

GAHC010055602020



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/1853/2020

PALASH SWARGIARY
S/O- LT. MONIRAM SWARGIARY, R/O- VILL. SINGRA, P.O. GARARTARY, P.S.
SARTHEBARI, DIST.- BARPETA, ASSAM, PIN- 781311.

VERSUS

THE STATE OF ASSAM AND 4 ORS.
REP. BY THE CHIEF SECY. TO THE GOVT. OF ASSAM, DISPUR, GHY.-06.

2:THE STATE LEVEL COMMITTEE (SLC)
REP. BY THE CHAIRMAN THE CHIEF SECY. TO THE GOVT. OF ASSAM
DISPUR
GHY-06.

3:THE COMM. AND SECY. TO THE GOVT. OF ASSAM
INDUSTRIES AND COMMERCE DEPTT.
ASSAM
DISPUR
GHY.-06.

4:THE GENERAL MANAGER
DISTRICT INDUSTRIES AND COMMERCE CENTRE
BARPETA
ASSAM.

5:THE DISTRICT LEVEL SELECTION COMMITTEE (DLC) BARPETA
REP. BY ITS CHAIRMAN CUM DY. COMMISSIONER
BARPETA
PIN- 781301

Advocate for the Petitioner : MR DEBA SARMAH

Advocate for the Respondent : GA, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA**

ORDER

09-08-2023

Heard Mr. D. Sarmah, learned counsel appearing on behalf of the petitioner. Also heard Mr. N. Kalita, learned Standing Counsel, Industries appearing for the respondent nos. 1 to 5, 7, 8 & 9 and Mr. D. Bora, learned Government Advocate for the respondent no.6.

2. The case of the petitioner is that his father who was a Grade-IV employee in the office of the General Manager, District Industries and Commerce Centre, Barpeta died in harness on 17.11.2014. Thereafter, the petitioner had applied for compassionate appointment on 05.12.2014 in the office of the respondent nos. 3 & 4. The application of the petitioner thereafter forwarded to the District Level Committee (DLC) for appointment on compassionate ground. The DLC vide a recommendation dated 25.02.2016 applying the Office Memorandum dated 02.03.2009 which was the scheme prevalent at the time of the death of the petitioner's father as well as the date of application of the petitioner, had recommended the case of the petitioner for the post of Grade-IV against the single vacant post which occurred in the year 2015 and the proposal was sent to be placed before the State Level Committee (SLC) for necessary consideration. However, the State Level Committee by its meeting held on 18.01.2020 rejected the case of the petitioner on the ground for want of vacancy for appointment on compassionate ground without considering the recommendation made by the DLC. Being aggrieved, the petitioner has filed the present petition.

3. It is submitted by the learned counsels for the parties that the issues involved in the present petition stands covered by the decision of a coordinate bench of this Court rendered vide judgment dated 07.12.2022 in WP(C) no.1914/2020 (*Kamal Krishna Talukdar vs. The State of Assam & Ors.*). As such, the writ petition may be closed in terms of the said judgment of the learned Single Judge passed in WP(C) no.1914/2020 on dated 07.12.2022. The relevant position of the said judgment is extracted herein below:

“

4. This Court has perused the materials on record. In the backdrop of the above, this Court would also like to take into account the respective contentions made by the parties. The learned counsel for the petitioner drawing the attention of this Court to various judgments of the Supreme Court i.e. in the case of **State of Madhya Pradesh and Others Vs. Amit Shrivastava** reported in (2020) 10 SCC 496, **Indian Bank and Others Vs. Promila and Another** reported in (2020) 2 SCC 729 as well as the judgment in the case of **Secretary to Government Department of Education (Primary) and Others Vs. Bheemesh alias Bheemappa** reported in 2021 SCC Online SC 1264 had submitted that the law has been clearly stated by the Supreme Court in the said judgments to the effect that the scheme which is to be made applicable would be the scheme which was applicable as on the date of death of the deceased employee.

5. The learned counsel therefore referred to paragraph Nos. 17, 18 and 19 of 2022:GAU-AS:17598 the judgment in the case of **Bheemesh alias Bheemappa** (supra) as well as paragraph Nos. 18 to 20 of the judgment in the case of **Indian Bank** (supra). This Court finds it relevant to take note of the said 2 (two) judgments more particularly taking into consideration the issue involved herein. The Supreme Court in the case of **Indian Bank** (supra) had observed in Paragraph Nos. 18, 19 and 20 while deciding the applicability of the relevant scheme observed that it is only the relevant scheme prevalent on the date of demise of the employee which has to be considered to be applicable and it is not for this Court to

substitute a scheme or subtract from the terms thereof in judicial review. Paragraph Nos. 18 to 20 of the said judgment in the case of **Indian Bank** (supra) are quoted herein below:

“18. The question of applicability of any subsequent Scheme really does not apply in view of the judgment of this Court in Canara Bank. Thus, it would not be appropriate to examine the case of the respondents in the context of subsequent Schemes, but only in the context of the Scheme of 4-4-1979, the terms of which continued to be applicable even as per the new Scheme of 5-11-1985 i.e. the Scheme applicable to the respondents. There is no provision in this Scheme for any ex gratia payment. The option of compassionate appointment was available only if the full amount of gratuity was not taken, something which was done. Thus, having taken the full amount of gratuity, the option of compassionate appointment really was not available to the respondents.

19. We may also notice that though the subsequent Schemes were not applicable, even if benefit was sought to be given of those Schemes, initial non-disclosure and subsequent disclosure by Respondent 1, of her employment and her emoluments would disentitle her under those Schemes, too. Thus, when the appellant was calling upon the respondents to apply under the subsequent Schemes, that could have been beneficial to the respondents only if they were entitled to any of the benefits under that Scheme. That could not happen because the benchmark provided in those subsequent Schemes took the emoluments of respondents beyond the prescribed limit, so as to disentitle them from both, compassionate employment and ex gratia payment. 20. We have to keep in mind the basic principles applicable to the cases of compassionate employment i.e. succour being provided at the stage of unfortunate demise, coupled with compassionate employment not being an alternate method of public employment. If these factors are kept in mind, it would be noticed that the respondents had the wherewithal at the relevant stage of time, as per the norms, to deal with the unfortunate situation which they were faced with. Thus, looked under any Schemes, the respondents cannot claim benefit, though, as clarified aforesaid, it is only the relevant Scheme prevalent on the date of demise of the employee, which could have been considered to be applicable, in view of the judgment of this Court in Canara Bank. It is not for the courts to substitute a Scheme or add or subtract from the terms thereof in judicial review, as has been recently emphasised by this Court in State of H.P. v. Parkash Chand.”

6. In the later judgment in the case of **Bheemesh alias Bheemappa** (supra), the Supreme Court after taking into consideration the various judgments on the issue had observed that if compassionate appointment is considered to be a condition of service and made automatic upon the death of an employee in harness without any kind of scrutiny whatsoever, the same could be treated as a vested right in law and

as such it was observed that it was not so inasmuch as appointment on compassionate ground is not automatic but subject to strict scrutiny of various parameters including the financial position of the family, the economic dependence of the family upon the deceased employee and the avocation of the other members of the family. In paragraph No.19 of the said judgment, the Supreme Court had observed that a Rule of interpretation which produces different results, depending upon what the individuals do or do not do, is inconceivable and taking into account that the two dates i.e. the date of death of the employee and date of consideration of the application of the dependent held that the date of death of the employee is a fixed factor which does not change and as such the said date need to be taken into consideration while applying the scheme in question. Paragraphs 17 to 20 being relevant are quoted herein below.

17. Keeping the above in mind, if we critically analyse the way in which this Court has proceeded to interpret the applicability of a new or modified Scheme that comes into force after the death of the employee, we may notice an interesting feature. In cases where the benefit under the existing Scheme was taken away or substituted with a lesser benefit, this Court directed the application of the new Scheme. But in cases where the benefits under an existing Scheme were enlarged by a modified Scheme after the death of the employee, this Court applied only the Scheme that was in force on the date of death of the employee. This is fundamentally due to the fact that compassionate appointment was always considered to be an exception to the normal method of recruitment and perhaps looked down upon with lesser compassion for the individual and greater concern for the rule of law.

18. If compassionate appointment is one of the conditions of service and is made automatic upon the death of an employee in harness without any kind of scrutiny whatsoever, the same would be treated as a vested right in law. But it is not so. Appointment on compassionate grounds is not automatic, but subject to strict scrutiny of various parameters including the financial position of the family, the economic dependence of the family upon the deceased employee and the avocation of the other members of the family. Therefore, no one can claim to have a vested right for appointment on compassionate grounds. This is why some of the decisions which we have tabulated above appear to have interpreted the applicability of revised Schemes differently, leading to conflict of opinion. Though there is a conflict as to whether the Scheme in force on the date of death of the employee would apply or the Scheme in force on the date of consideration of the application of appointment on compassionate grounds would apply, there is certainly no conflict about the underlying concern reflected in the above decisions. Wherever the modified Schemes diluted the existing benefits, this Court applied those benefits, but wherever the modified Scheme granted larger benefits, the old Scheme was made applicable.

19. *The important aspect about the conflict of opinion is that it revolves around two dates, namely, (i) date of death of the employee; and (ii) date of consideration of the application of the dependant. Out of these two dates, only one, namely, the date of death alone is a fixed factor that does not change. The next date namely the date of consideration of the claim, is something that depends upon many variables such as the date of filing of application, the date of attaining of majority of the claimant and the date on which the file is put up to the competent authority. There is no principle of statutory interpretation which permits a decision on the applicability of a rule, to be based upon an indeterminate or variable factor. Let us take for instance a hypothetical case where 2 Government servants die in harness on January 01, 2020. Let us assume that the dependants of these 2 deceased Government servants make applications for appointment on 2 different dates say 29.05.2020 and 02.06.2020 and a modified Scheme comes into force on June 01, 2020. If the date of consideration of the claim is taken to be the criteria for determining whether the modified Scheme applies or not, it will lead to two different results, one in respect of the person who made the application before June 1, 2020 and another in respect of the person who applied after June 01, 2020. In other words, if two employees die on the same date and the dependants of those employees apply on two different dates, one before the modified Scheme comes into force and another thereafter, they will come in for differential treatment if the date of application and the date of consideration of the same are taken to be the deciding factor. A rule of interpretation which produces different results, depending upon what the individuals do or do not do, is inconceivable. This is why, the managements of a few banks, in the cases tabulated above, have introduced a rule in the modified scheme itself, which provides for all pending applications to be decided under the new/modified scheme. Therefore, we are of the considered view that the interpretation as to the applicability of a modified Scheme should depend only upon a determinate and fixed criteria such as the date of death and not an indeterminate and variable factor.*

20. *Coming to the case on hand, the employee died on 8.12.2010 and the amendment to the Rules was proposed by way of a draft notification on 20.06.2012. The final notification was issued on 11.07.2012. Merely because the application for appointment was taken up for consideration after the issue of the amendment, the respondent could not have sought the benefit of the amendment. The Judgment of the Division Bench of the Karnataka High Court in Akkamahadevamma on which the Tribunal as well as the High Court placed reliance, was not applicable to the case of compassionate appointments, as the amendment in Akkamahadevamma came as a result of the existing rule being declared to be ultra vires Articles 14 and 16 of the Constitution.*

7. It may also be not out of place to mention that the judgment of the Supreme Court in the case of **Indian Bank (supra)** was also applied by a three Judges Bench of the Supreme Court in the case of **State of Madhya Pradesh and Others Vs. Amit Shrivastava** reported in **(2020) 10 SCC 496**. Therefore, the ratio laid down in all the three judgments makes it clear that it is the date of death of the

deceased employee which should be taken into consideration for applying the scheme in question.

8. In the instant case however, it would be seen that both the date of death as well as the date of filing of the application was done prior to the coming into effect of the Office Memorandum dated 01.06.2015 and the relevant Office Memorandum at that point of time was the Office Memorandum dated 02.03.2009. Under such circumstances, the Office Memorandum dated 02.03.2009 is to be made applicable in the case of the petitioner. The learned counsel for the petitioner has also drawn the attention of this Court to Para-1 of the Office Memorandum dated 02.03.2009 which is extracted below.

“State Government had adopted a scheme vide O.M. No.ABP.357/80/137 dated 09.09.1983 and as amended vide No.ABP.357/80/Pt./12 dated 23.03.1992 No.ABP.357/80/Pt./79 dated 08.04.1996 and Notification No.ABP.50/2006/58 dated 11.10.2006 to give appointment on compassionate ground to the widow or son or unmarried daughter or adopted son, adopted unmarried daughter of a Government servant who dies in harness with the view to give immediate financial assistance to the family of deceased in a class III/class IV post (not above the Level of L.D. Assistant) limiting such appointment to 5% of vacancies occurring in a year. The restriction will however not apply where only one vacancy is to be filled up in a year. Thus the Department can appoint one person on compassionate ground against 5% quota upto 20% vacancy in a year.”

9. In terms with the said Office Memorandum although the reservation on account of compassionate appointment was limited to 5% of the vacancies occurring in a year but it was mandated that the said restriction will however not apply where only one vacancy is to be filled up in a year and as such the Department can appoint one person on compassionate ground against 5% quota upto 20% of the vacancy in the year.

10. The materials on record would further show that the District Level Committee on the basis of the Office Memorandum dated 02.03.2009 and also taking into consideration that there was a vacancy in the post of Grade-IV in the year 2014 had recommended that the proposal of the petitioner for the post of Grade-IV against the single vacant post occurred in the year 2014. However, upon perusal of the minutes of the meeting held on 18.01.2020 by the State Level Committee i.e. the respondent No.2, it does not appear as to whether the State

Level Committee had duly applied its mind as to which Office Memorandum could be applicable or as to whether the petitioner would come within the ambit of Office Memorandum dated 02.03.2009 and merely on the ground that there was want of vacancy reserved for appointment on compassionate ground deferred the case of the petitioner. Also, there has not been anything mentioned to the effect that the District Level Committee in making the recommendation had made any mistake in arriving at the conclusion that there existed a vacancy.

11. Under such circumstances, this Court in the interest of the justice directs the State Level Committee i.e. the respondent No.2 to consider the case of the petitioner on the basis of the recommendations so made by the District Level Committee on 25.02.2016 afresh by applying the Office Memorandum dated 02.03.2009 and thereupon take a decision in the matter. The said exercise be completed within a period of 45 days from the date a certified copy of the instant judgment and order is served upon the Chairman of the State Level Committee.”

4. In that view of the fact that similar issues have been raised in the present writ petition and as the counsels are in agreement that the judgment of the Co-ordinate Bench passed on 07.12.2022 in WP(C) no.1914/2020 (*Kamal Krishna Talukdar vs. The State of Assam & Ors.*) will cover the issues raised in the present writ petition, the present writ petition disposed of in terms of the order direction passed by the learned Single Bench in WP(C) no.1914/2020 by order dated 07.12.2022. Accordingly, this Court in the interest of the justice directs the State Level Committee i.e. the respondent No.2 to consider the case of the petitioner on the basis of the recommendations so made by the District Level Committee on 25.02.2016 afresh by applying the Office Memorandum dated 02.03.2009 and thereupon take a decision in the matter. The said exercise be completed within a period of 45 days from the date a certified copy of the instant judgment and order is served upon the Chairman of the State Level Committee.

5. In terms of the above, the writ petition stands disposed of.

JUDGE

Comparing Assistant