

(2014) 02 GUJ CK 0077

In the Gujarat High Court

Case No : Special Civil Application No. 12886 of 2012

Vishal Keshubhai Chudasama

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 14-02-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2014) 2 GLR 1243

Hon'ble Judges : Abhilasha Kumari, J

Bench : Single Bench

Advocate : K.B. Pujara, for the Appellant; D.M. Devnani, Assistant Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Abhilasha Kumari, J.—Rule. Mr. D.M. Devnani, learned Assistant Government Pleader, waives service of notice of Rule for the respondents. The challenge in this petition preferred under Article 226 of the Constitution of India, is to the decision taken by respondent No. 5 the Gujarat Subordinate Services Selection Board, whereby, the application of the petitioner for appointment on compassionate grounds has not been considered in view of the new policy formulated by the State of Gujarat, as laid down in Government Resolution dated 05.07.2011.

2. The factual matrix of the case may be briefly summarised as below:

2.1 The father of the petitioner, Shri Keshubhai Jeevabhai Chudasama, was working in the office of respondent No. 4 (Deputy Executive Engineer, Saline Ingress Prevention Sub-Division Office, Talaja, District Bhavnagar) as a Chowkidar, having been duly appointed as such on a regular basis. He died in harness on 20.03.2010, having completed more than 29 years of service. The petitioner made an application for appointment on compassionate grounds in the prescribed format, as per the prevailing policy, on 31.05.2010. Pursuant thereto,

respondent No. 4 forwarded the application of the petitioner to respondent No. 3, the Executive Engineer, for further necessary action, on 04.06.2010. Respondent No. 3 forwarded it to Respondent No. 2-Superintendent Engineer, who, in turn, forwarded the application of the petitioner to Respondent No. 5 - Gujarat Subordinate Services Selection Board ("the Board"), enclosing details of the petitioner's educational qualifications, physical fitness and other relevant details. The Board was also informed that a Class III post was lying vacant. By another communication dated 11.04.2011, respondent No. 3 gave further information to the Board, as requested by the latter, and requested the Board to do the needful in the matter. However, the Board, instead of considering and processing the application of the petitioner, communicated its impugned decision dated 29.09.2011, to respondent No. 2, stating therein that the application of the petitioner could not be processed in view of the Government Resolution dated 05.07.2011, which provides for the grant of lump sum financial assistance. The petitioner represented to respondent No. 3, vide communication dated 10.02.2012, for appointment on compassionate grounds instead of monetary assistance, as per the policy prevailing on the date when the application was made, as, according to him, he is eligible for such appointment. In response thereto, the petitioner received a communication dated 18.02.2012, addressed by respondent No. 3 to respondent No. 2, regarding payment of compensation as per the Government Resolution dated 05.07.2011, which does not envisage grant of appointment on compassionate grounds. Being aggrieved thereby, the petitioner has invoked the extraordinary jurisdiction of this Court by way of the present petition.

3. Mr. K.B. Pujara, learned advocate for the petitioner has advanced detailed submissions, which are briefly recapitulated as follows:

3.1 It is submitted that the denial of appointment on compassionate grounds is a result of the delay caused by the respondents in deciding the application. The father of the petitioner died on 20.03.2010 and the petitioner made the application almost within two months, on 31.05.2010. Respondent No. 4 sent the application to respondent No. 3 on 04.06.2010, who, in turn, forwarded it to respondent No. 2 on 10.06.2010. Respondent No. 2 submitted the application to the Board on 08.07.2010. From the above sequence of events it is evident that the petitioner has not caused any delay in the process. The Board took no decision upon the application and, in the meanwhile, the Government Resolution dated 05.07.2011 came into force. When the petitioner made the application, the Scheme in vogue was as contained in the Government Resolution dated 10.03.2000, which contemplates compassionate appointment, therefore, the application of the petitioner has to be decided on the basis of that Government Resolution and not the subsequent Government Resolution dated 05.07.2011. Learned counsel for the petitioner has placed reliance upon a judgment of the Supreme Court in the case of Smt. Sushma Gosain and Others Vs. Union of India (UOI) and Others, in support of the submission that in claims for appointment on compassionate grounds, there should not be any delay in appointment, as the

purpose of such appointment is to mitigate the hardship faced by the family due to the death of the bread earner.

3.2 It is next submitted that the aim and object of the Scheme for appointment on compassionate grounds is to provide immediate succor to the family of an employee who dies in harness. In order to fulfill this aim, it has been provided at every stage of the Government Resolution dated 10.03.2000, that speedy action must be taken by the concerned department to process the application made by the dependant of the deceased employee. Learned advocate for the petitioner has taken the Court through the provisions of the Government Resolution dated 10.03.2000 to buttress this submission. It is submitted that the Government Resolution dated 10.03.2000 provides that in cases of Class III employments which are to be made by the Board, it is incumbent upon the department to send the application to the Board without delay, with full details and particulars, and the Board has to decide it without delay, on a priority basis. The decision is to be taken within one month. In the present case, though the department has sent the application of the petitioner to the Board expeditiously, the Board did not decide it within the stipulated period of time and kept it pending until the Government Resolution dated 05.07.2011 came into force. That the petitioner cannot be deprived of compassionate appointment just because the Board did not decide the application speedily, as it should have done. The coming into force of the Government Resolution dated 05.07.2011 during the pendency of the application with the Board is not the fault of the petitioner. When the application was made, Government Resolution dated 10.03.2000 was in force, therefore, the application of the petitioner ought to be decided on the basis of the policy contained in it and not under new policy as contained in the Government Resolution dated 05.07.2011, which does not provide for appointment on compassionate grounds but only for monetary compensation. Learned counsel for the petitioner submits that the petitioner has refused to take the monetary compensation offered by the respondent department and is entitled for compassionate appointment.

3.3 It is submitted that monetary compensation cannot be a substitute for appointment on compassionate grounds. In this regard, reliance has been placed upon the judgment of the Supreme Court in *Balbir Kaur and Another Vs. Steel Authority of India Ltd. and Others*,

3.4 It is next submitted on behalf of the petitioner that a Division Bench of this Court has taken a view that if no decision is taken by the concerned authorities for years together, such default cannot be permitted to operate to the disadvantage of the dependants of the deceased employee. In this regard, reliance is placed on a judgment dated 11.05.2010 passed in Letters Patent Appeal No. 22 of 2010 and connected matters, which has been confirmed by the Supreme Court.

3.5 The next judgment relied upon on behalf of the petitioner is dated 06.07.2012, rendered in Letters Patent Appeal No. 676 of 2012 and connected

matters, where a similar view is taken. Learned counsel for the petitioner submits that both these judgments have been rendered after the new scheme vide Government Resolution dated 05.07.2011, has come into effect, and the judgment of the Apex Court in the case of State Bank of India and Another Vs. Raj Kumar, , has been considered while deciding the Letters Patent Appeal.

Reliance is further placed on judgment dated 03.07.2012 in Letters Patent Appeal No. 786 of 2012, 2012 (3) GLH (NOC) 1, wherein a Division Bench of this Court has taken a similar view.

3.6 A submission has been advanced that the Government Resolution dated 05.07.2011 came into force on that very date, therefore, it cannot be applied retrospectively to applications made before that date. All such applications would be governed by the policy prevailing at the point of time they were made, as contained in Government Resolution dated 10.03.2000.

4. Per contra, Mr. D.M. Devnani, learned Assistant Government Pleader appearing for the respondents has strongly opposed the submissions advanced on behalf of the petitioner, by contending that on the coming into force of the Government Resolution dated 05.07.2011, all pending applications for grant of appointment on compassionate grounds would be governed by the provisions of the new policy of the State Government that provides for lump sum compensation to be given to the dependants of the deceased employee, instead of appointment on compassionate grounds. As this policy came into force pending the decision of the application of the petitioner, the respondent Board has rightly returned the application to the concerned department, to calculate the amount of financial aid the petitioner would be entitled to. The petitioner cannot insist on being granted appointment on compassionate grounds, as the earlier policy to this effect is no longer in force and his case is governed by the new policy which envisages the grant of financial aid.

4.1 It is further submitted that there has been no delay on the part of the respondents in processing the application of the petitioner, as is clear from the record. It is not a case where the application of the petitioner has remained pending for years together, as was the situation in some of the cases cited by learned counsel for the petitioner, such as the judgment dated 11.05.2010 rendered in Letters Patent Appeal No. 22 of 2010 and connected matters. It is contended that in those cases, the applications were pending for years together, therefore, the Division Bench arrived at a conclusion that default in considering the applications for compassionate appointment cannot be allowed to defeat the claims of the applicants. It is submitted that this judgment would not be applicable to the facts of the present case where there is no delay in considering the application of the petitioner. The application was made in 2010 and was pending only for 14 months. Learned Assistant Government Pleader has sought to distinguish the other judgments relied upon by the learned counsel for the petitioner in case of Sakil Suleman Shaikh Vs. Chief Secretary and others reported in 2012 (3) GLH NOC 1 and judgment dated 06.07.2012 in Letters

Patent Appeal No. 676 of 2012 and connected matters, on the same ground.

4.2 Learned Assistant Government Pleader has further submitted that the petitioner cannot claim any right to compassionate appointment. Moreover, he cannot insist, as a matter of right, that his application be considered under the old policy that has now ceased to exist on coming into force of the new policy. In support of this submission Learned Assistant Government Pleader has cited the judgment of the Supreme Court in MGB Gramin Bank Vs. Chakrawarti Singh, wherein the Supreme Court held that an applicant has no right to have his application decided in accordance with the Scheme in force on the date of his application. Reliance is also placed on State Bank of India vs. Raj Kumar (supra) wherein the Supreme Court held that, where an earlier scheme is abolished and the new scheme which replaces it specifically provides that all pending applications will be considered only in terms of the new scheme, then the new scheme alone, will apply.

4.3 It is contended by the learned Assistant Government Pleader that, though, in some of the judgments of the Division Bench relied upon by learned counsel for the petitioner, the case of State Bank of India Vs. Raj Kumar (Supra) has been considered, however, the said judgments have been rendered only on the ground of the delay in considering the applications in those cases. It is submitted that in judgment dated 12.04.2012 passed in Letters Patent Appeal No. 526 of 2012, the Division Bench has, while considering the case of State Bank of India Vs. Raj Kumar (Supra), held on facts that since the applications were made in the years 2008, 2009, 2010 and 2011, they would be governed by the new scheme dated 05.07.2011 which provides for lump sum financial assistance. It is contended that this judgment would be squarely applicable in the present case. It is further submitted that in the present case, there is no challenge to the Government Resolution dated 05.07.2011. In Rajendrabhai Dahyabhai Solanki Vs. State of Gujarat, reported in 2013 (1) GCD 47, this Court has held that the decision to discontinue the erstwhile policy and to substitute it by another policy is a policy decision of the State Government and the Court would not be justified in interfering with the said policy decision. It is submitted that as the application of the petitioner was pending when the new policy came into effect, it can only be considered under the new policy, therefore, the case of the petitioner can only be examined under the new policy.

4.4 On the strength of the above submissions, it is prayed that the petition be rejected.

5. In rejoinder, learned counsel for the petitioner has reiterated the submissions advanced by him earlier, while praying that the petition be allowed.

6. This Court has heard learned counsel for the respective parties, perused the material on record and given thoughtful consideration to the rival submissions advanced at the Bar. The question that arises for determination by this Court is whether the application of the petitioner for appointment on compassionate

grounds, which was made before the Government Resolution dated 05.07.2011, containing the new policy of the State Government, came into force and was pending decision on that date, should be decided on the basis of the new policy, or on the basis of the erstwhile policy prevailing at the time when the application was made?

7. Before the promulgation of the new policy by the Government Resolution dated 05.07.2011, the prevailing policy of the State Government for granting appointment on compassionate grounds to dependants of Class-III and Class-IV employees who died in harness, was contained in Government Resolution dated 10.03.2000, as amended from time to time. By the Government Resolution dated 05.07.2011, the State Government has done away with the earlier policy of granting appointment on compassionate grounds to the dependants of deceased employees and has replaced it by a policy which envisages the grant of financial assistance to be given to the dependant of the deceased employee, to be calculated on the basis of the length of service put in by such employee, who died in harness. The earlier policy of giving appointment on compassionate grounds has been abolished by the Government Resolution dated 05.07.2011. There is no challenge in this petition to the competence or the power of the State Government in changing its policy, or to the Government Resolution dated 05.07.2011. It is settled law that the State can change its policy and substitute it with a new one, especially when the policy has financial implications, as policy decisions are exclusively within the domain of the BALCO Employees Union (Regd.) Vs. Union of India and Others,

8. The Government Resolution dated 05.07.2011 was challenged before this Court in the case of Rajendrabhai Dahyabhai Solanki v. State of Gujarat (supra). This Court negatived the challenge and held that there was nothing in the new policy dated 05.07.2011, that was discriminatory or arbitrary.

9. As per the Government Resolution dated 05.07.2011, all pending applications as on that date, are to be decided under the new policy. A submission has been advanced that the Government Resolution dated 05.07.2011, having come into effect on that date, is prospective in nature, and cannot be applied retrospectively to applications made before it came into effect. It may be kept in mind that in Paragraph-3 of the said Government Resolution, it is specifically stated that the previous policy of appointment on compassionate grounds has been abolished by the new policy contained in this Government Resolution. This would mean that as on 05.07.2011, the earlier policy of giving appointment on compassionate grounds, ceased to exist. The only policy that now prevails, with effect from 05.07.2011, is the new policy of granting financial aid. It is clearly stated in Paragraph-5 of the Government Resolution dated 05.07.2011, that all pending applications will be decided under the new policy. Can this be said to result in retrospective application of the new policy? On the surface, the submissions advanced to this effect may seem attractive. However, on deeper consideration, in the view of this Court, the answer is in the negative. The reason

for this conclusion is that by the Government Resolution dated 05.07.2011, the earlier policy has been abolished and ceases to exist on that date. When the erstwhile policy no longer exists, it cannot be made applicable to applications pending on the date of coming into force of the new policy. There is no doubt that the Government Resolution dated 05.07.2011 is prospective in nature. It is, therefore, being applied prospectively - that is, from the date it comes into force. Applications pending on 05.07.2011 would be governed by the new policy, as the earlier policy has ceased to exist once the new policy comes into effect. To the mind of this Court, it cannot be said that the stipulation in the said Government Resolution dated 05.07.2011 that pending applications are to be decided under the new policy, would amount to a retrospective application of the new policy. On the contrary, if it is concluded that pending applications are to be decided under the old policy, it would tantamount to reviving a policy that has been abolished and has ceased to exist, by legal fiction.

10. The main thrust of the submissions advanced by learned counsel for the petitioner is that the delay in deciding the application on the part of the respondents has resulted in depriving the petitioner of appointment on compassionate grounds, as his application was kept pending and, in the meanwhile, the new policy came into force.

11. A few relevant facts may be noted in this regard. The father of the petitioner died on 20.03.2010. The petitioner submitted the application on 31.05.2010, to respondent No. 4, who forwarded it to respondent No. 3 on 04.06.2010. Respondent No. 3 sent the application to respondent No. 2 on 10.06.2010. Respondent No. 2 forwarded it to the Board on 08.07.2010, as it pertained to appointment to a Class-III post. The application was returned with certain remarks and queries by the Board to Respondent No. 2 on 13.08.2010. It was re-submitted by respondent No. 2 to the Board on 11.02.2011, after answering the queries. The application was again returned by the Board to respondent No. 2, with remarks, on 18.03.2011. Finally, respondent No. 2 submitted the application to the Board on 11.04.2001, after supplying the requisite information, as demanded by the Board.

12. The sequence of events makes it clear that the respondents were processing the application of the petitioner. The application was forwarded well in time. The Board returned the application twice to respondent No. 2, seeking certain information. This shows that it was in the process of deciding the application, as the information sought was to this end. While this process was going on, the Government Resolution dated 05.07.2011 came into effect. Respondent No. 5 then sent a communication dated 29-9-2011 to respondent No. 2 stating that in view of the Government Resolution dated 05.07.2011, it would not be possible to process the application of the petitioner for appointment on compassionate grounds and the concerned department should process the case for grant of financial aid, as per the new policy. Thus, before respondent No. 5 could decide the application the new policy came into force. There does not appear to be any

undue delay on the part of the respondents in processing the application of the petitioner. The present is not a case where the application was kept pending for several years.

13. In the judgments of the Division Bench, relied upon by learned counsel for the petitioner, being judgment dated 06.07.2012 in Letters Patent Appeal No. 676 of 2012 and connected matters and judgment dated 03.07.2012 in Letters Patent Appeal No. 786 of 2012 (2012 (3) GLH NOC 1) and judgment dated 11.05.2010 in Letters Patent Appeal No. 22 of 2010 and cognate matters, a salient feature that weighed with the Division Bench was the inordinate delay on the part of the concerned authorities in keeping the applications of the dependants of deceased employees pending, without any plausible reasons. The delay was for periods ranging from two to ten years. In such a fact situation, it was held that the default caused by the authorities could not be allowed to operate to the detriment of the applicants, especially as the instructions contained in the Government Resolution dated 10.03.2000, exhorted the authorities to take immediate action to help the family in distress. It is in this context that the Division Bench arrived at a conclusion that the applications ought to be decided on the basis of the policy prevailing on the dates on which they were made.

14. On the other hand, in a different fact situation, where there was no delay, the Division Bench held, in *State of Gujarat and Ors. Vs. Jadeja Dharmendrasinh Jayendrasinh and Ors.* reported in 2012 Law Suit (Guj) 218 that as all applications (except one) were made in the years 2008, 2009, 2010 and 2011 and the Government Resolution dated 05.07.2011 had been issued during their pendency, abolishing the scheme of appointment on compassionate grounds by substituting it with payment of lump sum financial assistance, the dependants of deceased employees would be legally entitled to avail of the new scheme under Government Resolution dated 05.07.2011, in view of the ratio of the judgment of the Apex Court in *State Bank of India and another vs. Raj Kumar (Supra)*. It may be noticed that in the judgments relied upon by learned counsel for the petitioner the Division Bench has distinguished the judgment in *State Bank of India vs. Raj Kumar (Supra)*, on the ground of delay on the part of the authorities in processing the applications for compassionate appointment. As stated hereinabove, there is no delay on the part of the authorities in processing the application of the petitioner herein, therefore, in the view of this Court, it cannot said that the application of the petitioner should be decided under the erstwhile policy, which now no longer exists.

15. It would be fruitful to refer to the pronouncements of law by the Supreme Court on this issue.

16. In *State Bank of India vs. Raj Kumar (Supra)* the facts were that when the applications of the dependants of deceased employees were being processed, a new scheme for payment of ex-gratia lump sum amount came into effect, abolishing the old scheme for compassionate appointment. The case of the

respondent therein was that he was entitled for consideration under the old scheme of compassionate appointment as this scheme was in force when the applications were made. The observations of the Supreme Court in this factual background are relevant, and are reproduced hereinbelow:

8. It is now well settled that appointment on compassionate grounds is not a source of recruitment. On the other hand it is an exception to the general rule that recruitment to public services should be on the basis of merit, by an open invitation providing equal opportunity to all eligible persons to participate in the selection process. The dependants of employees, who die in harness, do not have any special claim or right to employment, except by way of the concession that may be extended by the employer under the rules or by a separate scheme, to enable the family of the deceased to get over the sudden financial crisis. The claim for compassionate appointment is therefore traceable only to the scheme framed by the employer for such employment and there is no right whatsoever outside such scheme. An appointment under the scheme can be made only if the scheme is in force and not after it is abolished/withdrawn. It follows therefore that when a scheme is abolished, any pending application seeking appointment under the scheme will also cease to exist, unless saved. The mere fact that an application was made when the scheme was in force, will not by itself create a right in favour of the applicant.

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13. Further, where the earlier scheme is abolished and the new scheme which replaces it specifically provides that all pending applications will be considered only in terms of the new scheme, then the new scheme alone will apply. As compassionate appointment is a concession and not a right, the employer may wind up the scheme or modify the scheme at any time depending upon its policies, financial capacity and availability of posts.

(emphasis supplied)

17. In MGB Gramin Bank Vs. Chakrawarti Singh (Supra) the Apex Court held that applicant has no right to have his application decided in accordance with the scheme in force on the date of his application. Referring to the case of State Bank of India vs. Raj Kumar (Supra), the Supreme Court held that :

13. The Court considered various aspects of service jurisprudence and came to the conclusion that as the appointment on compassionate ground may not be claimed as a matter of right nor an applicant becomes entitled automatically for appointment, rather it depends on various other circumstances i.e. eligibility and financial conditions of the family, etc., the application has to be considered in accordance with the scheme. In case the Scheme does not create any legal right, a candidate cannot claim that his case is to be considered as per the Scheme existing on the date the cause of action had arisen i.e. death of the incumbent on the post. In State Bank of India & Anr. (supra), this Court held that in such a situation, the case under the new Scheme has to be considered.

14. In view of the above position, the reasoning given by the learned Single Judge as well as by the Division Bench is not sustainable in the eyes of law. The appeal is allowed and the impugned judgments of the High Court are set aside.

15. The respondent may apply for consideration of his case under the new Scheme and the appellant shall consider his case strictly in accordance with clause 14 of the said new Scheme within a period of three months from the date of receiving of application.

(emphasis supplied)

18. In the considered view of this Court, the case of the petitioner is squarely covered by the ratio of the judgments of the Apex Court in State Bank of India and another vs. Raj Kumar (Supra) and MGB Gramin Bank Vs. Chakrawarti Singh (Supra). The petitioner cannot claim any right to have his application decided under the erstwhile Government Resolution dated 10.03.2000. The old policy no longer exists and the only right of consideration available to the petitioner is under the new policy laid down in Government Resolution dated 05.07.2011, which provides for payment of financial aid. The petitioner has declined to accept financial assistance under the new policy, while insisting that his application be decided under the old policy contained in Government Resolution dated 10.03.2000. As held by the Supreme Court in MGB Gramin Bank Vs. Chakrawarti Singh (Supra), the petitioner cannot insist that his application be decided under the old policy, once that policy has been abolished and a new policy has come into force. The application of the petitioner can only be considered under the Government Resolution dated 05.07.2011. To take the benefit of financial assistance under the new policy, or not, is entirely a matter of choice on the part of the petitioner. However, in the event that the petitioner changes his mind and is desirous of availing of the benefit under the new policy, his initial refusal shall not deprive him of such consideration under the Government Resolution dated 05.07.2011, as his application has not been rejected by the respondents. For the aforestated reasons, the petition must fail. Accordingly, it stands rejected. Rule is discharged. There shall be no orders as to costs.