

Constitutional Writ
Present:
The Hon'ble Mr. Justice Bhaskar Bhattacharya
And
The Hon'ble Mr. Justice Prasenjit Mandal

Judgment on: 12th March, 2010.

M.A.T. No. 929 of 2009
With
C.A.N. 8850 of 2010

Doli Dolui
Versus
State of West Bengal & Ors.

POINTS:

Compassionate appointment-----Father-in- Law of the appellant was a government servant and died in harness----- The husband of the appellant applied for compassionate appointment----After his death, his wife i.e. the appellant applied for the same ----Respondents refused compassionate appointment to the appellant ------Writ Petition filed by the appellant dismissed on the ground of Locus Standi--- Appeal against ---Compassionate appointment, if can be given beyond the rules --- Applicability of Rules ----Daughter –in –Law, if entitled to compassionate appointment---- Delay in making the application, effect of----Constitution of India, Article 16.

FACTS:

This appeal was filed against a judgment and order of the learned Single Bench of Calcutta High Court passed on 17th August,2009, by which His Lordship dismissed the Writ Application on the ground of want of locus standi of the writ petitioner, as according to His Lordship, the petitioner being a daughter-in-law of the deceased employee, could not lawfully claim herself to be a “dependant” so as to get an order of appointment on compassionate ground.

The grievance of the appellant in her Writ Application was that the respondent authority did not consider her application for giving appointment on compassionate ground.

The only question that arises for determination in this Mandamus appeal is whether the appellant as the son's widow of the deceased employee, in the facts of the present case, is entitled to claim compassionate appointment as a dependant of the deceased employee.

HELD:

The Apex Court of this country has in several decisions specifically ruled out that the benefit of compassionate appointment in deviation from the usual existing rule of regular recruitment and in violation of Article 16 of the Constitution of India can be conferred only to the widow and the children of the deceased employee who were dependent upon him and not to any other persons.

In view of such decisions of the Supreme Court, the various State Authorities have amended the rules relating to the earlier practice of giving compassionate appointment to the persons other than spouse and children and in this case also, the Government has changed the earlier guidelines by restricting the benefit to only the spouse and children.

After the decisions of the Apex Court holding that the provision of granting compassionate appointment to persons other than spouse and children is *ultra vires* Article 16(2) of the Constitution of India, there is no scope of granting any relief to the appellant.

Secondly, the appellant never applied for compassionate appointment before the notification of the year 2005 was issued and as such, her application was not even pending on the date of issue of new guidelines. The application of the appellant was filed after the notification of the year 2005 and thus, her application was not even pending on the date of coming into operation of the new guidelines and at the same time, she did not even think it fit to apply as a "near relation" immediately on the death of her father-in-law but filed such application in the year 2009 whereas her father-in-law died in the year 2004 and the husband died in the year 2007.

The right to get appointment on compassionate appointment is not an inheritable right and thus, on the death of the husband of the appellant who applied for availing of the benefit of compassionate appointment, such right cannot be inherited by the appellant.

PARA--11

CASES CITED:

- 1) Abhisekh Kumar vs. State of Haryana and others (2006) 12 SCC 44
- 2) State of West Bengal vs. Bina Debnath 2009(4) CHN1

- 3) State of Punjab & Ors. vs. Sukh Deb Sarup Gupta AIR 1970 SC 1641
- 4) M.C. Verghese vs. T.J. Ponnann & Anr. AIR 1970 SC 1876

- 5) Nani Gopal Mitra vs. State of Bihar AIR 1970 SC 1636
- 6) State of Orissa vs. Bhupendra Kumar Bose & Ors. AIR 1962 SC 945;
- 7) Union of India & Ors. vs. Iqbal Singh AIR 1976 SC 211.
- 8) Auditor General of India and others vs. G. Ananta Rajeswara Rao (1994) 1 SCC 192
- 9) V. Shivamurthi vs. State of Andhra Pradesh (2008) 13 SCC 730.
- 10) Chairman Bihar Rajya Vidyut Board vs. Chhattu Ram (1999) 5 SCC 637

For the Appellant: Mr. Nitya Gopal Mukherjee.

For the State-Respondents: Mr. Sumitro Dasgupta,
Ms. Rina Banerjee.

THE COURT:

Bhaskar Bhattacharya, J.:

1. This appeal is at the instance of an unsuccessful writ petitioner and is directed against an order dated 17th August, 2009 passed by a learned Single Judge of this Court by which His Lordship dismissed the writ application on the ground of want of *locus standi* of the writ-petitioner, as according to His Lordship, the petitioner being a daughter-in-law of the deceased employee, could not lawfully claim herself to be a “dependant” so as to get an order of appointment on compassionate ground.

2. Being dissatisfied, the writ-petitioner has come up with the present appeal.

3. There is no dispute that the father-in-law of the appellant was an employee of the respondent and died-in-harness on 28th October, 2004 leaving not only his widow but also his three married daughters and a son, the husband of the appellant, who was alive at that point of time.

4. It appears from record, that the husband of the writ-petitioner, on January 6, 2005, filed an application for considering his case of appointment on

compassionate ground as the dependant of his father but before any communication was conveyed to the husband of the writ- petitioner about the fate of such application, he died on 27th July, 2007 leaving the appellant and three minor sons as his sole heirs and legal representatives.

5. On 19th February, 2009 the appellant filed an application before the employer of her deceased father-in-law for considering her prayer of appointment on compassionate ground for the death of her father-in-law informing that in the meantime her husband who had earlier applied for appointment on compassionate ground had already died and on 19th March, 2009 her mother-in-law, the widow of the deceased employee, gave her “no objection” in favour of granting appointment to the writ-petitioner.

6. The grievance of the appellant in her writ-application was that the respondent authority did not consider her application for giving appointment on compassionate ground.

7. There is no dispute that on June 6, 2005 the Government of West Bengal, Labour Department, issued a notification being No.97-Emp. laying down the guidelines of giving compassionate appointment to the dependant of an employee who has died-in-harness and according to that notification, the dependant should be the spouse, son or unmarried daughter who was solely dependant on the earning of the deceased at the time of death. But prior to the issue of that notification, there was a written communication dated 3rd December, 1996 issued by the Principal Secretary, the Government of West Bengal to all the District Magistrates giving direction as regards appointment of “son, daughter or near relation” of the employee of Gram Panchayat or Panchayat Samity who died-in-harness.

8. By a further letter by the Deputy Secretary to the Government of West Bengal dated 9th September, 1988 to the Director of Panchayat certain further directions were given after framing guidelines for giving compassionate appointment to the dependants of the employees and those dependants included “son, daughter or near relation”.

9. Mr. Mukherjee, the learned advocate appearing on behalf of the appellant vehemently contended before us, that the deceased employee having died prior to the issue of notification of 2005 which restricted the meaning of the word “dependant” only to the widow, the sons and the daughters, such notification will have no application to the case of the appellant because her right to get appointment on compassionate ground accrued prior to the issue of such

notification. In other words, Mr. Mukherjee contends that the deceased employee having died prior to the issue of 2005 notification, the learned Single Judge ought to have held that the writ-petitioner, being the widowed daughter-in-law of the deceased, had the right to apply for considering of her case of compassionate appointment as a “near relation”. It was further pointed that the husband of the appellant, as son of the deceased employee, duly applied for such compassionate appointment but he having died during the pendency of such application, the appellant had filed the aforesaid application for enforcement of her right which existed even at the time of death of her father-in-law. Mr. Mukherjee, therefore, prays for allowing the writ-application and for passing a direction upon the employer to consider the case of the appellant in accordance with the guidelines which prevailed prior to the issue of notification of the year 2005. In support of his contention, Mr. Mukherjee relies upon the following decisions:

- 1) Abhisekh Kumar vs. State of Haryana and others reported in (2006) 12 SCC 44;
- 2) State of West Bengal vs. Bina Debnath reported in 2009(4) CHN1;
- 3) State of Punjab & Ors. vs. Sukh Deb Sarup Gupta reported in AIR 1970 SC 1641;
- 4) M.C. Verghese vs. T.J. Ponnann & Anr. reported in AIR 1970 SC 1876;
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- 5) Nani Gopal Mitra vs. State of Bihar reported in AIR 1970 SC 1636;
- 6) State of Orissa vs. Bhupendra Kumar Bose & Ors. reported in AIR 1962 SC 945;
- 7) Union of India & Ors. vs. Iqbal Singh reported in AIR 1976 SC 211.

10. Therefore, the only question that arises for determination in this mandamus-appeal is whether the appellant, as the son’s widow of the deceased employee, in the facts of the present case, is entitled to claim compassionate appointment as a dependant of the deceased employee.

11. After hearing the learned Counsel for the parties and after going through the materials on record, we are unable to give any relief to the appellant for the following twofold reasons:

a) First, the Apex Court of this country has in several decisions specifically ruled out that the benefit of compassionate appointment in deviation from the usual existing rule of regular recruitment and in violation of Article 16 of the Constitution of India can be conferred only to the widow and the children of the deceased employee who were dependent upon him and not to any other persons. In view of such decisions of the Supreme Court, the various State Authorities

have amended the rules relating to the earlier practice of giving compassionate appointment to the persons other than spouse and children and in this case also, the Government has changed the earlier guidelines by restricting the benefit to only the spouse and children. Thus, after the decisions of the Apex Court holding that the provision of granting compassionate appointment to persons other than spouse and children is *ultra vires* Article 16(2) of the Constitution of India, there is no scope of granting any relief to the appellant. In this connection, we may profitably refer to the following observations of the Supreme Court in the case of Auditor General of India and others vs. G. Ananta Rajeswara Rao reported in (1994) 1 SCC 192:

“A reading of these various clauses in the Memorandum discloses that the appointment on compassionate grounds would not only be to a son, daughter or widow but also to a near relative which was vague or undefined. A person who dies in harness and whose members of the family need immediate relief of providing appointment to relieve economic distress from the loss of the bread-winner of the family need compassionate treatment. But all possible eventualities have been enumerated to become a rule to avoid regular recruitment. It would appear that these enumerated eventualities would be breeding ground for misuse of appointments on compassionate grounds. Articles 16(3) to 16(5) provided exceptions. Further exception must be on constitutionally valid and permissible grounds. Therefore, the High Court is right in holding that the appointment on grounds of descent clearly violates Article 16(2) of the Constitution. But, however it is made clear that if the appointments are confined to the son/daughter or widow of the deceased government employee who died in harness and who needs immediate appointment on grounds of immediate need of assistance in the event of there being no other earning member in the family to supplement the loss of income from the bread-winner to relieve the economic distress of the members of the family, it is unexceptionable. But in other cases it cannot be a rule to take advantage of the Memorandum to appoint the persons to these posts on the ground of compassion. Accordingly, we allow the appeal in part and hold that the appointment in para 1 of the Memorandum is upheld and that appointment on compassionate ground to a son, daughter or widow to assist the family to relieve economic distress by sudden demise in harness of government employee is valid. It is not on the ground of descent simpliciter, but exceptional circumstance for the ground mentioned. It should be circumscribed with suitable modification by an appropriate amendment to the Memorandum limiting to relieve the members of the deceased employee who died in harness from economic distress. In other respects Article 16(2) is clearly attracted.”

The aforesaid view has been subsequently followed in several decisions of the said Court including the recent one in the case of V. Shivamurthi vs. State of Andhra Pradesh reported in (2008) 13 SCC 730.

b) Secondly, the appellant never applied for compassionate appointment before the notification of the year 2005 was issued and as such, her application was not even pending on the date of issue of new guidelines. As pointed out by the Supreme Court in the case of Chairman Bihar Rajya Vidyut Board vs. Chhattu Ram reported in (1999) 5 SCC 637, even in a case, where during the pendency of the application for compassionate appointment at the instance of an adopted son, the Rules had been amended by taking away the right of the adopted son not being the natural son, the said adopted son could not insist on grant of appointment on the basis of previous Rule since amended. In the case before us, the application of the appellant was filed after the notification of the year 2005 and thus, her application was not even pending on the date of coming into operation of the new guidelines and at the same time, she did not even think it fit to apply as a “near relation” immediately on the death of her father-in-law but filed such application in the year 2009 whereas her father-in-law died in the year 2004 and the husband died in the year 2007.

12. We now propose to deal with the decisions cited by Mr. Mukherjee. In the case of Abhisekh Kumar (supra), the appellant’s father expired on February 10, 2001 while in office. In terms of the rule, as it then existed, the appellant was entitled to be appointed on compassionate grounds. An application for such an appointment was filed within two weeks by the appellant from the date of his father’s death. Not only the appellant was denied appointment in District Yamuna Nagar although his deceased father had been employed as a Kanungo in District Yamuna Nagar, when he was sought to be appointed in the District of Karnal, the same was denied to him by the District Magistrate, Karnal, inter alia, on the plea that there did not exist any vacancy. The appellant then filed a writ-petition before the Punjab and Haryana High Court. Before the said Court, the respondents raised an objection that in the meantime, the State of Haryana had issued a notification on February 28, 2003 known as “the Haryana Compassionate Assistance to the Dependents of Deceased Government Employees Rules, 2003”. Rule 9 of the Rules is quoted below:
“9. (a) Appointments under these Rules shall be made only on regular basis and that too only, if regular posts meant for that purpose are available.

(b) Appointments under these Rules can be made up to a maximum of

5% of sanctioned posts (falling under direct recruitment quota) in Group C and D categories to be determined by the Head of the Department on the 31st March of each year. The appointing authority may hold back up to 5% of posts in the aforesaid categories to be filled by direct recruitment through Staff Selection Commission or otherwise, so as to fill such posts by appointment on compassionate grounds.

(c) A person selected for appointment on ex gratia basis shall be adjusted in the recruitment roster against the appropriate category viz. Scheduled Caste/Scheduled Tribe/Backward Classes/General depending upon the category to which he/she belongs.”

13. The High Court relying upon and on the basis of the said Rule dismissed the writ petition filed by the appellant directing the respondents to make the payment of *ex gratia* amount under the Rules.

14. In such a case, the Supreme Court pointed out that the appellant had sought for appointment on compassionate grounds at a point of time when the 2003 Rules were not in existence. His case, therefore, was required to be considered in terms of the Rules which were in existence in the year 2001. It was further pointed out that evidently, in the State of Haryana, a State wise list was maintained and in terms of the said list so maintained by the State of Haryana, the appellant was entitled to get an appointment on compassionate grounds and he was actually offered such an appointment by the State but it was the District Magistrate who came in the way and refused to provide for the post.

15. In the case before us, first, her application was not pending on the date of new notification unlike the case of Abhisekh Kumar (supra); moreover, the special feature of this case is that the Supreme Court has specifically prohibited grant of compassionate appointment to any person other than the spouse and the children and for that reason, the Apex Court in the case of Chairman Bihar Rajya Vidyut Board vs. Chhattu Ram (supra), in spite of pendency of the application at the time of change of the Rules taking away the right of the adopted son held that the amended Rules should be applied.

16. In the case of State of West Bengal vs. Bina Debnath (supra), a Division Bench of this Court in a case filed by the son of the deceased employee relied upon the principles laid down in the decision of Abhisekh Kumar (supra) as in that case, the application of the son of the deceased was pending on the date of coming into operation of the new rules. In the case before us, no such application

was pending and over and above, the right of a person who is not the spouse or the natural child of the deceased employee to have compassionate appointment having been specifically disapproved by the Apex Court, the appellant cannot get such benefit.

17. In the case of *State of Punjab & Ors vs. Sukh Deb Sarup Gupta (supra)*, the Supreme Court while construing Section 8(1) of General Clauses Act held that the word 'enactment' would include any Act or a provision contained therein passed by the Parliament or the State Legislature. In our opinion the said decision cannot have any application to a case where due to the decision of Supreme Court, the provision of granting appointment on compassionate ground to any person other than spouse, son and daughter has been held to be *ultra vires* Article 16 of the Constitution of India and thus, the appellant cannot get the benefit of a practice which is found to be *ultra vires* the Constitution of India by the Apex Court.

18. In the case of *M.C. Verghese vs. T.J. Ponnann & Anr. (supra)*, it was held that in England the rule of law appear to be well settled that except in certain well-defined matters, the husband and wife are regarded as one person in the eye of law and in an action for libel, the disclosure by the husband of the libel to his wife is not a publication. By taking aid of this decision, Mr. Mukherjee contended that application filed by his client should be treated to be the application of the husband. We are not at all impressed by such submission. When the law declared by the Supreme Court specifically bars grant of relief of employment on compassionate ground to any person other than spouse and children, the appellant not having fallen within any of those categories cannot get the benefit of compassionate appointment.

19. In the case of *Nani Gopal Mitra vs. State of Bihar*, it was held that effect of the application of Section 6 of General Clauses Act is that pending cases, although instituted under the old Act, are governed by the new procedure under the amended law, but whatever procedure was correctly adopted and concluded under the old law cannot be reopened for the purpose of applying the new procedure. In the case before us, we have already pointed out that the appellant is not at all entitled to get the compassionate appointment in view of the pronouncement of the Supreme Court and as such, the principle laid down in the said decision cannot have any application to the fact of the present case. Once the Supreme Court declares a particular practice as *ultra vires* the Constitution of India, it should be presumed that such practice was unconstitutional from the very beginning and thus, the appellant cannot get the benefit of the said practice

after the pronouncement of such law.

20. In the case of State of Orissa vs. Bhupendra Kumar Bose & Ors. (supra), it was merely held that if the right created by the statute is of an enduring character and has vested in the person, the right cannot be taken away because the statute by which it was created has expired. In our opinion, the said principle has no application to a case where the Supreme Court has deprecated the previous practice of giving compassionate appointment to a person other than spouse or children being violative of Article 16 of the Constitution of India and in such a case, no person after passing of such judgment is entitled to get the benefit of such *ultra vires* provision.

21. In the case of Union of India & Ors. vs. Iqbal Singh (supra), it was held that the statutory rights of the claimant to get compensation which crystallized on assessment and verification of the claim are the separate right to the property covered by the wide definition of “property” within the meaning of Section 6 of the Transfer of Property Act and such right cannot evaporate or vanish suddenly with the death of the claimant. In the case before us, the right to get appointment on compassionate appointment is not an inheritable right and thus, on the death of the husband of the appellant who applied for availing of the benefit of compassionate appointment, such right cannot be inherited by the appellant.

22. Thus, the decisions cited by Mr. Mukherjee do not help his client in anyway.

We, therefore, find no merit in this appeal and the same is dismissed.

In the facts and circumstances, there will be, however, no order as to costs.

(Bhaskar Bhattacharya, J.)

I agree.

(Prasenjit Mandal, J.)