

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 347 OF 2018

Smt. Leelabai Yashwant Ghodke & Anr. ...Petitioners
Versus
The Union of India & Ors. ...Respondents

Mr. Vicky Nagrani for Petitioners
Mr. T. J. Pandian for Respondent Nos. 1 and 2.
Mr. Sandeep Marne for Respondent No. 3.

**CORAM: SMT. V. K. TAHILRAMANI, Acting C. J. &
M. S. SONAK, J.**

DATE : 25 APRIL 2018

ORAL JUDGMENT :

1] Heard the learned counsel for the parties.

2] Rule. With the consent of and at the request of the learned counsel for the parties, Rule is made returnable forthwith.

3] The challenge in this petition is to the judgment and order dated 21st July 2017 made by the Central Administrative Tribunal (CAT) in Original Application No. 710

of 2015 dismissing OA No. 710 of 2015 instituted by the petitioners.

4] In OA No. 710 of 2015 instituted by the petitioners, the petitioners had applied for the following substantive reliefs :

“(a) This Hon'ble Tribunal may graciously be pleased to call for the records of the case from the Respondents and after examining the same quash and set aside the impugned order dated 27.10.2015 with all consequential benefits.

(b) This Hon'ble Tribunal may further be pleased to hold and declare that Applicant no. 2 is actually entitled to be considered actually entitled to be considered for grant of compassionate appointment.

(c) This Hon'ble Tribunal may further be pleased to direct the Respondents to consider the case of Applicant No. 2 for grant of compassionate appointment and if found fit to appoint him on a suitable Group D post with all consequential benefits.

(d) Costs of the Applicant be provided for.

(e) Any other and further order as this Hon'ble Tribunal deems fit in the nature and circumstances of the case be passed.”

5] There is no dispute that Ashok Ghodke was an employee with the Central Railways working as a Senior Safaiwala (Group 'D' post) at the time of his demise on 22nd June 2008. Ashok Ghodke was married to Nirmala and had

two children from the wedlock - a daughter named Shraddha (now married to Satish Ingale) and son Sachin Ghodke - petitioner no. 2. Upon demise of his first wife, Nirmala on 18th November 1989, Ashok Ghodke married Chhaya Ghodke (respondent no. 3) on 10th November 1990. From the second marriage, Ashok and Chhaya begot two sons Nitin and Akshay.

6] There were disputes during the life time of Ashok Ghodke, as a result of which, his second wife Chhaya started residing separately. She instituted proceedings for maintenance and was even awarded maintenance by the competent courts. The petitioner no. 1, who is the mother of Ashok Ghodke and the petitioner no. 2, who is the son of Ashok Ghodke contended that the previous marriage of the respondent no. 3 Chhaya was subsisting and therefore, her marriage with Ashok Ghodke was neither legal nor proper. The disputes were attempted to be sorted out by certain writings and undertakings which are produced on record as Exhibits 'C' and 'D' to the petition. The said documents are not very relevant to the issues which arise in the present petition.

7] Upon the demise of Ashok Ghodke in harness, disputes arose as regards receipt of retiral / pensionary benefits as also the claim for compassionate appointment. In order to resolve this dispute, an agreement dated 20th August 2008 was entered into between Chhaya (respondent no. 3), Nitin (son of Ashok and Chhaya) , Sachin (son of Ashok and Nirmala) and Leelabai (mother of Ashok). As noted earlier, the present petition is instituted by Leelabai and Sachin (petitioner nos. 1 and 2) and Chhaya is impleaded as respondent no. 3.

8] In terms of the said agreement dated 20th August 2008 it was agreed that all pensionary benefits due and payable to Ashok Ghodke would be solely and entirely paid to Chhaya (respondent no. 3). In lieu of this, Chhaya, consented that the claim of Sachin (petitioner no. 2) be considered for compassionate appointment with the Railways. This agreement was duly signed and notarized by all the parties to the same. This agreement is annexed as Exhibit 'F' to the petition.

9] It appears that despite the agreement dated 20th August 2008, the Railway Authorities, refused to disburse the pensionary benefits in their entirety to Chhaya unless, Chhaya were to produce orders from competent court of law, including, a succession certificate. Accordingly, Chhaya, was constrained to institute proceedings No. 24 of 2008 before the Civil Court seeking for succession certificate. This application was disposed of by judgment and order dated 2nd January 2012, in which, it was held that both the petitioners as well as Chhaya and her children are equally entitled to pensionary benefits and other retiral dues payable on account of demise of Ashok. Such dues / benefits were directed to be paid in six equal parts. Copy of the order dated 2nd January 2012 is on record as Exhibit 'G' to the petition.

10] It is the case of the petitioners that even though, the order of the civil court entitles them to receive 50% of the pensionary benefits amount, till date, the petitioners consistent with the agreement dated 20th August 2008, have not withdrawn any amount on account of pensionary / retiral benefits. However, it is the case of the petitioners

that the respondent no. 3 reneged upon the terms of the agreement dated 20th August 2008 and began to herself claim for compassionate appointment. As a result, the railways, refused to consider the rival claims for compassionate appointment.

11] The petitioners then instituted OA No. 261 of 2012 before the CAT which was disposed of by order dated 3rd January 2014 with direction to the Railways to decide the pending representations / claims of the petitioners and respondent no. 3 - Chhaya. Liberty was granted to the parties to institute a fresh OA in case, they were aggrieved by the decision taken by the Railways.

12] The Railways then by order dated 19th May 2014, declined to offer compassionate appointment to the petitioner no. 2 - Sachin but offered compassionate appointment to the respondent no. 3 - Chhaya. This was on the basis that Chhaya, as a wife, has a better claim to seek compassionate appointment than the son Sachin.

13] The petitioners instituted OA No. 393 of 2014 to question the order dated 19th May 2014. This was disposed of by the CAT by order dated 28th April 2015. The order dated 19th May 2014 was set aside but the matter was remanded to the Railways for reconsideration of the issues. The precise terms of remand in the order dated 28th April 2015, read as follows :

“40. Hence, it is deemed fit to remand matter to R-1 and R-2 to examine the matter in the light of all the relevant provisions of the scheme and settled law and then pass a reasoned and speaking order. This must be done in accordance with law regarding eligibility of R-3 for compassionate appointment within a period of 6 months from the date of receipt of certified copy of the order. Both applicants and R-3 are at liberty to approach this Tribunal in case they are aggrieved with the said order of the official respondents. Till all the issues mentioned above are not examined comprehensively and the matter gone into in its entirety in accordance with rules, regarding the question of eligibility, instructions and settled law, the impugned orders cannot stand. Accordingly OA is disposed of in the light of above observations. No costs.”

14] In pursuance of the remand, the railways, have made an order dated 27th October 2015, again, refusing compassionate appointment to the petitioner no. 2 (Sachin) but offering the same to respondent no. 3 (Chhaya).

15] The petitioners aggrieved by the order dated 27th October 2015 instituted yet another OA No. 710 of 2015 before the CAT, in which, the CAT, granted interim relief restraining railways from appointing Chhaya in pursuance of the impugned order dated 27th October 2015. OA No. 710 of 2015 was ultimately disposed of by the CAT vide impugned judgment and order dated 21st July 2017 upholding the railways order dated 27th October 2015. Hence, the present petition.

16] Mr. Nagrani, the learned counsel for the petitioners submits that the petitioner no. 2 is aged 29 years whereas, the respondent no. 3 (Chhaya) is aged almost 54 years. He submits that if Chhaya is awarded compassionate appointment, she will be in a position to serve for hardly 4 to 6 years and this will provide hardly any succour to the family. He points out that that the CAT, in the impugned judgment and order, has upheld the Railway's order dated 27th October 2015 subject to the condition that Chhaya undertakes to take care of petitioner no. 2 (Sachin) in the same manner, as the deceased employee Ashok would have taken care of him. The impugned judgment and order

also directs that the appointment of Chhaya on compassionate grounds is liable to be cancelled if she fails in her responsibility to honour such undertaking. Mr. Nagrani submits that from these directions, it is quite clear that the CAT, has not only taken cognizance but has also accepted the validity of the agreement dated 20th August 2008 between the parties. Mr. Nagrani submits that if this is the position, then, the CAT, was duty bound to direct the railways to offer compassionate appointment to the petitioner no. 2 and leave respondent no. 3 Chhaya to avail the entire pensionary / retiral benefits. Mr. Nagrani submits that these fundamental aspects have been completely ignored by the CAT and therefore, the impugned judgment and order warrants interference.

17] Mr. Nagrani submits that there is no rule or executive instructions which obliges the railways to offer compassionate appointment on priority basis to the widow as compared to the claim of the son of the deceased employee. He submits that cases have to be examined on the basis of their intrinsic merit and compassionate appointment has to be offered on the basis of such intrinsic

examination of intrinsic merits. He submits that the petitioners had made it clear that they are willing to forego the entire pensionary / retiral benefits on account of demise of the deceased employee Ashok. They had also made it clear that they would furnish an undertaking to part with a substantial portion of the income by way of maintenance to respondent no. 3 Chhaya. Mr. Nagrani also offered to file undertakings in this court to this effect and eventually, also filed undertakings that the petitioner no. 2, will pay 35% of in hand salary and allowance to respondent no. 3 in case, the petitioner no. 2 is offered compassionate appointment.

18] Mr. Nagrani also pointed out that till date, the respondent no. 3, has received an amount of Rs.12,97,599/- towards retiral benefits and in contrast, the petitioners, have not received any amounts whatsoever. Mr. Nagrani also pointed out that the petitioners have filed yet another undertaking to forego 50% of the retiral benefit amounts which are still lying with the railways to be paid to respondent no. 3 Chhaya. On such basis, Mr. Nagrani contends that the petitioners have honoured every single condition of the agreement dated 20th August 2008, and

yet, the respondent no. 3, is unreasonably resisting the claim of the petitioner no. 2 for compassionate appointment. Mr. Nagrani submits that since all these aspects have not been considered by the railways as well as the CAT, interference is warranted.

19] Mr. Pandian, the learned counsel for the respondent nos. 1 and 2 i.e. Union of India and Railways submits that the said respondents, are in no manner concerned with private agreement between the petitioners and the respondent no. 3. He submits that such agreement, as has been correctly held by the CAT, does not bind the railways. He submits that in terms of the rules and executive instructions as applicable, the claim of a widow for compassionate appointment has a priority over the claim of the son of the deceased employee.

20] Mr. Pandian submits that only if the respondent no. 3 Chhaya were to consent for consideration of claim of petitioner no. 2, the railways, would have no difficulty in offering compassionate appointment to the petitioner no. 2. However, since, respondent no. 3 Chhaya, is not prepared

to give her consent, the railways, have only followed the rules and executive instructions and offered appointment to respondent no. 3 Chhaya. For these reasons, Mr. Pandian submits that there is no case made out by the petitioners.

21] Mr. Marne, the learned counsel for respondent no. 3 Chhaya adopts the submissions of Mr. Pandian and urges that this petition may be dismissed. In addition, Mr. Marne, refers to the affidavit of Dr. Tushaba Shinde, Senior Divisional Personnel Officer, Central Railways to submit that compassionate appointment has to be first offered to the widow and it is only if the widow cannot take up such employment, than the claim of the son be considered. Mr. Marne has relied upon the document R.B.E. No. 3/2009 dated 6th January 2009 to base his claim that a widow has priority in matters of compassionate appointment.

22] Mr. Marne submits that the respondent no.3 has two children and that aspect has also allegedly been considered by the railways in offering appointment to respondent no. 3. Mr. Marne points out that the respondent no. 3 would have had a service tenure of almost 10 years but for the interim

relief secured by the petitioners. He submits that the financial position of the respondent no. 3 is extremely weak as compared to the financial position of the petitioners. He submits that this is also a relevant circumstance which has been taken into consideration both by railways as well as the CAT. He submits that the CAT, by the impugned judgment and order, has substantially protected the interest of the petitioners, in as much as a condition has been imposed upon respondent no. 3 to take care of petitioner no. 2 in the same manner as the deceased employee would have looked after the petitioners. For all these reasons, Mr. Marne submits that this petition may be dismissed.

23] In rejoinder, Mr. Nagrani, has referred to a Master Circular No. 16 issued by the respondent nos. 1 and 2. He submits that in terms of this Master Circular, son / daughter / widow / widower of employees are eligible to be appointed on compassionate grounds in the circumstances in which such appointments are permissible. In fact this Master Circular states that where widow cannot take up employment and the sons/daughters are minor, the case may be kept pending till the first son / daughter becomes a

major. This Master Circular states that benefit of compassionate appointment may also be extended to a near relative / adopted son/daughter. On these basis, Mr. Nagrani submits that there is nothing like accord of priority to a widow over a son and the matters have to be examined on case to case basis. He submits that in the present case, taking into consideration the undertakings submitted by the petitioners or even otherwise, it is only appropriate that compassionate appointment is awarded to the petitioner no. 2. For these reasons as well, Mr. Nagrani submits that the impugned judgment and order warrants interference.

24] The rival contentions now fall for our determination.

25] The Railways / union of India, have not disputed that the issue of compassionate appointments is governed by Master Circular No. 16. Paragraph III of this Master Circular deals with the eligibility of persons to be appointed on compassionate grounds. The same, reads as follows :

“III. PERSONS ELIGIBLE TO BE APPOINTED ON COMPASSIONATE GROUNDS :

Son/daughter / widow / widower of the employees are eligible to be appointed on compassionate grounds in the circumstances in which such appointments are permissible. Where the widow cannot take up employment and the sons/ daughters are minor, the case may be kept pending till the first son / daughter becomes a major i.e. attains the age of 18 years, subject to time limits as provided under Para (V) of the Circular. The benefit of compassionate appointments may also be extended to a "near relative / adopted son / daughter." The eligibility of a near relative / adopted son / daughter to such appointments will be subject to the following conditions :

a. NEAR RELATIVE :

i. Such appointment is not permissible where the railway employee who has died in harness has left behind only the widow, with no son / daughter to be supported by her.

ii. The son or daughter of the employee or ex-employee is a minor one and the widow cannot take up employment.

iii. A clear certificate should be forthcoming from the widow that the "near relative" will act as the bread-winner of the family.

iv. If the family certifies at a later date that the "near relative", who was appointed on compassionate grounds, refuses to support the family, the services of that employee are liable to be terminated.

v. Once a "near relative" is appointed on compassionate grounds, no further appointment shall be given later to a son, or daughter or the widow of the employee, on compassionate grounds.

vi. The appointment of the “near relative” shall not be considered, if a son or daughter, or the widow herself is already working and is earning.”

A blood relation who is considered to be a bread-winner of the family can be considered as “near relative” for the purpose of appointment on compassionate grounds.

*[No.E(NG)III/78/RC-1/1 dated 03.02.1981,
No.E(NG)II/88/RC-1/1/Policy dated 12.2.1990]*

b. Adopted sons and adopted daughters

- i. ..*
- ii. ...*
- iii.*

*No. E(NG)II/88/RC-1/1/Policy dated 20.5.1988.
(RBE 106/1988)]”*

26] From the aforesaid, there is nothing to support the theory that the claim of the widow has to be considered in preference to the claim of a son of the deceased employee. From the Master Circular, it is clear that the claims of persons eligible to be appointed on compassionate grounds have to be considered on their own merits keeping in mind the purpose for compassionate appointment. Even the R.B.E. No. 3/2009 dated 6th January 2009 is basically, an order delegating the powers to make compassionate appointment. Therein, there is a line which states that the Board has decided that in supersession of the provisions

contained in the previous letters, powers are delegated to DRMs/CWMs /HODs to consider compassionate appointment in favour of widow / widower or any ward of her / his choice in respect of cases upto 20 years old from the date of death of the railway employee. This order, is really, not an order which states that some sort of preference is always to be given to the widow or the widower or that the compassionate appointment in favour of a son or a daughter can arise only where widow or widower nominates such son or daughter.

27] Besides, even if we are to proceed on the basis that some sort of preference is warranted in favour of the widow of the deceased employee, the question of preference can arise only when the merits of all claimants are equal or substantially equal. This again, would oblige the railway administration to examine the cases of the applicants on the basis of their individual merits, keeping in mind always, the salutary object of compassionate appointment. Only where the claims of the two claimants are evenly poised, can the issue of preference arise.

28] Suffice to note that there is nothing in the Master Circular which suggests any priority or preference to the widow irrespective of the merits of her candidature. So also, R.B.E. No. 3/2009 is not any document on the basis of which, priority or preference can be claimed. Since the railways, have proceeded on the basis that there exists such priority or preference and on such basis, refused to consider the case of the petitioner no. 2 on merits, we are satisfied that the decision of the railway administration warrants interference in the facts and circumstances of the present case.

29] We find that this is a case where the railways has excluded several relevant considerations and taken into account certain irrelevant considerations. Railways, appear to have proceeded on the basis that they have no choice in the matter when application for compassionate appointment is made by a widow and the son and that the railways are bound to always accord priority to the claim of the widow, without there being any obligation to consider several relevant factors, before arriving at an appropriate decision. The railways have also proceeded on the basis

that unless there is a consent by the widow, there is no question of taking into consideration the case of the son of the deceased employee for compassionate appointment. As noted earlier, there is nothing in the Master circular, which requires the railways to adopt such a stance. From the material placed on record, it is quite clear that the railways, are duty bound to examine the merits of the rival claims by taking into account relevant considerations and eschewing irrelevant considerations. The Railways, are ultimately, duty bound, to keep in mind the purpose of compassionate appointment and take decisions accordingly.

30] In the present case, the respondent no. 3 had already crossed the age of 50 years and presently, her age is about 54 years. The respondent no. 3 has already received an amount of Rs.13 lakhs or thereabouts towards pension and other retiral benefits on account of the demise of Ashok in harness. Respondent no. 3 is already in receipt of family pension. That apart, although, railways may be right in contending that a private agreement like the agreement dated 20th August 2008 may not *per se* bind the railways, nevertheless, the agreement was quite relevant because in

terms of the agreement, the respondent no. 3 had consented to the claim of the petitioner no. 2, who is admittedly, the young son of the deceased Ashok, being considered for compassionate appointment. Thus, even assuming that the requirement of consent was really existing, the said requirement, can be said to be fulfilled in the present case. Respondent no. 3 has not disowned the execution of the agreement dated 20th August 2008, though, at a later stage, respondent no. 3, has sought to renege from her commitments in terms of the said agreement. This was after, the respondent no. 3 secured the benefits under the said agreement. Till date, the petitioners have not even withdrawn 50% pensionary benefits / retiral benefits, even though, orders of the civil courts, entitle them to withdraw the same. This means that the petitioners, have substantially performed their part of the agreement dated 20th August 2008. All these were relevant considerations, which appear to have been ignored by the railways in the present matter.

31] If the respondent no. 3 is offered compassionate appointment at this stage, then, respondent no. 3, will have

a service tenure of hardly 4 to 5 years. The CAT, has already imposed certain conditions upon respondent no. 3, in terms of which, even the respondent no. 3, will have to part with certain portion of her salary and other benefits to the petitioners. In fact, the CAT has held that the respondent no. 3 will have to furnish an undertaking to this effect and in case, such undertaking is breached, then, the compassionate appointment of respondent no. 3 shall be liable to be cancelled.

32] Taking into consideration the tenure which the respondent no. 3 will have, it is unlikely that the respondent no. 3 will have any qualifying service so as to entitle her to benefits like pension etc., if applicable. In contrast, if the petitioner no. 2 who is aged 29 years, is offered compassionate appointment then, the petitioner no. 2, will have a substantially long tenure. From the material on record, it is clear that the respondent no. 3 has already received certain benefits on account of demise of her husband. The benefits include amounts to the extent of almost Rs.13 lakhs. The benefits also include family pension which is continued to be received by the respondent no. 3.

In contrast, the petitioners, the aged mother of deceased Ashok and the young son of deceased Ashok, do not appear to have received any substantial benefits till date. The railways, in these circumstances, were duty bound to take into consideration all these aspects, which, do not appear to have been taken into account in the present case.

33] As if this is not sufficient, the petitioners, have filed undertakings in this court which will ensure that the respondent no. 3 is paid almost 35% of the salary and allowances, should, the petitioner no. 2 secure compassionate appointment.

34] The undertakings furnished by the petitioners are taken on record and marked as 'X' for purpose of identification. In any case, the terms of said undertaking are transcribed below for convenience of reference :

“ We, Leelabai Ghodke and Sachin Ashok Ghodke, the Petitioners do hereby state on solemn affirmation as under:-

1. We, say that we undertake to pay 35% in hand Salary and allowances to the Respondent No. 3 on considering Petitioner No. 2 case for grant of compassionate appointment and failing which the official Respondents are at liberty to terminate

services of Petitioner No. 2 at any point of time.

2. We further say that the terminal benefits of total amount of Rs.1,86,899/- shall also be paid to Respondents No. 3 for which the Petitioners have no objection. It is further clarified that 50% of the said amount is already withdrawn by Respondents No. 3 and the remaining 50% is still with the Respondents and is not withdrawn by the Petitioners and the Petitioners have no objection if the remaining 50% of the said amount is also paid to Respondent No. 3.

3. We further herewith are producing the chart to show the amount received the Respondent No. 3 till date by way of family pension. Copy of chart is annexed hereto and marked as **Exhibit X**.

4. We, therefore pray that the Writ Petition be made absolute in terms of above undertaking.

VERIFICATION

We, Leelabai Ghodke and Sachin Ghodke, the Petitioners herein do hereby state on solemn affirmation that the contents of Para are true to my own knowledge and which I believe to be correct.

Solemnly affirmed at Mumbai)
On this 25th day of April, 2018)

Thumb Impression
of
Leelabai Ghodke
(Petitioner No. 1)

Sd/-
(Sachin A. Ghodke)
Deponent"

35] The petitioner no. 2, has also filed an additional affidavit on 5th April 2018 in this court, which reads as follows :

“ I, Sachin Ashok Ghodke, Petitioner no. 2 do hereby state on solemn affirmation as under:-

I say that I undertake to pay 35% in hand salary and allowances to the Respondent no. 3 on considering my case for grant of compassionate appointment and failing which the official respondents are at liberty to terminate my services at any point of time.

I therefore say that the Writ Petition be made absolute in terms of above undertaking.

VERIFICATION

I, Sachin Ghodke, the Petitioner herein do hereby state on solemn affirmation that the contents of Para are true to my own knowledge and which i believe to be correct.

*Solemnly affirmed at Mumbai)
On this 5th day of April, 2018)*

*sd/-
(Sachin A. Ghodke)
Deponent”*

36] We accept the undertakings tendered by the petitioners as undertakings to this court.

37] Upon cumulative consideration of all the aforesaid facts and for reasons as aforesaid, we set aside the impugned judgment and order dated 21st July 2017 as also the impugned order dated 27th October 2015. Further, we direct the respondent nos. 1 and 2 to appoint the petitioner

no.2 on compassionate basis to a Group 'D' post on same terms and conditions as were offered to the respondent no. 3. The respondent nos. 1 and 2, in the appointment order itself, to incorporate the undertakings furnished by the petitioners, so that, if need arises, the respondent nos. 1 and 2 can enforce the commitments made by the petitioner no. 2 in the matter of payments to the respondent no. 3. This exercise to be completed within three months from today.

38] Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

39] All concerned to act on basis of authenticated copy of this order.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)