

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (S) No.3919 of 2006**

Smt.Laxmi Choubey, W/o Late Shri Gyan Chand Choubey Aged about 35 years R/o Madhuban Road Near Maharani School Dayalband Bilaspur (CG)

---- Petitioner

Versus

1. The Food Corporation of India, Through: Chairman cum Managing Director, Head Quarter, 16-20 Barakhambha Lane, New Delhi
2. General Manager Food Corporation of India Regional Office Kapa, Raipur (CG)
3. Area Manager, Food Corporation of India, District Office, Link Road, Bilaspur (CG)

---Respondents

For Petitioner	:	Mr.K.K.Singh, Advocate
For Respondents	:	Mr.B.P. Gupta, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

17/05/2017

1. The petitioner's husband Shri Gyan Chand Choubey while working as Watchman in Food Corporation of India (hereinafter called as 'FCI') died in harness on 7.10.1998. The petitioner submitted an application for compassionate appointment, but that was not considered by the FCI leading to filing of Writ Petition No.1979 of 2002 before this Court, in which this Court directed the FCI to consider the case of the petitioner for compassionate appointment expeditiously. Thereafter, the petitioner's case was considered and by order dated 8.5.2006 her case for compassionate appointment has been rejected on the ground that her case is time barred.
2. Feeling aggrieved against that order, this writ petition has been filed, which has been replied by the respondents opposing the claim of the petitioner holding that order

passed by the FCI is strictly in accordance with law and the petitioner is not entitled for compassionate appointment.

3. Mr.K.K.Singh, learned counsel appearing for the petitioner, would submit that the petitioner's case has been rejected mainly on the ground that only 5% post of direct recruitment quota was available for appointment that too within three years, which is unsustainable and bad in law and the respondent-FCI be directed to create the post and the petitioner to be considered on that post.
4. On the other hand, Mr.B.P.Gupta, learned counsel for the respondents, would submit that the petitioner's case has been rejected mainly on the ground that compassionate appointment was available only for three years and if vacant post which is only 5% of direct recruitment is available within three years from the date of death, otherwise application is to be rejected as per Government of India policy. He would further submit that retiral dues has been paid to the petitioner i.e. ₹ 296708/- and if the said amount is kept in bank, then that will carry interest at least ₹ 29671/- per year and per month interest would be ₹ 2473/- and as such, income derived by the petitioner is sufficient to maintain her family and therefore, the petitioner is not entitled for compassionate appointment.
5. I have heard learned counsel appearing for the parties, considered their rival submissions made hereinabove and also gone through the record with utmost circumspection.
6. The petitioner's application has been rejected principally on the ground mentioned in the order dated 8.5.2006 which states as under:-

“As per office Memorandum No.14014/19/02-Estt(D) dated 5.5.2000 of Ministry of Pers. Public Grievances & Pension, Dept. of Personnel &

Training, GOI, circulated by HQs. New Delhi vide letter No.EP-1(1)/95-Vol.III dated 5.2.04, if compassionate appointment is not possible to be offered to the applicant within three years in the prescribed ceiling of 5% of direct recruitment quota, his case will be finally closed and will not be considered again (copy enclosed)."

7. A careful perusal of the order would show that main reason for not granting compassionate appointment is non-availability of post within three years from the date of death of the concerned employee.
8. Submission of learned counsel for the petitioner is that in that case supernumerary post be created for her appointment, whereas it is the case of the respondents that within three years from the date of death of the concerned employee, post for appointment has not been fallen vacant, therefore, the petitioner is not entitled to be considered for compassionate appointment on account of non-availability of post.
9. Way back in the year 1989, in the matter of **Smt. Sushma Gosain and others v. Union of India and others**¹, 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

¹ (1989) 4 SCC 468

applicant.”

10. Similarly, in the matter of **Himachal Road Transport Corporation v. Shri Dinesh Kumar**², 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: -

“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.”

11. Likewise, in a decision in the matter of **Hindustan Aeronautics Ltd. v. Smt. A. Radhika Thirumalai**³, 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.”

2 (1996) 4 SCC 560

3 (1996) 6 SCC 394

12. Subsequently, in the matter of **Indian Bank v. K. Usha and another**⁴, Their Lordships of the Supreme Court have 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].”

13. Similar is the position in the matter of **Steel Authority of India Ltd. v. Madhusudan Das and others**⁵ 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 Constitution of India mandate that all eligible candidates should be considered for appointment in the posts which have fallen vacant.”

14. Recently, in the matter of **State Bank of India**

4 (1998) 2 SCC 663

5 (2008) 15 SCC 560

and another v. Rajkumar⁶, 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 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.”

15. Extremely recently, in the matter of **Canara Bank and others v. M. Mahesh Kumar and others**⁷, Their Lordships of the Supreme Court have only directed for consideration of the claim of compassionate appointment as per the

6 (2010) 11 SCC 661

7 (2015) 7 SCC 412

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applicable scheme in line of the judgment of the Supreme Court in the matter of **Bhawani Prasad Sonkar v. State of U.P.**⁸

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, required post for appointment on compassionate ground has not fallen vacant within a period of three years from the date of death of the concerned employee and applicable policy provides for appointment only against regular vacant post, therefore, on that count, the application of the petitioner 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 petitioner 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

B/-