
(2005) 09 GAU CK 0039
In the Gauhati High Court
Case No : W.A. No. 2 (K) of 2005

State of Nagaland and Another

APPELLANT

Vs

Asieno Sakhrie

RESPONDENT

Date of Decision : 16-09-2005

Acts Referred:

Constitution of India, 1950 — Article 12, 309

Citation : (2005) 4 GLT 523

Hon'ble Judges : B.P. Katakey, J;B.K. Sharma, J

Bench : Division Bench

Advocate : B.N. Sarma, S.S. Goswami and K. Hazarika, for the Appellant; R. Iralu, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—This appeal is directed against the judgment and order dated 27.03.03 passed in W.P. (C) No, 16 (K)/02 allowing the writ petition with a direction to regularize the service of the writ Petitioner as Typist in the regular scale of pay.

2. The Respondent who was the writ Petitioner lost her husband on 02.12.93 while he was in his service. He left behind the Petitioner along with her three minor children. The husband of the Petitioner was serving as District Sports Officer. Upon such death of the husband of the Petitioner, she applied for her appointment on compassionate ground and the Respondents who are the Appellants in this appeal, appoint her by order dated 24.06.94. She was appointed as Typist on contract basis for a period of three months w.e.f. 01.07.94 to 30.09.94.

3. After the initial appointment of the Petitioner, she was again appointed by order dated 19.03.97 as LDA for a period of six months. Although her appointment was stated to be on contract basis, she was appointed on compassionate ground in the Nagaland Civil Secretariat. The Petitioner was

continued in her service by issuing various orders of appointment limiting the durations for temporary spells. By the last order dated 16.11.01 she was appointed as Typist on fixed pay of Rs. 3000/- in the Nagaland Civil Secretariat w.e.f. 15.10.01 for the period upto 31.03.02. Along with her, other 109 candidates were appointed and their such appointment was stated to be on recommendations of the Selection Committee. The name of the Petitioner figured at Serial No. 79 of the list.

4. Amidst of the aforesaid temporary spells of service of the Petitioner in the time scale of pay and eventually on fixed pay of Rs. 3000/- by order dated 16.11.01, the Petitioner made time to time representations urging for her appointment on compassionate ground and/or regularisation of her service. The Secretary to the Govt. of Nagaland in the Public Health Engineering Department by his communication dated 30.07.01 addressed to the Secretary to the Govt. of Nagaland in the Home Department, while forwarding one such representation of the Petitioner made the following endorsement.

Please find enclosed herewith an application for regularisation received from Mrs. Asieno Sakhrie which is self explanatory. This is a very genuine case requires compassionate consideration. I shall therefore be grateful if the application is given due consideration if there arises any opportunity to accommodate her.

5. It appears that the authority made an endorsement dated 16.8.01 on the body of the said communication to the following effect:

This case should not fall under the general category of casual appointees but should fall under the category of appointees on compassionate ground.

We may therefore take up the case along with other similar case for regularisation against clear vacancies.

6. The Respondents in the writ petition resisted the claim of the Petitioner by filing their counter affidavit. The basic ground urged on behalf of the Respondents was that since the Petitioner was appointed on contract basis, she had no right to get regularisation of her service. Referring to the Rules of recruitment, i.e. Nagaland Secretariat Subordinate Service Rules 1972, it was the case of the Respondents that unless the requirements of the provisions of the Rules were fulfilled, the Petitioner could not be regularized in her service. As regards the appointment of the Petitioner on fixed pay, it was the stand of the Respondents that such appointments were made on the basis of the recommendation of a Committee. Thus, there was no denial on the part of the Respondents that the Petitioner was selected for appointment on fixed pay basis. However, the Respondents did not deal with the basic issue as to whether the Petitioner was entitled to get appointment on compassionate ground. In their counter affidavit, they never denied the right of the Petitioner to get consideration for appointment on compassionate ground.

7. The learned Single Judge having regard to the facts and circumstances

involved in the case as noticed above, was of the opinion that the Petitioner with the burden of three minor children cannot be rendered jobless and accordingly direction was issued for regularisation of her service.

8. Mr. B.N. Sarma, learned Sr. Counsel appearing for the Appellants submitted that the writ Petitioner cannot claim as a matter of right regularisation of her service. He also submitted that even if the case of the Petitioner is considered to be one of compassionate appointment, only direction that could have been issued by the learned Single Judge was to consider her case for such appointment. He argued that no mandamus could have been issued by the learned Single Judge for regularisation of her service. He placed reliance on the following decision of the Apex Court:

B.N. Nagarajan and Others Vs. State of Karnataka and Others,

Director, Institute of Management Development, U.P. Vs. Smt. Pushpa Srivastava,

Life Insurance Corporation of India Vs. Mrs. Asha Ramachandra Ambekar and another,

State of Orissa v. Chandra Sekhar Mishra, (2002) 10 SCC 583

9. Countering the above arguments made on behalf of the Appellants, Mr. R. Iralu, learned Counsel appearing for the Respondent/ Petitioner submitted that the writ Petitioner deserves special consideration in view of the fact that she was in dire need of employment under the Appellants in view of sad demise of her husband, the sole breadearner of the family. He submitted that the Appellants instead of acting as a modal employer, unnecessarily dragged the Petitioner to the Court who is in precarious predicament with her three minor children. He submitted that the Appellants ought to have given consideration to the case of the Petitioner in a meaningful manner instead of arising the pleas centering legal niceties. Placing reliance on the decision of the Apex Court as reported in Balbir Kaur and Another Vs. Steel Authority of India Ltd. and Others, , he submitted that impugned judgment and order is required to be sustained.

10. We have given our anxious consideration to the submissions made by the learned Counsel for the parties and the materials on record. At the very outset on being asked as to whether at the time of death of the husband of the Petitioner, there was any prevalent scheme of the State of Nagaland providing for compassionate appointment. Mr. B.N. Sarma, learned Sr. counsel appearing for the Appellants submitted that there was no such scheme for compassionate appointment and thus the case of the Petitioner could not be considered for such appointment. He submitted that the appointment of the Petitioner for temporary durations was out of sheer sympathy and not by way of consideration of any vested right of the Petitioner for consideration of her case for appointment on compassionate ground.

11. The Appellants placing reliance on Annexure-A Office Memorandum dated 13.02.02 contended that as per the said scheme appointments on compassionate

ground could only be made in the department in which the deceased employee was serving. One of the pleas raised on behalf of the Appellants was that since the writ Petitioner was appointed in the department other than the one in which the deceased husband of the Petitioner worked, her such appointment was beyond the scope of the Office Memorandum dated 13.02.02.

12. The above plea of the Appellant is belied by there own office memorandum dated 01.08.78 on the subject of compassionate appointment. By the said office memorandum dated 01.08.78, the Govt. of Nagaland in the Department of Personnel and Administrative Reforms adopted the office memorandum dated 23.05.78 issued by the Ministry of Home Affairs, Govt. of India issued on the subject of compassionate appointment. A copy of the office memorandum dated 01.08.78 was produced by the learned Counsel for the Petitioner/Respondent. He also produced a copy of the Govt. of India office memorandum dated 23.05.78 laying down the procedure for consideration of the case for compassionate appointment. Thus, the argument made on behalf of the Appellants that at the time of death of the husband of the Petitioner, there was no scheme for compassionate appointment was contrary to the actual position in the matter. Learned Counsel for the writ Petitioner/Respondent also brought on record the office memorandum dated 13.06.79 issued by the Govt. of Nagaland in the Department of Personnel and Administrative Reforms, which reads as follows:

No. AR-8/8/78 dated Kohima the 13 th June, 1979 OFFICE MEMORANDUM

Sub: Compossionate appointment of son/ daughter/near relative of deceased gov. servants.

The undersigned is directed to refer to the subject mentioned above and to say that the proposal for compassionate appointments of son/daughter/near relative of deceased Govt. servants who dies in harness, leaving his family in immediate need of assistance has been under examination of the Govt. for sometime back.

It has been decided that since the Govt. is already giving due consideration to such cases no specific policy is required to be laid down for such appointments at present.

This supersedes this Departments office Memorandum of even number dated 01.08.1978.

Sd/-

Deputy Secretary to the Govt. of Nagaland

13. From the above, it will be seen that the arguments advanced on behalf of the Appellants that there was no scheme and/or policy for compassionate appointment was contrary to the actual position in the matter. While it is true that a particular scheme for compassionate appointment was adopted and laid down vide Annexure-A office memorandum dated 13.02.02 annexed to the writ appeal, there is no gainsaying that the Govt. of Nagaland did consider the case

for compassionate appointments in the past as could be gathered from the aforesaid office memorandum. Thus the writ Petitioner was entitled to be considered for compassionate appointment on the death of her husband. There is no dispute that she was in need of assistance with her three minor children on the death of her husband. The plea now being raised on the basis of the office memorandum dated 13.02.02 that compassionate appointment can only be made in the department in which the deceased employee was serving, is not at all tenable. In fact, the Govt. of Nagaland which is expected to be a modal employer ought not have raised such a plea so as to deprive the Petitioner from compassionate appointment.

14. The above plea is available to the Govt. of Nagaland only on the basis of the aforesaid office memorandum dated 13.02.02, which cannot be said to have retrospective operation. The husband of the Petitioner died in 1993 and the Petitioner was appointed in 1994. Thus, her case was required to be considered on the basis of the aforesaid memoranda of 1978 and 1979. In the said memoranda no distinction was made between the department in which the deceased employee was serving and the other departments. In any case all the departments being under the State Govt., there cannot be any bar for compassionate appointment in any department to mitigate the hardship which normally falls on the family with the expiry of the sole breadearner.

15. The writ Petitioner was first appointed first in 1994 and thereafter she was appointed for temporary spells by issuing various appointment orders. In some of the orders it was clearly mentioned that her appointment was on compassionate ground. In this connection, the aforesaid endorsement made by the competent authority has a relevance. In the said endorsements it was clearly indicated that the case of the Petitioner should not be equated with that of the casual appointees and that her case needs special consideration under category of compassionate appointment.

16. In the case of B.N. Nagarajan (supra), the Apex Court emphasized that regularisation does not connote permanency and cannot be made in violation of any rules framed under Article 309.

17. In the case of Pushpa Srivastava (supra), the Apex Court having regard to the fact that the Respondent was appointed on contractual and ad hoc basis on consolidated pay for a fixed period there could not have been any direction for regularisation of her service.

18. Dealing with the appointment on compassionate ground, in the case of Asha Ramchandra Ambekar (supra), the Apex Court emphasized that normally no mandamus should be issued for appointment on compassionate ground and for which direction that can be issued for consideration of the case of the incumbent. It emphasized that no mandamus should be issued directing to do a thing forbidden by law. It also emphasized that the High Courts and the Tribunals cannot confer benediction impelled by sympathetic consideration. However, it

was also observed that the Courts should endeavour to find out whether a particular case in which sympathetic consideration is to be weighed falls within the scope of law and to examine the case on the basis of the regulations and instructions governing the matter.

19. The last case on which Mr. Sarma, learned Sr. Counsel placed reliance is of Chandra Sekhar Mishra (*supra*) in which also the Apex Court held that relief granted to a contractual employee was uncalled for in the given fact situation.

20. From the above position, the whole emphasis of arguments of Mr. Sarma, learned Sr. counsel for the Appellants was that be in the realm of compassionate appointment or in the realm of contractual appointment, the Petitioner cannot claim regularisation of her service as a matter of right. In the aforesaid decisions the Apex Court observed that in case of contractual appointment limiting period of employment, there cannot be any direction for regularisation of such service. Likewise in the case of compassionate appointment, there cannot be any *mandamus* for such appointment. However, at the same time, the Apex Court emphasized that the case will have to be weighed on the basis of the existing regulations and guidelines. While holding that the Courts cannot confer benediction impelled by sympathetic consideration, the Apex Court also observed that endeavour should be made to find out whether a particular case in which sympathetic consideration is to be weighed falls within the scope of law.

21. In the instant case, the plea advanced on behalf of the Appellants-that in absence of any scheme of compassionate appointment, the writ Petitioner cannot claim her appointment on compassionate ground is unfortunate. As noticed above, at the first instance, the State Govt. adopted a scheme for compassionate appointment of the Central Govt. and thereafter by the office memorandum dated 13.06.79 the decision of the Govt. was conveyed for giving due consideration to the case for compassionate appointment. Thus, the policy decision of the State Govt. for providing compassionate appointment was prevalent at the time of death of the husband of the Petitioner and making the application by her for consideration of her case. In fact, the orders were also issued appointing her on compassionate ground. Thus, the departmental authorities who had issued the orders of appointment in favour of the Petitioner were not oblivious of the position of the writ Petitioner requiring immediate assistance for survival of her family. It is in this context, her case was forwarded for compassionate appointment justifying the case and by the above quoted end or esement her case was categorized to be different to that of other casual employees.

22. On the request made by us, the learned Sr. counsel for the Appellants produced before us the report of the Selection Committee for selection of casual employees. As per the recommendation made by the Selection Committee, the service of die Petitioner along with others are to be continued on fixed pay basis till such time they are absorbed against future regular vacancies. However, this aspect of the matter was not highlighted in the counter affidavit filed in the writ

proceeding and instead a colour was sought to be given that appointment of the Petitioner was for a limited duration upto 31.3.02 which impelled the Petitioner to approach this Court. This approach is unbecoming of a modal employer.

23. As emphasized by the Departmental authorities, the case of the Petitioner needs special consideration same being a case of compassionate appointment. However, the Appellants in stead of adopting a pragmatic approach to the matter, played with precarious predicament in which the Petitioner had fallen with her three minor children after the death of her husband. It is in this context, learned Counsel for the Petitioner/Respondent placed reliance on the decision of the Apex Court in the case of Balbir Kaur (supra). The learned Counsel for the Appellants during the course of argument submitted that if the directions contained in the judgment of the learned Single Judge are to be accepted, same will open the Pandora's box inasmuch as other such candidates numbering 109 will also claim similar benefits. As noticed above, the Selection Committee selected 110 candidates who were working on casual basis and the name of the Petitioner was included at serial No. 79 of the list. Thus, the case of the remaining 109 candidates is not like that of the Petitioner whose case falls altogether in a different category.

24. It is in the above context, the Apex Court in the aforesaid decision of Balbir Kaur (supra) observed that the Steel Authority of India an authority under Article 12 of the Constitution of India has an obligation to act in terms of the avode objective of social and economic justice as enshrined in the Constitution and to act as a modal and ideal employer. The Apex Court in the said decision has made the following observation:

The sudden jerk in the family by reason of the death of the breadearner can only be absorbed by some lump-sum amount being made available to the family-this is rather unfortunate but this is a reality. The felling of security drops to zero on the death of the breadearner and insecurity thereafter reigns and it is at that juncture if some lump-sum amount is made available with a compassionate appointment, the grief-stricken family may find some solace to the mental agony and manage its affairs in the normal course of events. It is not that monetary benefit would be the replacement of the breadearner, but that would undoubtedly bring some solace to the situation.

25. From the aforesaid discussions of the facts and the materials on record, it will be seen that the Appellants in their end eavour to deprive the Petitioner from getting employment on compassionate ground took the pleas contrary to the practice in reality. At the first instance, they denied existence of any policy for compassionate appointment and secondly, they also projected the case of the Petitioner to be in the same category with that of the 109 casual employees. The Appellants having denied the writ Petitioner of her right for consideration of compassionate appointment over the years and forcing her to accept the temporary appointments for temporary spells which she was bound to accept being at the receiving end, cannot take the untenable plea that she cannot resile

back from her position of contractual or casual employee. The Appellants ought to have considered the case of the Petitioner altogether in a different consideration having regard to the fact that she lost her husband and the burden of three minor children fell on her. The Appellants did not discharge their duty as a modal employer and made to suffer the Petitioner for all the years.

26. There is another aspect of the matter. Even if the Petitioner was not considered for compassionate appointment by the Appellants in its true perspective but she was given compassionate appointment although for limited durations. Thereafter, taking her such appointment to be casual employment, her case was considered by the Selection Committee and she was found to be suitable for retention in service. However, she was appointed again for limited duration and that to on consolidated and fixed pay. However, with the production of records it has been revealed that the Selection Committee recommended for retention of the service of the selected candidates numbering 110 on fixed pay basis till such time they are regularly absorbed against future vacancies.

27. From the discussions made above there is no escape from the conclusion that the Petitioner deserves special consideration. But the Appellants instead of discharging their duty as a modal employer took recourse to untenable pleas. The apprehension of the Appellants is that if the directions contained in the impugned judgment and order are to be implemented in respect of the Petitioner, the other casual employees numbering 109 might also fall in queue seeking similar directions. Such appreciation can well be taken care of making it clear that the case of the Petitioner falls altogether in a different category and that the directions contained in the impugned judgment and order was only confined to the case of the Petitioner.

28. For the forgoing reasons and discussions, we are of the considered opinion that no interference is called for to the impugned judgment and order. Consequently, the writ appeal stands dismissed. However, having regard to the facts and circumstances of the case, there shall be no order as to costs.