

**Court No. - 34**

**Case :-** WRIT - A No. - 15345 of 2023

**Petitioner :-** Dharmveer Singh And Another

**Respondent :-** State Of U.P. And 5 Others

**Counsel for Petitioner :-** Mohd. Yaseen, Siddharth Khare

**Counsel for Respondent :-** C.S.C.

**Hon'ble Ajit Kumar, J.**

1. Heard learned counsel for the parties and perused the record.
2. Petitioners before this Court, namely, Dharmveer Singh and Anoop Kumar Chaurasia are seeking compassionate appointment on account of their respective fathers dying in harness on 13th January, 2015 and 8th October, 2014 respectively while working as Fireman at Fire Station – Bilhaur, District Kanpur Nagar and Fire Station Golghar, District- Gorakhpur. However, their claimd are not being considered on the ground that only 5% of the vacancies meant for direct recruitment are reserved for making compassionate appointment under the U.P. Fire Service Sub-ordinate Office Employees Service Rules, 2016.
3. It is argued that in view of subsequent amendment in rules if 5% of the vacancies is taken to be the rule prevailing at the time of death of earning member of family, petitioners would not come within the zone of consideration. Besides this, the argument is that U.P. Fire Service Sub-ordinate Office Employees Service Rules, 2008 that has been replaced by 2016, would only be applicable as the cause of action arose in respect of the petitioner in the year 2014-15 respectively. As a sequel to this the argument is that no amended rule can be given effect to retrospectively unless it so provides and so the eligibility is to be seen as per the rule existing at the time cause arises.

Thus, it is argued that petitioners' application having been made for compassionate appointment on account of their respective fathers dying in harness in the year 2015 and 2014, claims are to be seen in the light of the service rule exi

sting in those respective years.

4. Learned Advocate has placed reliance upon the judgment of Supreme Court in the case of **Secretary to Government, Department of Education (Primary) & others v. Bheemesh @ Bheemappa** (Civil Appeal No.- 7752 of 2021) decided on 16th December, 2021.

5. He has further relied upon the Division Bench judgment of this Court in the case of **State of U.P. and others v. Himanshu Yadav** (Special Appeal No.- 126 of 2023) delivered on 7th July, 2023 and a recent judgment of Division Bench of this Court in the case of **Oriented Insurance Company Ltd. v. Priyanka Agarwal** (Special Appeal No.- 309 of 2019) decided on 4th August, 2023.

6. While in all the three judgments principle enunciated and followed is the same but it is quite apt here to refer the judgment, in the first place, of Division Bench in the case of Himanshu Yadav (*supra*), the reason being that Himanshu Yadav has put the claim for compassionate appointment on account of his late father Satish Chandra dying in harness on 5th November, 2014 while working as a Constable at Police Station- Kushikala, District- Mathura. Petitioner in that case, namely, Himanshu Yadav had applied for compassionate appointment and while he appeared in the written examination upon qualifying the physical efficiency test, he was not selected. The writ petition was disposed of in the light of the law laid down by the Supreme Court in the case of Bheemesh @ Bheemappa (*supra*). The State of Uttar Pradesh came to challenge the order of learned Single Judge in the *intra court* appeal.

7. The plea taken was that Rule 5 of Rules, 2015 read with Government order dated 18th September, 2015 which provided that if a candidate was not found suitable for appointment for a particular post then alternative appointment would be offered and if he did not accept then he would be taken to have foreclosed his rights & claims.

8. Vide paragraph 14 of the judgment the Division Bench referred to the issue involved thus:

*“14. In a nutshell, the argument is that the issue with regard to the applicability of the analogy that the rules which were prevalent on the death of the deceased employee are to be considered, would not apply particularly when on the date of death of the employee, the writ petitioner was not eligible and he acquired necessary qualifications only in the year 2018, post enforcement of the 2015 rules wherein the entire procedure for compassionate appointment had gone a sea change.”*

9. Now, while the argument was advanced by learned Standing Counsel appearing for the State that the rules that was prevalent at the time of consideration would be followed for the purposes of compassionate appointment and not the rules that were prevalent at the time of death of deceased and two judgments in the case of **N.C. Santosh v. State of Karnataka (2020) 7 SCC 617** and **State of West Bengal v. Debabrata Tiwari and others (Civil Appeals No.- 8842-8855 of 2022) decided on 3<sup>rd</sup> March, 2023** were cited inasmuch as the argument advanced was that compassionate appointment cannot be taken to be as a matter of right and as a source of recruitment in normal parlance but only as an exception to the general rules and Article 14 & 16 of the Constitution and that in the absence of any challenge to the Government order dated 18<sup>th</sup> September, 2015 that provided for alternative appointment to be offered if a candidate was not found to be eligible, it was liable to be accepted as rule. The Division Bench has repelled all those submissions by relying upon the judgment in the case of **Bheemesh @ Bheemappa (supra)** and observed thus:

*“41. In the facts and circumstances of the said case [Bheemesh Alias Bheemappa (supra)], it was, thus, observed that the amendment to the rules was brought later to the date of death of the employee and merely for the fact that the application for appointment was taken up for consideration after enforcement of the amendment, the claimant could not have sought benefit of the amendment. The decisions of the Tribunal and that of the High Court extending benefit of amendment to the scheme treating the amendment to the rules as retrospective in nature, have been set aside while rejecting the application of the claimant for compassionate appointment therein.”*

10. Then again upholding judgment of learned Single Judge, the Division Bench vide paragraph 42 laid the *ratio* thus:

*“42. In light of the law laid down by the Apex Court discussed above, it is evident that the Apex Court in the case of N.C. Santhosh (supra), heavily relied by the learned counsel for the appellant, while holding that the dependent of a government employee having no vested right accruing on the date of death of the government employee cannot demand consideration of his application on the basis of the then existing rule was guided by the fact that the benefits under the old scheme prevailing on the date of death of the employee has been taken away in the modified scheme for compassionate appointment.”*

11. Vide paragraph 61 of the judgment the Division Bench finally held thus:

*“61. Lastly, considering the submission of the learned Additional Advocate General for the appellants based on the decision of the Apex court in State of Uttar Pradesh and others vs. Premrata reported in (2022) 1 SCC 30 that the offer given to the respondent/writ petitioner for appointment on compassionate ground on a lower post was sufficient compliance of the scheme requiring appointment to the dependents of the deceased, suffice it to note that such an offer ignoring the fact that the appellants do not adhere to the requirement of the rules by filling up vacancies year-wise, cannot be said to be in the spirit of law. No one can be granted benefit of their own wrong. By first accumulating the applications for compassionate appointment over the period of four years and then excluding the candidates from the zone of consideration by holding an objective test after a period of four years from the date of the promulgation of the Rules providing for restriction to 5% limit to the number of vacancies to be filled up by direct recruitment, the appellants have committed a mistake benefit of which cannot be granted to them. ”*

12. Besides above, in recent judgment of the Division Bench in the case of **Oriented Insurance Company** (*supra*), the Court followed the judgment of the Special Appellate Bench in the case of **Himanshu Yadav** (*supra*). The Court further observed that merely because a matter has been referred to a larger Bench in **State Bank of India v. Sheo Shankar Tewari (2019) 5 SCC 600**, the legal position as stands today cannot be made unsettled but the law exists shall have to be followed. Vide paragraph 23 the Court held thus:

*“23. We are also aware that the reference made to Larger Bench of the Supreme Court in State Bank of India Vs. Sheo Shankar Tewari is still pending before that Court. However, in view of the discussion made above as to the law laid down by the Supreme Court, since the occurrence of that reference vide order dated 08.02.2012 we do not find any doubt exists as to the law to be applied in matters of compassionate appointments, in the meanwhile. For that reason as well, since on the date of occurrence of death of Sri Surendra Kumar Agrawal, on 06.9.2014, there did not exist any scheme for grant of compassionate appointment, the claim made by the petitioner would fail. ”*

13. In view of the above, respondents are directed to accord due consideration to the claim of the petitioners for compassionate appointment on the basis of the law that existed at the time of death of deceased employee the earning member of family, namely, Shyam Singh on 13<sup>th</sup> January, 2015 and 8<sup>th</sup> October, 2014 respectively.

14. Appropriate decision shall be taken according due consideration of the law discussed above within a period of 30 days from the date of production of certified copy of this order and if petitioners are found entitle to compassionate appointment to a suitable post, the same shall be offered to them within the next 30 days' time.

15. The writ petition succeeds and is allowed. Writ of mandamus is issued accordingly to ensure compliance of the aforesaid direction.

**Order Date :- 16.10.2023**

Atmesh