

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (S) No.627 of 2012

1. Smt. Vimla Diwan, W/o Late Chainuram Diwan, aged about 41 years,
2. Ku. Sunita Diwan, D/o Late Chainuram Diwan, aged about 22 years,

Both are resident of Depot Campus, Dhamtari, Permanent Address: Village Sambalpur, P.O. Mainpur, Distt. Gariyaband, Chhattisgarh.

---- Petitioners

Versus

1. State of Chhattisgarh, Through Secretary, Department of Forest, D.K.S. Bhawan, Mantralaya, Raipur, Chhattisgarh.
2. Chief Conservator of Forest (Administration), Raipur, C.G.
3. Conservator of Forest, Raipur, C.G.
4. Collector, Dhamtari, Distt. Dhamtari, C.G.
5. Divisional Forest Officer, Forest Division Dhamtari, Distt. Dhamtari C.G.

---- Respondents

For Petitioners: Mr. Ajit Singh, Advocate.

For Respondents/State: Mr. Varun Sharma, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

23/11/2015

1. Decisive issue falling for consideration would be whether dependent of a deceased Government servant is entitled to be considered even if vacant post is not available for

appointment?

2. Husband of petitioner No.1 and father of petitioner No.2 died in harness on 27-4-2004. Petitioner No.1 submitted an application for compassionate appointment in the Office of the Divisional Forest Officer, Dhamtari, it was examined by the Conservator of Forest of the concerned circle and it has been held that since there was no post of Class-IV lying vacant for grant of compassionate appointment at Raipur Circle, it was recommended to the Chief Conservator of Forest (Administration) for consideration and decision. By order dated 8-8-2007, it has been held that since the post is not available in the Forest Circle of Raipur, compassionate appointment cannot be granted. The petitioners have now filed this writ petition questioning the order of the respondent and also for issuing a writ of mandamus against the respondents directing them to consider the case of the petitioners for compassionate appointment.
3. Mr. Ajit Singh, learned counsel for the petitioners, would submit that even though the post is not available yet a supernumerary post should be created and a direction should be given to make appointment. He relied upon the judgments of the Supreme Court in the matters of **State of**

M.P. and others v. B.S. Bhadoriya¹.

4. Mr. Varun Sharma, learned Panel Lawyer for the State/ respondents would oppose the submissions and would submit that if no post is available, no writ of mandamus can be issued for creating supernumerary post and for considering the case for appointment. He would further submit that scheme / policy of the Government also provides that if post is not available, compassionate appointment cannot be granted.
5. I have heard learned counsel for the parties, perused the documents filed on behalf of both the parties and also gone through the case-laws cited by both the parties.
6. Late Chainuram while working as Forest Guard died in harness on 27-4-2004. At that point of time, the policy of the State Government / instruction dated 10th June, 2003 was in force and applicable for consideration of the case of dependents of the deceased servant for compassionate appointment. Paragraph 6 of the said instruction provides that compassionate appointment would be considered only against regular vacant post and it should not exceed more than 5% of the total posts available for direct recruitment.
7. Case of the petitioners has been considered and rejected

¹ (2014) 5 Scale 180

by the competent authority stating that within three years from the date of death of the deceased employee as per the policy, the post has not fallen vacant and, therefore, the petitioners are not entitled to be considered for compassionate appointment on account of unavailability of post.

8. Way back in the year 1989, in the matter of **Smt. Sushma Gosain and others v. Union of India and others**², the Supreme Court directed for creation of supernumerary post in absence of any vacant post by observing in paragraph nine as under: -

“9. We consider that it must be stated unequivocally that in all claims for appointment on compassionate grounds, there should not be any delay in appointment. The purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread earner in the family. Such appointment should, therefore, be provided immediately to redeem the family in distress. It is improper to keep such case pending for years. If there is no suitable post for appointment supernumerary post should be created to accommodate the applicant.”

9. Similarly, in the matter of **Himachal Road Transport Corporation v. Shri Dinesh Kumar**³, the Supreme Court has said that in absence of vacancy, grant of appointment would be misuse of public funds which is totally unauthorized, by observing as under: -

2 (1989) 4 SCC 468

3 (1996) 4 SCC 560

“In the absence of a vacancy it is not open to the Corporation to appoint a person to any post. It will be a gross abuse of the powers of a public authority to appoint persons when vacancies are not available. If persons are so appointed and paid salaries, it will be a mere misuse of public funds, which is totally unauthorized. Normally, even if the Tribunal finds that a person is qualified to be appointed to a post under the kith and kin policy, the Tribunal should only give a direction to the appropriate authority to consider the case of the particular applicant, in the light of the relevant rules and subject to the availability of the post.”

10. Likewise, in a decision in the matter of **Hindustan**

Aeronautics Ltd. v. Smt. A. Radhika Thirumalai⁴, the

Supreme Court has again distinguished the view taken in

Smt. Sushma Gosain (supra) and reiterated the view

taken in **Himachal Road Transport** (supra) by holding as

under in paragraphs six and seven: -

“6.In other words, an appointment on compassionate grounds can be made only if a vacancy is available.....”

7. In Umesh Kumar Nagpal (supra) it has been indicated that the decision of Sushma Gosain (supra) has been misinterpreted to the point of distortion and that the decision does not justify compassionate appointment as a matter of course. The observations on which reliance has been placed by the learned Single Judge in Sushma Gosain (supra) have to be read in the light of the facts of that particular case.”

11. Subsequently, in the matter of **Indian Bank v. K. Usha**

and another⁵, Their Lordships of the Supreme Court have

4 (1996) 6 SCC 394

5 (1998) 2 SCC 663

held that the Court cannot direct by writ of mandamus to create vacancy, by observing as under in para 17: -

“17. Now remains the consideration of the third contention. Learned counsel for the appellant were right when they contended that if the scheme for granting compassionate appointments as per the rules and regulations of the employer concerned expressly provides that such appointments can be granted to the heirs of its deceased employees dying in harness only if vacancies exist for absorbing them, then the compassionate appointments could be granted only against such vacancies and the Court cannot direct, by mandamus, to create vacancies for that purpose if there are none. In this connection they rightly invited our attention to a decision of this Court in the case of [Hindustan Aeronautics Ltd. v. A. Radhika Thirumalai \(Smt.\)](#) [(1996) 6 SCC 394].”

12. Similar is the position in the matter of **Steel Authority of India Ltd. v. Madhusudan Das and others**⁶ in which it has been held that appointment on compassionate ground cannot be claimed as a matter of right and it must be confined to the post which has fallen vacant, and observed as under: -

“This Court in a large number of decisions has held that the appointment on compassionate ground cannot be claimed as a matter of right. It must be provided for in the rules. The criteria laid down therefor, viz., that the death of the sole bread earner of the family, must be established. It is meant to provide for a minimum relief. When such contentions are raised, the constitutional philosophy of equality behind making such a scheme be taken into consideration. Articles 14 and 16 of the

6 (2008) 15 SCC 560

Constitution of India mandate that all eligible candidates should be considered for appointment in the posts which have fallen vacant.”

13. Recently, in the matter of **State Bank of India and another v. Rajkumar**⁷, the Supreme Court has re-emphasized need for strict compliance with the terms of scheme and the availability of the post and Their Lordships have held in paragraphs nine and eleven as under: -

“9. Normally, the three basic requirements to claim appointment under any scheme for compassionate appointment are: (i) an application by a dependent family member of the deceased employee; (ii) fulfillment of the eligibility criteria prescribed under the scheme, for compassionate appointment; and (iii) availability of posts, for making such appointment. If a scheme provides for automatic appointment to a specified family member, on the death of any employee, without any of the aforesaid requirements, it can be said that the scheme creates a right in favour of the family member for appointment on the date of death of the employee. In such an event the Scheme in force at the time of death would apply.

11. Normal schemes contemplate compassionate appointment on an application by a dependent family member, subject to the applicant fulfilling the prescribed eligibility requirements, and subject to availability of a vacancy for making the appointment. Under many schemes, the applicant has only a right to be considered for appointment against a specified quota, even if he fulfills all the eligibility criteria; and the selection is made of the most deserving among the several competing applicants, to the limited quota of posts available. In all these schemes there is a need to verify the eligibility and antecedents

⁷ 1975 (3) SCC 76

of the applicant or the financial capacity of the family. There is also a need for the applicant to wait in queue for a vacancy to arise, or for a Selection Committee to assess the comparative need of a large number of applicants so as to fill a limited number of earmarked vacancies.”

14. Extremely recently, in the matter of **Canara Bank and others v. M. Mahesh Kumar and others**⁸, Their Lordships of the Supreme Court have only directed for consideration of the claim of compassionate appointment as per the applicable scheme in line of the judgment of the Supreme Court in the matter of **Bhawani Prasad Sonkar v. State of U.P.**⁹.

15. The **B.S. Bhadoriya's** case (supra) relied upon by learned counsel for the petitioners, is of no help to the petitioners. In that case, the High Court of M.P., issued direction to the State of M.P., to consider the case of the petitioner therein for compassionate appointment, which was set-aside by Their Lordships of the Supreme Court holding that on the ground of delay, purpose of making such appointment has evaporated.

16. Thus, on the basis of aforesaid decisions, it is quite vivid that for compassionate appointment availability of post(s) is *sine qua non* and in absence of vacant post, no mandamus can be issued. In the present case, admittedly,

⁸ (2015) 7 SCC 412

⁹ (2011) 4 SCC 260

requisite post for appointment on compassionate ground has not fallen vacant within a period of three years and applicable policy provides for appointment only against regular vacant post, therefore, on that count, the application of petitioner No.1 has rightly been rejected by the competent authority.

17. In view of the aforesaid discussion, I do not find any illegality or infirmity in the impugned order refusing compassionate appointment to the petitioners on account of unavailability of vacant post. Accordingly, the writ petition deserves to be and is hereby dismissed. No order as to costs.

Sd/-
(Sanjay K. Agrawal)
Judge

HIGH COURT OF CHHATTISGARH, BILASPUR

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Smt. Vimla Diwan and another

- Versus -

State of Chhattisgarh and others

HEAD NOTE

In absence of vacant post, candidate is not entitled to be considered for compassionate appointment.

रिक्त पद के आभाव में, अभ्यर्थी अनुकंपा नियुक्ति हेतु विचार किये जाने के लिए हकदार नहीं है।