HIGH COURT OF GUJARAT

PATEL BHARATKUMAR BHIKHABHAI

Versus

STATE OF GUJARAT & 1

Date of Decision: 08 December 2016

Citation: 2016 LawSuit(Guj) 2125

Hon'ble Judges: S G Shah

Case Type: Special Civil Application

Case No: 3174 of 2010

Final Decision: Petition allowed

Advocates: K B Pujara, Amita Shah, R C Jani

Cases Referred in (+): **10**

S.G. Shah, J.

[1] Heard learned advocate Mr. K. B. Pujara for the petitioner and learned advocate Mr. R. C. Jani for respondent No.2. Perused the record.

[2] Petitioner has prayed to quash and set aside the order dated 09.05.2008; copy of which is produced at Annexure G so also order dated 16.11.2009; copy of which is produced at Annexure H; by respondent No.2; whereby a request for compassionate appointment has been refused by the respondent. Petitioner has also prayed for a direction to the respondent to appoint the petitioner in the cadre of Class IV because of death of his father which occurred on 10.02.2005, base upon the policy of compassionate appointment which was prevailing on that date. Petitioner has also prayed to stay the orders referred herein above pending this petition. However, such interim relief was not granted, while admitting the petition on 03.05.2010

[3] It is undisputed fact that father of the petitioner was given a job on 07.09.1982 because of acquisition of his land for the capital project. Therefore, petitioner's father was in service of respondent as Junior Clerk till his death. It is also undisputed fact that during the tenure of his services i.e. before the age of superannuation, petitioner's father had expired on 10.02.2005. Because of such sudden demise, the petitioner being son of the government employee has applied for compassionate appointment on

15.02.2005 i.e. just within 5 days of death of his father, which shows need of bread earner in the family of the petitioner. Petitioner was neither employed nor having some good earnings either on the date of his application which is just within 5 days of the death of his father or even thereafter. Therefore, by all means, what is to be considered is the position with reference to the petitioner and his family on the date of death of his father, so also law, rule and scheme applicable on that date.

[4] Unfortunately, in addition to all other submissions, factually as well as relying upon certain Government Resolutions, it has been submitted by the respondent today that since more than 10 years have lapsed as on date and since petitioner was able to survive for all such 10 years, it is to be believed that petitioner is earning his livelihood and hence he is not entitled to compassionate appointment. However, petitioner has filed this petition in the year 2010 and, therefore, 6 years have been lapsed till date after filing this petition only to decide it by this Court. Thus, when this petition itself was pending before the highest Court of the State, for which litigant cannot be held responsible, because entire system has failed to decide such petition at the earliest. At the same time, it cannot be ignored that in fact, petitioner has already agitated the issue by filing similar petition being Special Civil Application No. 10153 of 2007 wherein the Co-ordinate bench of this Court has on 27.06.2007 passed following order;

> 1. Heard learned Advocate Mr. MS Joshi for petitioner and Mr. Patel, learned AGP for respondent State Authority.
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> 2. Application made by the petitioner for appointment on compassionate ground has been rejected by the State Authority by order dated 1st June, 2006 page 10 only on the ground that the petitioner is not possessing the educational qualification of Matriculation as required under the Notification dated 16th March, 2005.
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> 3. It is submitted by the learned Advocate Mr. Joshi before this court that the said decision is not correct and same is not based on the policy which was prevailing at the time of death of the father of the petitioner, on 10th February, 2005 as well as the date on which such application was made by the petitioner for appointment on compassionate ground. He submits that the case of the petitioner is required to be considered only as per the policy prevailing at the relevant point of time. In support of his submissions, reliance was placed by learned Advocate Mr. Joshi on the two decisions of the apex court as under:
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> (1) Abhishek Kumar Vs State of Haryana and others, 2006 13 Scale 658
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> (2) State Bank of India & Ors. Vs. Jaspal Kaur, 2007 3 JT 35.

4. I have considered the submissions made by learned Advocate Mr. Joshi for petitioner and the learned AGP Ms. Natani for the State authority.

5. In the matter of the Abhishek Kumar Vs State of Haryana and others, 2006 13 Scale 658, in para 5 the apex court has held as under: Appellant herein had sought for appointment on compassionate grounds at a point of time when 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. Evidently, in the State of Haryana a State wise list is maintained. In terms of the said list so maintained by the State of Haryana, the appellant was entitled to obtain an appointment on compassionate grounds. He was offered such an appointment by the State. It was the District Magistrate who came on the way and refused to provide for the post.?

6. The Apex Court has also taken view in case of State Bank of India & Ors. Vs. Jaspal Kaur, 2007 3 JT 35, wherein the Apex Court in para 30 held as under:

"30. Finally in the fact situation of this case, Sri. Sukhbir Inder Singh (late), Record Assistant (Cash & Accounts) on 01/08/1999, in the Dhab Wasti Ram, Amritsar branch, passed away. The respondent, widow of Sri Sukhbir Inder Singh applied for compassionate appointment in the appellant Bank on 5/2/2000 under the scheme which was formulated in 2005. The High Court also erred in deciding the matter in favour of the respondent applying the scheme formulated on 04/08/2005, when her application was made in 2000. A dispute arising in 2000 can not be decided on the basis of scheme that came into place much after the dispute arose, in the present matter in 2005. Therefore, the claim of the respondent that the income of the family of deceased is Rs. 5855/- only, which is less than 40% of the salary last drawn by Late Shri Sukhbir Inder Singh, in contradiction to the 2005 does not hold water."

9. Therefore, considering the facts of this case and the submissions made by the learned Advocates for both sides, it is directed to the respondent State Authority to reconsider the case of the petitioner for appointment on compassionate ground on the basis of the policy which was prevailing at the time when the father of the petitioner expired and the date on which application was made by the petitioner for such appointment on compassionate ground and to pass appropriate reasoned order in accordance with law and the policy prevailed at the time of death of the father of the petitioner within three months from the date of receipt of copy of this order and to communicate same to the petitioner immediately thereafter.

10.This petition is accordingly disposed of at this stage without expressing any opinion on merits of the matter and with a liberty in favour of the petitioner to

challenge orders that may be made by respondents before the appropriate forum in accordance with law if the same are adverse to the petitioner. Direct Service is permitted."

[5] If we come to the factual development and history, now it is clear that death of petitioner's father had taken place on 10.02.2005, petitioner has applied for compassionate appointment on 15.02.2005. On 21.07.2005, mother of the petitioner being wife of deceased employee of the respondent has also conveyed to the respondent that since her son is SSC failed, he has applied for the post of Peon under the compassionate appointment scheme, but now her son has cleared the examination of SSC. However, even after such disclosure, she has fairly prayed for appointment of her son as Peon considering her application dated 15.02.20105 and death of her husband on 10.02.2005. The respondent has failed to take any action or steps or even to refuse to appoint the petitioner and, therefore, it seems that petitioner has reminded the respondent repeatedly but lastly on 09.03.2007, 04.04.2007 and 24.04.2007. In response to such repeated reminders, now for the first time, respondents have come forward with their letter dated 01.06.2007 addressed to the widow of their deceased employee i.e. mother of the present petitioner that pursuant to order dated 16.03.2005, now minimum qualification for the appointment in Class IV is also fixed as 10th pass and that since petitioner has passed only 9th standard examination, in view of guidelines issued by the government on 06.08.2005, petitioner could not be appointed on Class IV post under compassionate appointment scheme also.

[6] Therefore, petitioner has no option but to challenge such decision by filing Special Civil Application No. 16153 of 2007, decision of which is quoted in para 3 herein above. Such decision dated 27.06.2007, now makes it clear that respondents are required to consider the case of the petitioner for appointment on compassionate ground on the basis of policy, which was prevailing at the time when his father has expired and the date on which application was made by the petitioner for such appointment on compassionate ground and, therefore, co-ordinate bench of this High Court has practically directed the respondent to pass appropriate reasoned order in accordance with law and the policy prevailing at the time of death of the father of the petitioner within 3 months from the date of receipt of copy of such order and to communicate the same to the petitioner immediately thereafter, making it clear that petitioner will be at liberty to challenge such order if the same is adverse to the right of the petitioner. For such direction, practically the co-ordinate bench has relied upon few decisions of the Honourable Supreme Court, which are quoted in such order dated 27.06.2007 and, therefore, it cannot be said that such direction was inappropriate or unwarranted. In

any case, when such directions are not challenged by the respondents now it becomes clear that they have to adhere to such directions in its true perspective.

[7] It seems that pursuant to such directions, the respondents have by their letter dated 05.12.2007 asked for certain information from the mother of the petitioner and in turn petitioner has provided requisite information to the respondents. But unfortunately while seeking such information by letter dated 05.12.2007, respondents have now acted arbitrarily and failed to comply with the directions in judgment and order dated 27.06.2007 in Special Civil Application No. 10153 of 2007 relying upon Office Order dated 29.03.2007 that they are supposed to process the file as per the scheme which was in force in the month of February 2005 when its employee had died and when petitioner has applied for compassionate appointment. It is undisputed fact that in February 2005 there is no such requirement to call for the information as asked for by the respondent by their letter dated 05.12.2007. Therefore irrespective of factual details base upon the disclosure of such information by the petitioner basically the calling of such information itself is against settled legal position which is in force pursuant to decision of the Honourable Supreme Court which are referred in judgment dated 27.06.2007, which is quoted herein above. Thereby after seeking information, provided by the petitioner, now respondents have came forward by their impugned order dated 09.05.2008 i.e. after 11 months from the date of judgment dated 27.06.2007, though they have to take decision in three months from the date of such judgment, that petitioner is not entitled to appointment on compassionate ground.

7.1 For rejecting such request of the petitioner, now in addition to previous ground of educational qualification that the petitioner has not studied upto SSC standard, a new ground has been put forwarded that pursuant to circular dated 29.03.2007 when scrutiny was made, it was found that financial condition of the petitioner is sufficient for survival and, therefore, he is not entitled for compassionate appointment. For the purpose, amount of CPF, Gratuity, Insurance scheme and other properties of petitioner's mother was taken into consideration.

7.2 The representation by the petitioner's mother, thereafter has also been negativated by the respondent confirming that they would stick to their decision which is under challenge in such petition.

[8] The factual details recorded herein above makes it clear that the respondents have acted in arbitrary manner while rejecting the request for compassionate appointment by the petitioner by their order dated 09.05.2008, in as much as, though by judgment and order dated 27.06.2007, which is supported by the decisions of the Honourable Supreme Court, respondents are required to consider the application of the petitioner as per the scheme which was in force in the month of February 2005 and that at the

relevant time there was no criteria either for educational qualification that even for Class IV cadre, minimum education of SSC is must and consideration of gratuity and other retirement benefits while considering the actual necessity of job of such petitioner.

> Therefore, practically though respondents have to appoint the petitioner as a Peon in Class IV even though he has cleared examination in the month of February 2005 base upon the policy and scheme applicable at the relevant time, and that there is specific directions to that effect, respondents have relied upon the Government Resolution dated 29.03.2007 and thereby respondents have practically even committed if not contempt of Court then at least disobedience of Court's order without challenging such order before the higher forum and without conveying the Court even in such disposed off matter that irrespective of Court's direction they are unable to proceed in the matter because of some Government Resolution since such Resolution is not under challenge. However, discussion herein after would make it clear that there is no need to challenge such new resolution because the Honourable Supreme Court has repeatedly and even recently reconfirmed that claim of compassionate appointment under a scheme of particular year cannot be decided based on subsequent scheme that came into force after claim for compassionate appointment.

[9] In the present case, it is undisputed fact that claim for compassionate appointment by the petitioner was in the month of February 2005 whereas its rejection was based upon the scheme dated 29.03.2007. Thereby, there is no option but to allow such petition when respondents have to rely upon the Government Resolution dated 10.03.2007 on the subject of compassionate appointment; copy of which is produced at page 34 with the petition (annexure I). Perusal of such resolution confirms that the government has decided to grant compassionate appointment to the dependent of deceased government employee as in such resolution/scheme there was no restriction regarding income claiming and so far as appointment in Class IV is concerned, the requisite educational qualification was only upto passing of 9th standard examination and it is only for Class III where SSC pas candidate was made eligible. Therefore, in the present case, when petitioner has applied in the year 2005 i.e. well before the Resolution/scheme dated 29.03.2007 though he is entitled to be appointed even in Class III because of clearance of SSC examination when he is requested to appoint him in Class IV as Peon, it is surprising to note that irrespective of such clear facts and circumstances to appoint the petitioner as a Peon on compassionate ground, the respondents have failed to take any steps till 01.06.2007.

[10] There was one another circular dated 07.09.2002 on the subject of compassionate appointment but since it is only regarding definition of members of

dependent family and when such resolution / circular does not speak anything about educational qualification or consideration of retirement benefits and property there is no reason for the respondents to deny the compassionate appointment to the petitioner on any such ground which are nothing but flimsy and arbitrary in nature. Thereby though now facts and settled legal position is very much clear, the respondents have resisted the petition by filing their affidavit in reply, contending the same repetition that they have acted upon the letter and circular dated 06.08.2005 which says that amendment in minimum educational qualification for such appointment is to be applied to all pending cases and, therefore, they have applied the provisions of circular dated 29.03.2007 to the present case.

> However, it was the previous position i.e. before judgment dated 27.06.2007, wherein respondents were directed to apply old scheme, but unfortunately the respondents have applied the new scheme dated 29.03.2007 and pleaded the same story in affidavit in reply that because of such new scheme when family of the petitioner are getting financial benefits from the property and other retirement benefits, petitioner is not entitled to compassionate appointment.

[11] Unfortunately, the respondents have failed to realize that they are trying to drive the clock back, in as much as, all their contentions are repeatedly negativated by the High Court in different matters and thereafter in new claims they are again taking the same stand and thereby drag the claimants to the Court for no valid reasons. Therefore in affidavit in rejoinder the petitioner has now specifically disclosed the decision dated 01.04.2008 in Special Civil Application No. 18847 of 2007 between Mehboobbhai M. Sandhod Vs State of Gujarat and judgment dated 27.07.2007 in LPA No. 1356 of 2007 in Special Civil Application No.18847 of 2007 between Deputy Executive Engineer vs. Mehboobbhai M. Sandhod, whereby now even division bench of this High Court has confirmed that when compassionate appointment was denied on the ground that petitioner was not SSC pass, on the date when he applied since conditions was not there that he should be SSC pass and it was only on 16.03.2005 when government has come with guidelines granting of compassionate appointment even to persons who are not SSC pass even on undertaking filed by the petitioner that if he is offered the services he will pass the 10th standard examination, the employer was directed to offer him the appointment as Class IV as claimed by the petitioner in that case. Whereas the position of present petitioner is far better than it. The petitioner has also placed on record the judgment dated 09.03.2009 in SCA No. 701 of 2009 wherein also considering this relevant scheme applicable at the relevant time the co-ordinate bench of this High Court has quashed and set aside the order of the government rejecting the application for appointment on compassionate ground considering the income limit and directed the respondents to reconsider the case of the petitioner for appointment on

compassionate ground and to pass appropriate order within two months. While doing so the Court is also relying upon the fact that at the relevant time when the petitioner before it submitted the application for compassionate appointment at that time there is no income limit and, therefore, respondent ought not to have rejected such application on such ground. While taking such decision the co-ordinate bench has relied upon the decision in 38 of 2008 so also 16826 of 2007 because pursuant to Government Resolution dated 10.03.2000 and income limit were removed and thereafter it was again endorsed by Government Resolution dated 29.03.2007. Therefore claims between these two Government Resolution cannot be denied on the ground of income.

[12] Petitioner has also placed on record his result of SSC examination which he has cleared as back as in the year 2006. Petitioner has also placed on record the orders regarding acquisition of his father's Land for which he was appointed by the respondents. Therefore, so far as record is concerned there is nothing on record to support the stand of the respondents that why they have not complied with the judgment and order dated 27.06.2007

[13] In support of his claim Mr.Jani, learned advocate for the respondent is relying upon following citations:

(1) Santosh Kumar Dubey Vs State of Uttar Pradesh and Ors., 2009 6 SCC 481

(2) State Bank of India Vs Raj Kumar, 2010 11 SCC 661

(3) State Bank of India Vs Surya Narain Tripathi, 2014 3 Scale 536

13.1 The sum and substance of all such decisions is to the effect that the compassionate appointment is a concession and not a right and, therefore, employer may wind up the scheme or modify the scheme at any time depending upon its policies, financial capacity and availability of posts. Learned advocate Mr. Jani has read out several paragraphs from above referred judgments but the discussion as above makes it clear that all such observations are of no use because of latest decision by the Honourable Supreme Court and more particularly considering the settled legal position while applying the ratio by any such decision in future as observed by the nine Judges bench in case of Indra Sawhney vs. Union of India, 1993 AIR(SC) 477, wherein while considering the principle of doctrine of equality, the Honourable Supreme Court has held that law of long standing is to be respected (Head Note 'C' 26 and 26A of AIR). When it is stated that relevance and significance are kept in mind and in law certainly, consistency and continuity are highly desirable features and decision that has stood and never been doubted as before respected. Thereby, when there are number of cases confirming other view, trace case, confirming different view can certainly be ignored. Irrespective of such

principal the reference of case of Santosh Dubey makes it clear that even the Honourable Supreme Court has taken a decision as per prevailing Rules ignoring the subject and, therefore, applying the principle that rule or scheme applicable on the date of claim is the outcome of judicial dictum of all the cases and, therefore, only because of result of rejecting some cases in above referred three cases, it cannot be said that in all petitions for compassionate appointment irrespective of facts and circumstances, there cannot be an order for compassionate appointment even if petitioner is entitled for the same.

[14] As against that petitioner is relying upon the decision in case of Canara Bank & Anr. vs. M. Mahesh Kumar, 2015 7 SCC 412 wherein the Honourable Supreme Court has after referring as many as 15 previous judgments on the subject, held that the object of the scheme of compassionate appointment is to help the dependents of the employees who died and to overcome the financial situation due to sudden shortage of income. But claim of compassionate appointment of particular year cannot be decided in light of subsequent scheme that came into force after the claim.

The circular being an administrative or executive order cannot have retrospective effect so as to take away right accrued as per previous circular. It is also held that the grant of family pension or payment of termination benefits cannot be treated as substitute to provide employment. Thereby all the prayer by the bank were dismissed and bank was directed to consider the case of the petitioner has per the scheme which was in force at the time of death of an employee concerned. This would certainly put an end to all the controversy raised by the respondents. Therefore practically there is no option but to allow the petition.

[15] However, during the course of arguments and discussion, respondents have came forward with other affidavit dated 06.12.2016 now annexing with it a circular dated 05.07.2011 and 07.04.2016 whereby now government has changed its scheme of compassionate appointment by offering lumpsum amount of compensation which was initially minimum Rs.4,00,000/- but now increased to Rs.8,00,000/- and, therefore, it is submitted by learned advocate Mr. Jani that since there is no post available with the respondents so as to accommodate the petitioner even in class IV cadre according to him it would be appropriate to award lumpsum amount of compensation to the petitioner instead of compassionate appointment as claimed for.

[16] With reference to above discussion it would be appropriate to recollect the decision in case of Shtijith vs. Deputy Director, 2012 AIR(SC) 2665 wherein it is held that availability of vacancy has nothing to do with making of an application, though factual details were different in that case.

[17] The reference of judgment dated 08.09.2016 in case of Dhirendrabhai Bhupendrabhai Patel vs. Gujarat State Road Transport Corporation in Special Civil Application No. 13622 of 2015 is necessary wherein recently the co-ordinate bench of this Court has taken a stand that it would be open for the petitioner to select either of the option i.e. one of ex gratia lumpsum compensation as per the scheme and second reservation of 33% of vacant posts as and when posts are to be filled up by the authority considering such specific scheme by the Corporation in that case with direction to the petitioner to select either of the option within two months and apply to the respondents.

[18] However, learned advocate for the petitioner has rightly pointed out that such resolution dated 05.07.2011 and 07.04.2016 are with reference to the application or claim pending on the date of such resolution, whereas in the present case, the claim of the petitioner has already been refused by the respondents arbitrarily and illegally. There is substance in such submission for the details and reasons recorded herein above. Therefore, such resolution dated 05.07.2011 would not be applicable in the present case.

[19] So far as modality of appointment after such litigation is concerned, petitioner is relying upon following decisions:

(1) Manoj Manu & Anr. vs. Union of India & Ors., 2013 12 SCC 171

(2) Sasidhar Reddy Sura vs. State of Andhra Pradesh, 2014 2 SCC 158

(3) Patel Rakeshkumar Dharamdas vs. State of Gujarat in unreported judgment dated 26.07.2016 in Misc. Civil Application (For Review) No.3397 of 2015 in Special Civil Application No.1282 of 2011

19.1 The sum and substance of all above cited cases is to the effect that all such cases where petitioner is entitled to appointment after prolonged litigation, though such petitioner shall get the seniority from the date of their entitlement for appointment it is with retrospective effect without financial benefit i.e. arrears of pay for all such period, since such petitioners are not working for all such period.

[20] In view of above facts and circumstances, when there is clear arbitrariness by the respondents in not adhering to the scheme applicable on the date of claim for compassionate appointment for the petitioner by taking shelter of different resolutions and that too by giving retrospective effect to such resolution, now when it is clear that claim for compassionate appointment is to be considered base upon the scheme that may be applicable on the date of claim and when the Honourable the Supreme Court has also confirmed that while applying such scheme, the amount of Family pension or

retirement benefit cannot be treated as a substitute for compassionate appointment, there is no reason to dismiss such petition and, therefore, it needs to be allowed as prayed for so far as right to get appointment on compassionate ground is concerned whereas so far as other benefits are concerned, the above referred decisions are to be followed.

[21] Therefore, this petition is allowed. Thereby impugned order dated 09.05.2008 as annesure G and order dated 16.11.2009 as per annexure H are quashed and set aside. Respondents shall do the needful for giving appointment to the petitioner with retrospective effect i.e. from the month of May 2008 when his claim was rejected on compassionate ground in view of death of his father on 10.02.2005 on the basis of policy of compassionate appointment existed on that date. Thus the effect of appointment is given retrospectively so far as seniority and scale is concerned.

However, petitioner shall not be paid salary for the period between May 2005 till the date of appointment since he has not worked for such period. Respondent shall do the needful to execute above directions within three months without fail. Petition is allowed to aforesaid extent. Rule is made absolute accordingly.

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