IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Date of decision: 17.11.2016

CWP No.7076 of 2011

Poonam ...Petitioner

Vs.

The State of Haryana & others ...Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Ms. Gagandeep Kaur, Advocate, for the petitioner.

Mr. J.S.Bedi, Addl. AG, Haryana.

RAJIV NARAIN RAINA, J.

Constable Kitab Singh died on 08.02.1998 leaving behind his wife; one married & two unmarried daughters as well as his son Jaivir. The Police Department appointed Jaivir as a Constable on compassionate grounds under the ex gratia scheme. He had served for less than two years, when he met with a road accident and died of the injuries sustained on 04.05.2003 leaving behind his wife Poonam - the petitioner and a toddler of 1½ month. Poonam became a single parent and dependent on her matrimonial home. Shortly before the death of Jaivir, the State of Haryana notified 'the Haryana Compassionate Assistance Rules, 2003', (for short '2003 Rules') which were brought into force on 28.02.2003. She applied to the Police Department to absorb her in any of the ministerial services on the staff strength by way of compassionate appointment, as she possessed the minimum qualification of 10+2 from the Board of School Education, Haryana and there was no earning member of the family, her husband being the only son of his parents. When there was no response to her request, she approached this Court by way of CWP No.19336 of 2005 seeking directions to the respondents to absorb her in State service on compassionate grounds. The writ petition was disposed of on 13.12.2005 with a direction to the respondents to take a decision on the representation submitted by the petitioner within a period of three months by passing a reasoned order. In implementation of the order, memo dated 24.04.2006 was issued by the Director General of Police, Haryana vide which the claim of the petitioner for ex gratia appointment/absorption was rejected on the ground that husband of the petitioner had less than three years of service at the time of his death and as such the petitioner is not entitled for absorption in the State service. There was a deficit of one year to meet the demands of the regulations.

Feeling aggrieved, the petitioner challenged the impugned memo dated 24.04.2006 by way of filing CWP No.9090 of 2006. However, during the pendency of the writ petition, the State of Haryana notified the Rules called 'the Haryana Compassionate Assistance to the Dependents of Deceased Government Employees Rules, 2006' (for short '2006 Rules'), which were brought into force on 01.08.2006. The writ petition was decided in the presence of the prevailing 2006 Rules by the Division Bench of this Court on 08.03.2007 with a direction to the respondents to consider the claim of the petitioner under the 2006 Rules and take a final decision within a period of three months. The salient feature of the new Rules is that it provides for financial assistance to the dependents of the deceased government servants in a scheme provided in the Rules based on options, whether claimant wishes to draw benefit of lump sum ex gratia grant available in the 2003 & 2005 Rules, as the case may be, in lieu of the monthly financial assistance provided by 2006 Rules. Clause 6 of the 2006

Rules provides that 'all pending cases of ex gratia assistance shall be covered under the new rules". The calculation of the period and payment shall be made to such cases from the date of notification of these rules with the option as afore-stated.

Sadly, no action was taken by the Police Department in implementation of the order dated 08.03.2007, whereas a final decision had to be taken by June, 2007. It is only after the petitioner filed COCP No.40 of 2010, the impugned order dated 14.05.2010 was issued by the Director General of Police, Haryana rejecting the claim of the petitioner relying on a circular letter dated 08.06.2007 wherein it was provided that in cases where death happened prior to 01.08.2006 and where PPO/GPO have been issued by Accountant General, Haryana, in such cases dependents cannot opt for the new scheme, 2006 with effect from 01.08.2006. As a result, the petitioner was left without right to financial assistance or claim for compassionate appointment under the previously prevailing ex gratia schemes. The order of the Director General of Police, Haryana appears to prima facie frustrate the directions of this Court in CWP No.9090 of 2006 decided on 08.03.2007.

The petitioner is before this Court praying for setting aside of the impugned order dated 14.05.2010 being illegal and arbitrary and in clear violation of the directions issued in the petitioner's case. In short, the petitioner was denied compassionate appointment for the first time on 24.04.2006 on the specious plea that the husband of the petitioner, a compassionate appointee himself, had less than 3 years of service at the time of his death. Financial assistance is denied by applying 2006 Rules, which came into effect from 01.08.2006. The petitioner is before this Court claiming compassionate appointment and in the alternative financial assistance.

It appears rather clearly that the petitioner is estopped from claiming compassionate appointment on account of her counsel making statement before the Division Bench on 08.03.2007 that her case be considered in accordance with the new 2006 Rules based on the suggestion made in the written statement that her case can only be considered as per the new Rules. Therefore, the Court accepted the stand of the State and directed the competent authority under the 2006 Rules to take a final decision. No doubt, the letter and spirit of the order indeed was to bring financial relief to the petitioner. For this relief it matters little, whether the petitioner has been paid after the death of her husband amounts towards Janta Insurance Policy, HAP Contributory, GIS, Family Pension, Leave Encashment, Police Welfare Relief Money and Death -cum- Retirement Gratuity in the sums mentioned in Para.5 of the written statement filed by the State pleading therein that the petitioner has been paid her dues as per her entitlement and nothing remains due.

The question which falls for consideration is; whether the petitioner is entitled to the alternative relief of financial assistance under the 2003 Rules, the 2005 amended Rules enhancing financial assistance from ₹2.5 lakhs to ₹5 lakhs or the new policy in the Rules of 2006. Any of them would bring relief to her.

To digress from the disputed issue for a while, this Court in COCP No.40 of 2010 reaffirmed the stance that respondents should reconsider the matter by an appropriate order in terms of the order dated 08.03.2007 passed by the Division Bench in CWP No.9090 of 2006. This affirms the faith of the Court twice offer expressed once in 2007 and then again in 2010 that the petitioner's case should be considered as per directions to which the respondents were party. If the State takes a stance in Court as arise in the circumstances of this case, any departure would amount to hoodwinking the Court because the State had opportunity in 2007 in the writ proceedings and again in the year 2010 in the contempt proceedings to have formally taken the stand that the petitioner had no case at all for award of financial assistance and more specifically at the stage of contempt order. But they did not do so for three years even after directions in CWP No.9090 of 2006 were issued on 08.03.2007 while disposing of the case and then avoiding contempt proceedings holding over reconsideration. This is more peculiar since the order in CWP No.9090 of 2006 was passed on 08.03.2007 while the circular clarifying Clause 6 of the 2006 Rules was issued thereafter on 08.06.2007 containing Clause 3, a provision in the following words:

> "In cases where death happened prior to 01.08.2006 and where PPO/GPO have been issued by the Accountant General, Haryana cannot opt for new scheme introduced w.e.f. 01.08.2006."

What this means is that when pensionary entitlements are handed over to the dependent of the deceased government employee and death occurs prior to 01.08.2006, the claimant would lose rights to financial assistance.

It is argued by the learned counsel for the petitioner that this circular flies in the face of the 2006 Rules, which confer rights to financial assistance on dependents in pending cases. By no means can it be said that the case of the petitioner for compassionate appointment was not pending, which was her first prayer, which request was rejected for the first time on 24.04.2006, three years after the death of Jaivir on the ground that he had not put in three years of service by the time of death. Though the right to compassionate appointment appears to have been waived before the Division Bench asking for alternative relief in terms of 2006 Rules, but I have serious doubt, whether cases of compassionate appointment with respect to an exclusionary clause can be viewed myopically in socially beneficial statutory scheme from the date of death by sudden and unforeseen accident, which is a purely fortuitous circumstance to deprive State help for ex gratia appointment and such a provision may not survive the test of judicial scrutiny. However, the constraints placed by the orders of the Division Bench shy me from entertaining the plea on the first prayer and the debatable issue is left open to be decided in some other case. This Court is bound by the statement made by the counsel for the petitioner before the Division Bench and accepted by it. It is not clear from record, whether the counsel had either orally or on written instructions received from his client, relinquished her rights, when he made the statement. But then the statement has been made too long ago to reopen without the same having been agitated and disputed by the petitioner in any of the litigations after the orders were passed by the Division Bench on 08.03.2007.

Therefore, the short question which requires to be determined is; whether a clarification can override the Rule and change its shape and content without carrying out an exercise amending the parent document created by the respondents by resort to proviso to Article 309 of our Constitution making rules statutory in character which would enjoy primacy over instructions and clarifications which supplant the rules or make dangerous inroads in them. The relationship between Rules and Instructions was probably first enunciated in the constitution Bench ruling of the Supreme Court in <u>Sant Ram Sharma Vs. State of Rajasthan & others</u>, AIR 1067 SC 1910 observing that: "Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed". In order of superiority in service law Acts come first, then Rules framed under Proviso to Article 309, lower still, executive instructions under Article 162, still lower, but effective enough in service law provided they don't trample on rules or supplant them and only supplement them and then circulars and clarifications on policy, which can neither disturb rules or instructions issued in exercise of executive power which extends to legislative power. In this case, we are dealing with a clarification disturbing rights created by rules. Clarifications are meant as explanations or coating and removing a difficulty felt in implementation of rules or policy tending to crease out anomalies etc.

The clarification issued in the present case to my mind creates a new principle altogether which is neither foreshadowed nor forthcoming in the notification dated 01.08.2006 containing the new policy of ex gratia financial assistance on compassionate grounds to members of the family of a deceased government employee, who dies while in service. Rule 8 of this notification is the 'Repeal and Savings Clause'. It repeals the Haryana Compassionate Assistance to the Dependents of Deceased Government Employees Rules, 2005, which were in force immediately before the commencement of the new Rules. There are two provisos to Rule 8, which deserve to be read for a fuller understanding of the provision and, therefore, Rule 8 is quoted below:

> "8. The Haryana Compassionate Assistance to the Dependents of Deceased Government Employees Rules, 2005, which are in force immediately before the commencement of these rules as hereby repealed:

> Provided that families will have the option to opt for the lump sum ex gratia grant provided in the rules 2003 or 2005, as the case may be, in lieu of the monthly financial assistance provided under these rules;
>
> Provided further that in all pending cases where the family exercise the option to receive the financial assistance under these rules, the calculation of the period and payment shall be made from the date of notification of these rules."

To make it easier to proceed further with the case, the second proviso is important. It guarantees that in all pending cases where the family exercises the option to avail financial assistance within prescription of the 2006 Rules, the calculation of the period and payment shall be made w.e.f. 01.08.2006. The object of the Rules is in proviso 2 aimed at tiding over an emergency situation resulting into sudden loss of bread-earner by giving financial assistance to those he leaves behind. The eligibility will be as per the provisions of the Pension/Family Pension Scheme, 1964 as per Rule 3. Applications can be filed in Form A as per Rule 4 by an eligible family member and no time limits are set in the new policy. The 'criteria of financial assistance' and 'pending cases' are defined as follows:

> "**5. Criteria for financial assistance -** (1) On the death of any Government employee, the family of the employee would continue to receive as financial assistance a sum equal to the pay and other allowances that was last drawn by the deceased employee is the normal course without raising a specific claim –
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> (a) for a period of fifteen years from the date of death of the employee, if the employee at the time of his death had not attained the age of thirty-five years.
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> (b) for a period of twelve years or till the date the employee would have retired from Government

service on attaining the age of superannuation, whichever is less, if the employee at the time of his death had attained the age of thirty-five years but had not attained the age of forty-eight years.

(c) for a period of seven years or till the date the employee would have retired from Government service on attaining the age of superannuation, whichever is less, if the employee had attained the age of forty-eight years.

(2) The family shall be eligible to receive family pension as per the normal rules only after the period during which he receives the financial assistance as above is completed.

(3) The family of a deceased Government employee who was in occupation of a Government residence would continue to retain the residence on payment of normal rent/ license fee for a period of one year from the date of death of the employee.

(4) Within fifteen days from the date of death of a Government employee, an ex-gratia assistance of twenty five thousand rupees shall be provided to the family of the deceased employee to meet the immediate needs on the loss of the bread earner.

(5) House Rent Allowance shall not be a part of allowance for the purposes of calculation of assistance.

6. Pending cases - All pending cases of ex-gratia assistance shall be covered under the new rules. The calculation of the period and payment shall be made to such cases from the date of notification of these rules. However, the families will have the option to opt for the lump sum ex-gratia grant provided in the Rules, 2003 or 2005, as the case may be, in lieu of the monthly financial assistance provided under the Haryana compassionate Assistance to the Dependents of the Deceased Government Employees Rules, 2006."

The interplay between 2003 Rules; 2005 (Repealed) Rules and 2006 extant Rules are dependent on a variable computation or formula based on age and time of death of government employee and, therefore, choices given to receive options, which claimants feel satisfied with since there are several permutations and combinations which may arise to cater to myriad situations and circumstances dependent families may find themselves in. Further, Rule 7 deals with 'removal of doubts' and is not without any bearing on the case and is reproduced to read as follows:

> "**7. Removal of doubts -** If any doubt arises relating to the application, interpretation and scope of these rules, it shall be referred to the Government in the department of General Administration (in General Services-II Branch) whose decision thereon shall be final."

The expression 'if any doubt arises' employed in the provision refers to application, interpretation and scope of Rules, which are referable to the State Government in the Department of General Administration in General Services-II Branch whose decision shall be final. The impugned circular letter which is clarificatory in nature does not remove any apparent doubts relating to application, interpretation and scope of the Rules, but goes beyond removal of doubts and virtually takes away rights of claimants in pending cases altering the entire shape of the ex gratia grant scheme of financial assistance. This is not legally permissible in the manner in which valuable rights have been taken away and applying the principles in *Sant Ram Sharma's* case, the clarification cannot be supported as legal since it appears to supplant the rules. The clarification is also not in exercise of legislative power by executive action nor has it any semblance of legitimate clarificatory power and authority used to fill in the gaps in the Rules, where there are apparently none whatsoever and therefore it does not supplement rules but supplants them by roping in a principle foreign to the Rules that in cases where death has occurred prior to the date of notification of the 2006

Rules and where PPO/GPO have been issued, the claimant would lose rights altogether under the 2006 Rules for award of financial assistance. By one stroke of the pen the impugned clarification takes away pre existing rights preserved under the 2003 and the 2005 Rules and leaves the claimant without recourse to administrative remedy. If the door of the administrator is closed by the clarification, the doors of this Court are always open to do justice. In absence of amendment carried out in the 2006 Rules by following the procedure established by law, the clarification cannot take away the rights of the petitioner and, therefore, the clarification has to be ignored by giving primacy to the 2006 Rules.

As a result of the above discussion, this petition is allowed. Accordingly, the impugned orders are quashed. The clarification letter is invalidated as illegal and arbitrary and not binding on the rights of claimants. The petitioner is held legally entitled to financial assistance in terms of new 2006 Rules. The petitioner may exercise her option accordingly to be filed before the Department by completing the formalities upon which action be taken positively within a period of two months from the date of receipt of certified copy of this order. The amounts be determined and paid to the petitioner in terms of the 2006 Rules.

17.11.2016 **[RAJIV NARAIN RAINA]**
Vimal **JUDGE**

Whether speaking/reasoned: *Yes*

Whether Reportable: *Yes*