

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.6168 of 2018

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Mrinal Kanti, S/o Late Chandra Mouli Mishra, R/o Muhalla- New Gosai
Tola, Gola Road, Danapur, Ward No. 20, Near Dokhan Ram D.A.V. School,
P.S.- Danapur, Distt.- Patna.

... .. Petitioner

Versus

1. The State of Bihar.
2. The Chief Secretary, Government of Bihar, Patna.
3. The Principal Secretary, Personnel and Administration Department, Govt. of Bihar, Patna.
4. The Additional Secretary of Govt. personnel and Administration Department Govt. of Bihar, Patna.

... .. Respondents

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Appearance :

For the Petitioner/s	:	Mr. Rajendra Narayan, Senior Advocate
		Mr. Maya Shankar Mishra, Advocate
For the Respondent/s	:	Mr. Sheo Shankar Prasad -S.C.-8

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY
ORAL JUDGMENT

Date : 26-07-2018

Heard learned counsel for the petitioner and
learned counsel for the State.

2. It is unfortunate that the State authorities always compels the person to approach this Court and creates multiplicity of litigation, is the result of the present litigation. When this Court has already, in earlier proceeding, has recorded in a positive term that the father of the petitioner will be presumed to have died followed by release of retiral dues, but has been deprived of compassionate appointment on the ground



that at the relevant time there was no circular for granting the compassionate appointment.

3. This issue is no longer *res integra* but this issue has already been decided by this Court in two judgments i.e. in the case of ***Rajiv Kumar vs. State of Bihar and Ors***, reported in ***2004(1) PLJR, 36*** and in the case of ***Smt. Kamla Devi and Sudhir Kumar vs. State of Bihar and Ors.***, reported in ***2005(2) PLJR, 155***. However, for final adjudication of the case, the facts about the entitlement of the petitioner for compassionate appointment is required to be recorded, which are as follows:-

4. The father of the petitioner was appointed as Stenographer-cum-Typist in the Department of Information and Public Relation on 10.02.1975, was promoted as Personal Assistant in the Personnel and Administrative Reforms Department, Government of Bihar. While he was deputed as Personal Assistant to Special Secretary of Vigilance Department (Cabinet), Government of Bihar, Patna, he went to his office on 07.05.1994 from his Government accommodation but never returned thereafter and became traceless, which was informed to the Shastri Nagar Police Station on 28.05.1994 by the mother of the petitioner and the Special Secretary of Vigilance Department, vide memo no.1174 dated 16.06.1994 also sent



information to Senior Superintendent of Police as well as other Police Officials about the traceless of the father of the petitioner. The Police took up the investigation, but could not trace out the father of the petitioner and ultimately, Police submitted that he was traceless and could not locate him either in alive condition or in dead condition. After lapse of seven years, in terms of Section 108 of the Evidence Act, the traceless person will be presumed to have been died.

5. The mother of the petitioner filed a writ petition vide C.W.J.C. NO.1544 of 2002 for grant of legal dues, retirement benefit and compassionate appointment and this Court has recorded the fact that as the father of the petitioner remained absent for seven continuous years, presumption will be drawn of his death. In consequence, the Court has directed to consider the case of the mother of the petitioner with regard to redressal of her grievance by making payment of legal dues to her within a period of three months from the date of receipt/production of a copy of the order. It has also been recorded that till legal dues are not paid, no coercive action will be taken against her for vacating the quarter which was allotted to her husband. The mother of the petitioner was also given liberty to file an application before the authority concerned for



appointment on compassionate ground. So, by this order direction was given to pay legal dues, retiral dues as well as liberty was given to the mother of the petitioner to file an application for compassionate appointment. It appears that the Secretary, Personnel and Administrative Reforms Department vide order dated 06.08.2002 rejected the claim of the mother of the petitioner for payment of retiral dues and also refused to pay legal dues and consequence thereof, which was challenged before this Court in C.W.J.C. No.13551 of 2002. This Court vide order dated 09.09.2011 has quashed the order dated 06.08.2002 as well as the order dated 27.07.2002, by which the father of the petitioner was terminated from the service, which was challenged vide I.A. No. 6640 of 2008. The Court in different paragraphs has dealt with the matter and recorded that the father of the petitioner has remained traceless from 07.05.1994 and the order of termination is completely illegal. So far the application after 07.05.1994 purportedly filed by the father of the petitioner, which was claimed by the mother of the petitioner to be forged letter, was accepted by the Court. It has further been recorded that the departmental proceeding and the order of suspension including termination of service are frivolous and declared to be illegal and bad in law.



6. After the aforesaid order, the State vide order dated 25.10.2017 directed for payment of legal dues to the heir and successor of Chandra Mouli Mishra i.e. father of the petitioner, but vide order dated 20.12.2017 rejected the prayer for grant of compassionate appointment to the petitioner on the ground that at the relevant time there was no Circular, Rules or Regulations was prevalent to provide compassionate appointment to the heir and successor of the person who remained traceless for seven years. But, subsequently, the Government has taken decision vide memo no.7146 dated 31.10.2008 to grant benefit of compassionate appointment to the heir and successor of such traceless persons, is the ground for rejection of claim of the petitioner for compassionate appointment.

7. So far the issue of legal death is concerned, a person who remains traceless for seven years, as per Section 108 of the Evidence Act, the presumption will be drawn of his death. When the Government has provided the rule of compassionate appointment to the ward of the person who died in harness physically or remained traceless for seven years, presumption is, death of that person, so there cannot be any discrimination in granting the benefit of compassionate appointment to the ward who has died in harness physically or



to the ward of person who remained traceless for seven years.

This issue has been dealt in the following two judgments.

8. It is also to be taken notice that in the judgment and order passed in C.W.J.C. No.13282 of 2005 and other analogous cases (Annexure-10) the Court the taken note of the fact that already the Government has framed the policy to grant the benefit of compassionate appointment to the ward of person who remained traceless for seven years, which has been quoted in paragraph no.3 of the judgment and order itself, which is as follows:-

“3. Having heard counsel for the parties and having perused the pleadings filed by them including different circulars relied on during the hearing of the writ petition, namely, Circular Letter no.13293 dated 5th October, 1991, Circular Letter no.9739 dated 26th November, 1997. Annexure-12 to the supplementary affidavit and the Circular Letter No.281 dated 01.02.2006, Annexure-A, I am of the view that the State Government has already taken a decision which is contained in Circular Letter No.9739 dated 26th November, 1997. Annexure-12 to the supplement affidavit to consider the case of the dependents of those Government Servants who have remained traceless for seven years for appointment on compassionate grounds which decision has not been revised in



the subsequent Circular bearing letter no.281 dated 1.2.2006, Annexure-A. In the circumstances, I have no option but to quash the order bearing Letter No.49 dated 10.2.2005. Annexure-9/Office Order No.122 dated 31st August, 2005. Annexure-2/Memo no.260 dated 3.2.2004, Annexure-5/Memo no.1629 dated 02.08.2005. Annexure-5 and to direct that the State Government is duty bound to consider the case of the petitioners in the light of the instructions contained in Circular letter no.9739 dated 26th November, 1997. Annexure-12 to the supplementary affidavit but while considering their case for such appointment the State Government/competent authority of the department concerned shall take into account the family income of the traceless Government servant from other sources: movable/immovable properties on the basis of which the family survived during the preceding years. Such information is sought for in the application form for compassionate appointment as provided in Circular Letter dated 5.10.1991 and if the family members/dependents survived the intervening seven years in penury then they shall be granted compassionate appointment, otherwise not. The case of the petitioners for compassionate appointment shall be considered as early as possible in any case within a period of three months from the date of receipt/production of a copy of this order before the Secretary, Personnel and Administrative



Reforms Department/ Secretary, Minor Irrigation Department/Environment and Forest Department, Bihar Patna/ Secretary, Bihar State Electricity Board, Patna/ District Magistrate-cum-Chairman, District Compassionate Committee, Patna.”

9. In the case of Rajiv Kumar vs. State of Bihar and Ors. (supra) the Court has held that if a person has remained traceless for seven years, the presumption is of death whether body was found or not found, but the heir and successor will be granted the benefit of compassionate appointment. It will be relevant to quote paragraph nos. 3 and 4 of the said judgment, which are as follows:-

“3. This presumption which the State administration evades is section 108 of the Evidence Act, 1872. In the present case, the petitioner’s father died in 1992 and the dead body was not found. Admittedly, the petitioner was a minor. Even if he was a minor, in any case, the State administration would have confronted the petitioner that he will have to wait for seven years for the record to be retained in inaction for the reason that “presumed dead” would be presumed after seven years.

4. The petitioner waited for seven years. The presumption of the law is complete and now he is a major. This is too small a matter that the



State administration should pick holes to defeat the application from non-consideration. The petitioner's father after seven years would be presumed dead unless otherwise found alive somewhere else, and the petitioner's application ought to be acted upon."

10. Same issue came for consideration before this Court in the case of Smt. Kamla Devi and Sudhir Kumar vs. State of Bihar and Ors., (supra), there the Court has placed reliance on the judgment rendered in the case of ***Renuka Rai vs. The State of Bihar and Others***, reported in ***2002 (2) PLJR page 46***, and held that the law is that when word 'death' is to be construed and understood, the same should take into account not only death occasioned as a natural consequence but also by reason of of the presumption laid down by the Legislature in the Evidence Act. In such view of the matter, respondents ought to have decided application of the petitioner in accordance with law and should have brought the same to a logical conclusion which they have not done for no just reason. Further held that the declaration of death of the deceased will relate back to the date when it was informed that the person is traceless. The period of death will start from the date of his disappearance and the Court has passed the order of compassionate appointment.



11. It will be relevant to quote paragraph nos. 2, 3 and 4 of the said judgment, which are as follows:-

*“2. On 7th March, 1994, the father of petitioner no.2, a Government employee, was found untraceable. The appropriate police complaints were made. However, the father of petitioner no.2 could not be traced. Even after expiry of seven years from the date the father of petitioner no.2 was found untraceable, he could not be traced. In such circumstances, in view of the provisions contained in the Evidence Act, a presumption of the death of the father of the petitioner no.2 is to be drawn. Accordingly, such presumption has been drawn. In terms of the presumption, the death occurred not after expiry of seven years from the date when the person stood untraceable but from the date the person was found untraceable. In such view of the matter, the date of death of the father of petitioner no.2 relates back to 7th March, 1994. The petitioner no.2 after obtaining necessary death certificate applied for compassionate appointment; that has been rejected only on the ground that in terms of the government policy there is no scope of giving appointment to a person who is presumed to be dead in terms of the provisions of the Evidence Act. A learned Single Judge of this Court in the case of **Renuka Rai vs. The State of Bihar and Others** reported in 2002(2) PLJR 46 has held that the law is that when word “death” is to be construed and*



understood, the same should take into account not only death occasioned as a natural consequence but also by reason of the presumption laid down by the Legislature in the Evidence Act. In such view of the matter, respondents ought to have decided the application of the petitioner in accordance with law and should have brought the same to a logical conclusion which they have not done for no just reason.

3. Be that as it may, in the counter affidavit, it has been contended by the respondents that since the father of the petitioner no.2, in accordance with his service record, was born on 2nd March, 1943, he would have retired on 4th March, 2001 much before the presumption could be drawn in relation to his death. It is unfortunate that such a submission could be made. After all by reason of the government employee becoming untraceable, his family suffered much more pain and much more anguish than the family of an employee who died in the natural course, for they could not have recourse to what they were otherwise entitled to as a consequence of death and had to wait for seven years to take the shelter of the legislative sufferings, this kind of submission and contentions were advanced. As aforesaid, the fact remains that although the death was pronounced after seven years, but the effect of the pronouncement relates back to the date of his disappearance. In such view of the matter,



for all practical purposes it must be deemed that father of petitioner no.2 died while in service and accordingly, the claim of the petitioner no.2 founded on compassion should be decided.

4. It is true that there is a limit for making application for compassionate appointment. This limit, however, will start running from the date when the period of presumption will come to an end and not on the date of the death for by reason of a fiction of the statute made through the legislative mandate, although the death has occurred, the cognizance thereof can be taken after expiry of the time specified.”

12. In view of the aforesaid three judgments of the Single Bench and Division Bench, it is very much clear that even a person whose mortal body was not found and has remained untraceable for seven years, there cannot be distinction for refusal to grant compassionate appointment on the ground that at the relevant time there was no such scheme for grant of compassionate appointment to the heir and successor of the deceased. There cannot be any justified distinction between the ‘natural death’ and the ‘presumed dead’, both will give same consequence. If the effect is the same, the authority cannot give discriminatory treatment to grant the compassionate appointment to the ward who died natural death



and refusing to grant the same to the ward of person whose death has been declared under presumption of law.

13. In such view of the matter, order dated 20.12.2017 is quashed. This Court directs the respondents authorities to grant compassionate appointment to the petitioner without any delay preferably within a period of four months from the date of receipt/production of a copy of this order.

14. With the aforesaid observations and directions, this writ petition is disposed of.

(Shivaji Pandey, J)

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AFR/NAFR	N.A.F.R.
CAV DATE	N/A.
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