionate employment for the wards of those employees who

have been medically de-categorized, and have retired, without being offered an alternative suitable job. We are unable to accept the plea of the respondents that on being de-categorized, appellant's father had opted for voluntary retirement.

24. In light of the foregoing discussion, the appeal is allowed; the impugned judgment is set aside and it is directed that the appellant shall be granted employment on compassionate ground within three months of the receipt of copy of this judgment, subject to his complying with other eligibility conditions, as applicable on 1st September, 1999. However, for all intents and purposes, he shall be deemed to be in service from the date of actual joining."

The Hon'ble Apex Court has thus held that this was a case of premature retirement on medical grounds and accordingly the respondents were directed to consider compassionate ground appointment.

4. The respondents had opposed the instant OA with following averment:

"6. It is submitted that though, the applicant was declared unfit for all medical Categories of the Indian Railway, however his illness does not fall in the prescribed category defined for invalidation during last one year of service, as per letter no. 85/H/5/10 dated 27.06.1990 issued by the Ministry of Railway which states that "The grounds for considering invalidation on medical grounds in such cases would only be for terminal stages of fatal illness or massive injury with recent loss of both lower limbs/both upper limbs. For all other cases including diminution loss of vision, high blood pressure, uncontrolled diabetes etc. leave may be granted under Para 529 of Indian Railway Medical Manual."

5. The relevant policy letter dated 27.06.1990 which deals with the compassionate ground appointment in respect of medical invalidation cases, provides for the following:

"Sub:- Decategorisation and Medical invalidation of Railway Employees.

It has been brought to the notice of this Ministry that a large number of Railway employees on various Zones, are pressurising to get themselves invalidated on medical grounds during the last year of their service.

As per the extant provisions the medical examinations for all cases for invalidation on medical grounds is conducted by Board of 3 Medical Officer. The report of this examination is submitted to the CMOs. The date of acceptance of the report by the CMO is date of certification for invalidation on medical grounds.

It has been decided that in those cases where the date of medical certification falls in the last one year of service, the following rules shall apply:-

1. The Medical Board to be constituted should be headed by a SAG officers, Employees working in Divisions/Extra Divisional Unit which do not have a SAG Medical Officer would have to requisition a suitable SAG Officer nearby as nominated by CMO.

2. General Manager would be competent authority to accept this invalidation on after the age of 57 years, acting on the expert advice of the CMO. He will use discretion.

3. The grounds for considering invalidation on medical grounds in such cases would only be for terminal stages of fatal illness or massive injury with recent loss of both lower limbs/both upper limbs. For all other cases including diminution loss of vision, high Blood Pressure, uncontrolled diabetes etc. leave may be granted under Para 529 of Indian Railway Medical Manual.

The procedure enumerated above may be strictly followed in all case of medical invalidation after the age of 57 years."

6. Respondents pleaded that since the balance service left, at the time when the applicant was declared medically unfit, was less than a year and the applicant was allowed to continue in his job on normal salary till he attained the age of superannuation. The provisions of policy letter dated 27.06.1990 were, therefore, not attracted, and therefore, the competent authority, namely, General Manager had rejected the request of compassionate ground appointment, which cannot be faulted. The ratio of the two relied upon judgments are also not applicable in this OA. The OA needs to be dismissed.

7. Matter has been heard at length. Sh. Mohit Prasad, learned counsel represented the applicant and Sh. Shailendra Tiwary, learned counsel represented the respondents.

8. In the instant case, the applicant had suffered from arthritis and diabetes. The respondent - Railway has a system to provide medical treatment in their primary health units through Authorised Medical Attendants as well as of a higher level Specialist Hospitals also on free of cost basis. These treatments were accorded.

The applicant has not suffered any injury.

For the sick period, the applicant was granted medical leave and he was continued in service till he attained the age of superannuation.

Therefore, the provisions of policy letter dated 27.06.1990 are not attracted. The decision by the respondent- Railway cannot be faulted.

9. The Hon^{ble} Apex Court had laid down the parameters which are required to be kept in view while considering the compassionate ground appointment request [para 3 (i) & (ii)]. It has specifically been directed that where a scheme exists, the provisions of the same are required to be strictly followed in letter and spirit.

10. In the instant case, the medical invalidation was declared by the Medical Board in the last year of service of the applicant and therefore, he was continued in service till he attained the age of superannuation. He had not suffered in injuries also as are defined in policy letter dated 27.06.1990 (para 5 supra).

11. The scheme of compassionate ground appointment is to take care of the financial distress, death or when an employee is no more employable. These conditions do not hold true in respect of the applicant as he continued to be in service till he retired on attaining the age of 60 years and he has been granted the medical leave as well as retiral dues.

12. Accordingly, the provisions of policy letter dated 27.06.1990 are not applicable in the case of the applicant. Accordingly, OA is dismissed being devoid of merit. No costs.