

IN THE HIGH COURT OF JUDICATURE AT PATNA

**Letters Patent Appeal No.685 of 2014
IN
Civil Writ Jurisdiction Case No. 18719 of 2012**

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1. Sanjay Kumar Pathak, Son of Mahesh Pathak, resident of village- Patkhauria,
P.S. Kudra, District- Kaimur at Bhabhua

.... Appellant

Versus

1. The State of Bihar
2. The Director General of Police, Bihar, Patna
3. The Inspector General of Police, B.M.P. Bihar, Patna
4. The Deputy Inspector General of Police, B.M.P., Patna
5. The Commandant BMP 03, Bodh Gaya, Gaya
6. The District Magistrate-cum-Chairman, District Compassionate Establishment
Committee, Gaya

.... Respondents

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Appearance :

For the Appellant : Mr. Swaraj Kumar Ghosh, Sr. Advocate, with
Mr. G.G.Tiwary

For the Respondents : Mr. Brajesh Kumar, AC to AAG 4

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CORAM: HONOURABLE DR. JUSTICE RAVI RANJAN

and

HONOURABLE MR. JUSTICE MADHURESH PRASAD

ORAL JUDGMENT

(Per: HONOURABLE DR. JUSTICE RAVI RANJAN)

Date: 13-09-2018

Heard the parties.

Admit.

Mr. Brajesh Kumar, AC to AAG 4, accepts notice on behalf
of the respondents.

This appeal is being considered and disposed of on merit
today itself on the consent given by the respective parties.

This Letters Patent Appeal is directed against the order
dated 24.2.2014 passed by the learned Single Judge of this Court in
CWJC No. 18719 of 2012, by which the writ petition was dismissed.



Same was filed by the appellant – writ petitioner for setting aside the order dated 23.7.2012 passed by the authority concerned rejecting the claim of appointment on compassionate ground.

The short facts which would be necessary for consideration of the lis stand enumerated as under.

Admittedly father of the petitioner, who was Constable in the Bihar Military Police, went on leave on 11.12.2002 but thereafter nobody has heard about him i.e. either his employer or the family members. As a consequence thereof, in terms of the policy of the State Government as enumerated in the order of the Commandant, BMP 03 Bodh Gaya (Annexure 2) he was declared missing on 16.2.2010 from the date of his leave i.e. 11.12.2002 and considering this as a “Civil Death” the family pension etc. was allowed to the widow. It appears that on 17.5.2011 the widow filed an application before respondent No. 5 i.e. Commandant, BMP 03, Bodh Gaya, informing him regarding her missing husband and that considering his civil death, to allow family pension to her and she also made a request that one of her son namely Sanjay Kumar Pathak should be appointed on compassionate ground as he is looking after her. Her such request was turned down by respondent No. 5 vide Annexure 7 on the ground that the District Compassionate Appointment Committee, which is responsible for making a recommendation in that respect, has recommended for rejecting the claim on the ground that the policy of appointment on compassionate ground with in



respect to the persons who were considered as dead in view of found missing was notified only on 31.10.2008 i.e. much after the date on which her husband went missing. It was considered that the claim was made with respect to the incident which had taken place prior to coming into force of the aforesaid policy decision with respect to grant of compassionate appointment in such cases.

The aforesaid order of rejection was subjected to challenge by the writ petitioner-appellant by filing CWJC No. 18719 of 2012, which was dismissed by the order impugned on the ground that father of the writ petitioner went on leave on 11.12.2002 and has been missing since then and that the policy for grant of compassionate appointment in such cases having been notified on 31.10.2008, the decision contained in Annexure 4 taken by respondent No. 5 cannot be faulted with inasmuch as change in policy will always be prospective and cannot be operated retrospectively. It is this order which is under challenge in this appeal.

Mr. Swaraj Kumar Ghosh, learned Senior Counsel, appearing along with Mr. G.G.Tiwary, submitted that the impugned order in the writ petition has been passed under gross misconception and there has been error in the order passed by the learned Single Judge also. It is contended that the policy, which stands appended as Annexure 'A' to the counter affidavit filed by the State respondent, envisages that the consideration for compassionate appointment can



be made only after two years from the date on which the said person has been declared missing. It is contended that no outer limit having been provided in the policy, rejection of the claim on such ground that it was filed after seven – ten years since when father of the petitioner had gone missing, is apparently erroneous.

Learned Counsel also took us to the provisions contained in Section 108 of the Evidence Act, under which in case question arises as to whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it. It is contended that as per this provision no person could be declared dead before seven years from the date from which he has gone missing.

Thirdly, it is submitted that such declaration of competent Authority is required under Clause 3(2) Ka (iii) of the 2008 policy, which in the instant case is dated 16.2.2010 (Annexure 2). Under that order the father of the petitioner has been declared missing since 11.12.2002.

On the strength of the aforesaid, it is asserted that the writ petitioner could not have filed a petition for appointment on compassionate ground before expiry of seven years from the date since when his father has been declared missing and also not before 16.2.2010 when the competent authority of the Bihar Military Police has declared him to have gone missing since 11.12.2002. In support



of his aforesaid submission, learned Counsel has placed reliance upon several decisions which would be considered and dealt with hereinafter.

Per contra, learned Counsel appearing for the State has defended the impugned order in the writ petition contained in Annexure 4 as well as the impugned order passed by the learned Single Judge on the ground that the petitioner cannot derive benefit of the 2008 policy for the reason that on the date, when his father had gone missing i.e. 27.12.2002, no such policy was in existence and after coming of the new policy in the year 2008 he has tried to derive benefit from the aforesaid policy by making application in the year 2011. It is also asserted that such benefit can only be given within two years from such declaration.

Having heard both sides, we find force in the submission raised on behalf of the appellant. The matter of appointment in such a situation on compassionate ground came up before a Single Bench of this Court in CWJC No. 8716 of 2002 which was disposed of on 2.2.2005 in **Smt. Kamla Devi and Sudhir Kumar vs. The State of Bihar & ors., 2005(20 PLJR 155**. The learned Single Judge has held that while construing the word 'death', in a policy for compassionate appointment it cannot be held that only natural death can be taken into consideration but also the death by presumption laid down by the legislature under Section 108 of the Evidence Act, which is termed in the legal parlance as "Civil Death". It has to be



noted that at that point of time when judgment was being passed the new policy which admittedly came in the year 2008 was not in existence. It was also held that it is true that there is limit for making such application for appointment on compassionate ground but this limit will start running from the date when the period of presumption will come to an end and not on the date of the death by reason of a fiction on the statute made through legislative mandate.

We are in respectful agreement with the view expressed by the learned Single Judge. As the petitioner could not have filed the claim earlier unless the competent authority held that the said person has gone missing since seven years from the date of the leave which has been decided by Annexure 2. Under Section 108 of the Evidence Act also he could not have taken steps prior to 2009 i.e. after seven years from the date his father had gone missing and when he became eligible after declaration by the competent authority vide Annexure 2 on 16.2.2010, prior to which the policy of 2008 had already come into existence. Thus, it cannot be construed by any imagination that policy is being applied retrospectively. In his case application would be prospective for the reason that without such declaration which was made on 16.2.2010 as per policy dated 31.10.2008, he could not have filed application for compassionate appointment, also in view of the provisions of the new policy which has been discussed above, in any case before 11.12.2009 i.e. after seven years when his father has been declared to have been missing.



In Rajiv Kumar vs. The State of Bihar & ors, 2004(1)

PLJR 36 (DB), a Division Bench of this Court has also considered the issue of appointment on compassionate ground in such matter and has held that one has to wait for seven years since the employee had gone missing for making a claim for appointment on compassionate ground for the reason that before the “presumed dead” as mandated under Section 108 of the Evidence Act, he could not have raised this claim.

In Md. Noor Alam vs. The State of Bihar & ors, 2007(4)

PLJR 200, a Single Bench has noticed that the State Government had already taken a decision which is contained in Circular letter No. 9739 dated 26th November 1997, to consider the case of dependants of those government servants who have remained traceless for seven years for appointment on compassionate ground but that was not revised and placed in the subsequent circular which came under letter No. 281 dated 1.2.2006.

We have considered this decision only for the purpose that in case the submission of the State made in this regard is considered for the time being, though not accepted, that there was no policy of the State Government on 11.12.2002, when father of the petitioner got missing as declared vide Annexure 2. On that date the said circular dated 26.11.1997 was in operation but no claim could have been made under that for the reason that seven years was not completed in view of the pre-condition of that circular which was



admittedly completed in the year 2009 prior to which new Circular of the year 2008 came. So on that account also, such submission made on behalf of the State is noted only to be rejected.

In **Smt. Kaushalya Devi vs. The State of Bihar, 2009 (2) PLJR 325**, yet again such a matter was considered by a Single Bench of this Court. In that case the concerned employee had gone traceless since 5.10.1994 but it was held that even though such policy of the State Government with respect to appointment on compassionate ground which was available under Circular dated 26.11.1997, could not be revised in the subsequent circular dated 1.2.2006 the case of the petitioner was required to be considered under the old policy of the year 1997.

Having considered the aforesaid pronouncements, we are of the view that the petitioner could not have applied for appointment on compassionate ground before 11.12.2009 i.e. without completion of seven years from the date since when his father had gone traceless in view of the provisions contained in Section 108 of the Evidence Act. Our further view is that in view of the pre-condition enumerated in the new policy which has been adopted by the State Government on 31.10.2008 petitioner's claim could not have been considered under Clause 2(2)Ka(iii) without declaration by the competent authority regarding a "Civil Death" which was eventually issued by respondent No. 5 vide Annexure 2 on 16.2.2010. Thus, it was not possible for the writ petitioner to make such a claim before the



aforesaid order.

So far as the period of limitation is concerned, there is no outer limit which has been given in the circular. Thus, in our view, the general period of limitation which is available under the policy for appointment on compassionate ground i.e. five years for making such a claim i.e. period of five years would be applicable in such case but not from the date the employee had gone missing. But from the date either to be calculated since after completion of seven years which stands enumerated in the new circular as aforesaid or from the date when the competent authority has declared such employee as traceless.

Having held so, and as a consequence thereof, in our view the impugned order contained in Annexure 4 of the writ petition has to be set aside and as such ordered accordingly. The impugned order is set aside and the writ petition is allowed. The order passed by the learned Single Judge is also declared to be erroneous and, as such, is also set aside.

The appeal stands allowed, however, there shall be no order as to cost.

The Respondent No. 5 as well as the competent authority are directed to reconsider the case of the writ petitioner – appellant in accordance with law taking into consideration the observations and the findings recorded in this appeal. Since much time has elapsed since the writ petitioner had applied for such a claim, it is expected



that such a decision would be taken within a period of three months
from the date of receipt/production of a copy of this order.

(Dr. Ravi Ranjan, J.)

(Madhuresh Prasad, J.)

Snkumar/-

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